

EU Labour and Employment Law. Interpretation by the Court of Justice (ECJ)

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y Seguridad Social

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EU LABOUR AND EMPLOYMENT LAW.
INTERPRETATION BY THE COURT OF JUSTICE

COLECCIÓN DE DERECHO DEL TRABAJO Y SEGURIDAD SOCIAL

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Antonio V. Sempere Navarro	

PRESENTATION

Fide is pleased to present the first English edition of this book for legal professionals. This publication follows three updated editions in Spanish and is now intended to become a key reference for legal professionals throughout Europe. A distinctive feature of this edition is that it focuses exclusively on the case law of the Court of Justice of the European Union (ECJ).

This project began more than half a decade ago under the direction of María Emilia Casas, Román Gil, Ignacio García-Perrote, Adriano Gómez and Antonio Sempere, who directed and coordinated all the working sessions and debates on each of the topics covered in the chapters. The fact that each topic has benefited from the contributions of all the professionals involved in this work has resulted in an outstanding final product. As a result of this collective effort, we are proud to present the English edition of this publication. Contributing to the knowledge of European Union Social Law and its application by the ECJU is a major challenge that requires continuous updating. We would therefore like to express our sincere thanks to the directors and authors of this work for their meticulous efforts in the preparation of each chapter.

The complexity, diversity and, in some cases, specialization of each topic require a collective reflection that allows for an in-depth and extensive analysis of each topic. The methodology applied in the preparation of this work ensures that each proposal or solution incorporates a comprehensive perspective, resulting in a truly collective work, where each idea, suggestion and conclusion arises from the debate and reflection of those who are today recognized as the leading experts in the study and application of Labour Law.

The reader has now in his hands an extraordinary publication, distinguished by the richness of its content, its structure and its esteemed authors.

On the other hand, as in the Spanish edition, this work is further enriched by the remarkable appendix compiling the case law of the ECJ.

We would like to reiterate our immense gratitude to this exceptional group of professionals for their generosity, dedication, commitment and enthusiasm in the preparation of this unique publication. Their efforts ensure the dissemination of knowledge, expertise and the development of enriching debates.

The participation and support of the main associations of labour law professionals, such as *the Asociación Nacional de Laboralistas (Asnala)* and the *Foro Español de Laboralistas (Forelab)*, have not only been essential, but have played a crucial role in the success of this book. We would also like to extend our thanks to the *Agencia Estatal Boletín Oficial del Estado (AEBOE)*, for the publication of this work, as well as for all the support received and the effective dissemination of this book, which is now available to all legal professionals.

Finally, we would like to invite all legal practitioners to read this book, to draw on the valuable insights it offers and to actively contribute to enriching the debate on the ideas set out in these pages.

Cristina Jiménez Savurido

PRESIDENT OF FIDE

PROLOGUE

The European Union, an ambitious project born out of the ashes of conflict, has constantly evolved beyond its initial economic mandate to encompass a profound social dimension. This book, “EU Labour and Employment Law. Interpretation by the Court of Justice”, aims to contribute to a better understanding of the living and changing social doctrine of the Court of Justice of the European Union through a work that is truly European in both form and content.

The origins of the work we present here lie in a book of the same name aimed at Spanish jurists (and therefore with reference to the judicial and scientific doctrine of that country) which, after a remarkable journey in the field of Spanish labour law, has undergone an international and European metamorphosis in search of any reader interested in the EU who wishes or needs to know the doctrine on Labour and Employment Law of its Court of Justice, based both on the common judicial denominator – the common doctrine of the European courts, with hardly any reference (except when it has a beyond-the-national-state impact) to local case law – and on a language generally shared by jurists beyond national borders, among which English – in which we publish - stands out today.

This edition, like the previous local editions that have been published since (...), initially by Editorial Francis Lefebvre, to whom we reiterate our gratitude for their generous work, which was fundamental for the creation and first editions of this work, and subsequently by a very prestigious Spanish public publisher – the Official State Gazette (BOE) – expanding its reach to anyone who wishes to access it, as it can be downloaded digitally and free of charge, for which we are grateful not only to the BOE but also to the altruistic co-authors.

Our work has thus been radically renewed and has become a fully European book, by European jurists and for European jurists, limited to European social legislation interpreted by the ECJ, and in the most widely accessible language in Europe.

The ECJ is the definitive interpreter of EU law, and its case law in the social field has been fundamental in defining the rights and obligations of individuals, companies and Member States. From fundamental principles such as non-discrimination, the free movement of workers and freedom of movement and establishment, to complex regulations on working time, temporary employment, holidays, business succession, individual and collective dismissal, temporary employment agencies, social security, the posting of workers, social dialogue, healthcare, disability and aspects of private international law, among many others, the Court's judgments have continually shaped the fabric of European societies. This book sets out these judgments clearly and rigorously and provides a comprehensive understanding of their impact and implications.

The remarkable growth in the number of referrals for preliminary rulings by national courts on the application of the Charter of Fundamental Rights of the European Union, which has the "same legal value" as the Treaties (Article 6(1) TEU), to Member States when they apply Union law, including regulations, but also their own law transposing Union directives, continues to deserve special mention. The Court of Justice's responses on the Charter have grown accordingly, occupying a particularly significant place in terms of quantity –approximately one in ten cases concerns the Charter– and in terms of quality, placing fundamental rights at the forefront of the preliminary ruling dialogue between national courts and the Court of Justice, according to its current President, Koen Lenaerts. The Court of Justice has applied the social principles and rights of the Charter to employment contracts, notably, but not exclusively, in the material areas of the rights to non-discrimination (Article 21) and paid annual leave (Article 31(2)), and has done so by recognising their status as subjective rights that can be invoked, together with the right to effective judicial protection (Article 47), in disputes between individuals, i.e. recognising the direct horizontal effect of those provisions of the Charter, with the force of primary law, as specified by social harmonisation directives, which, as is well known, do not have such horizontal effect and are not observed by the national legislation falling within the scope of the Charter, which must therefore must be inapplicable. The reader will find this issue addressed in the various chapters of the book, which have also been revised to incorporate the latest EU legislation, which is extensive even though the internal transposition of the new social directives has not yet been completed in all cases.

We believe that this work is clear proof that knowledge of the case law of the ECJ is essential for the exercise of any function (teaching, research, defence, administration, jurisdiction, collective bargaining, social dialogue and consultation, legislation) in the field of labour law and social security and protec-

tion. It is well known that the case law of the ECJ, even when handed down in response to questions from courts in other States, has an immediate impact on the interpretation and application of the law in each and every one of the legal systems of the EU Member States. It is no exaggeration to say that, even now, its “Europeanity”, i.e. the integration of the Union’s legal system into the European legal space, is so dense and relevant that it is unmanageable for any operator without knowledge of EU social law as interpreted by the ECJ. This is the aim of this collective work.

This work is therefore not only an academic resource, but also a timely tool for understanding the current evolution of EU social law through the lens of its most authoritative interpreter. By offering a panoramic view of the ECJ’s social case law, including the latest developments, this book will undoubtedly contribute to a deeper appreciation of the EU’s commitment to a social Europe. It is an indispensable guide for anyone wishing to navigate the complexities and nuances of this crucial area of European law.

We hope that this English edition will encourage further debate and research, ultimately contributing to the continued development of a fairer and more equitable European Union.

Special recognition is once again due to the highly valuable case law annex prepared by A.V. Sempere Navarro with such precision and accuracy, which is a valuable and useful feature of this book.

As is only fitting, we continue to be extremely grateful to the authors of this work for their extraordinary enthusiasm and dedication in bringing it to fruition, whose efforts will undoubtedly contribute to justifying the aspiration that this book will become a benchmark in its field at European level, as it has already done in Spanish, as many have said. We would also like to thank the BOE publishing house, FIDE for its essential drive and coordination in managing this work, and the Spanish associations of labour lawyers FORELAB and ASNALA for their firm commitment to it, which remains unchanged in order to enable and improve knowledge of the judicial interpretation of European Union social law to which it aspires.

Madrid, 15 June 2025.

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Foreword by ASNALA and FORELAB

It is with great satisfaction that we present a breaking edition of this written work dedicated exclusively to the Employment Law of the European Union, and its interpretation and application by the Court of Justice, which has become a point of reference among labour law professionals in Spain. In the three Spanish language editions that have been published to date, we have aimed to offer a comprehensive and updated analysis of the main EU employment judgements, and this time, we go a step further by publishing it in English, with the objective of reaching a broader international audience, thus opening the doors to a greater dissemination and enrichment of legal knowledge in the field of labour law.

This decision not only broadens the diffusion of the work but also makes it accessible to professionals across Europe and beyond. With this, we aim for this book to be a useful tool for anyone who, from any part of the world, wishes to delve into European Union Employment Law and its impact on labour relations. We firmly believe that this English edition will strengthen the dialogue and exchange of knowledge at the international level, thus contributing to the global enrichment of labour law.

European Union law has demonstrated its supremacy and relevance in shaping the labour regulations of the Member States, establishing a common framework that promotes social and economic cohesion. For this reason, we have placed special emphasis in this edition on updating and improving the content, addressing the new challenges posed by the Employment Law of the European Union in a constantly changing global context.

This book covers a wide range of subjects, from typical labour law matters, such as employment contracts, the right to strike or the transfer of businesses, to cutting-edge issues such as artificial intelligence and its growing influence on labour relations. These aspects, which have already begun to transform the labour landscape, are addressed in depth, providing essential guidance for professionals who must adapt to these new challenges.

It also includes chapters on equality and non-discrimination based on gender, sexual orientation and identity, areas that have become particularly relevant in recent Spanish and European legislation, with the imposition of new compliance obligations for companies that are generating ongoing debate among different legal professionals.

In addition, the book analyses the directives on occupational health and safety, as well as the directive on predictability of working conditions, which are crucial to ensure a safe and fair working environment.

These are just a few of the areas addressed in this edition, achieving not only a compendium of legislation and case law, but also a critical analysis tool that helps to understand a multitude of issues that every labour law specialist should know in order to offer comprehensive and effective advice within the European regulation.

From the National Association of labour Lawyers (ASNALA) and the Spanish Forum of labour Lawyers (FORELAB), we are particularly proud of our work in the promotion and dissemination of legal knowledge. Our vocation has always been to share knowledge and create synergies among experts in labour Law, facilitating spaces for professional meeting and debate in which current challenges are addressed and new ideas that enrich our profession are generated. Promoting discussion forums, congresses, seminars, and publications such as this book has been an essential part of our mission, and we are convinced that this collective effort contributes to the advancement and strengthening of labour Law in our country and beyond.

As in previous editions, this book has been produced through the collaboration of a group of leading Spanish jurists and academics and its outstanding group of Directors, whom we take this opportunity to congratulate and thank for their dedication and excellence. Their effort and commitment have been fundamental to the completion of this project, and their work not only enriches our knowledge, but also reflects the quality and prestige of the Spanish labour community.

We hope that this work will continue to be a valuable tool for all labour law professionals, inspiring and guiding future generations of lawyers in their commitment to social justice and the protection of labour rights.

ANA GÓMEZ HERNÁNDEZ
PRESIDENT OF ASNALA

FERMÍN GUARDIOLA
PRESIDENT OF FORELAB

CHAPTER 1

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, APPLICATION AND EFFECTIVENESS

MIGUEL RODRÍGUEZ-PIÑERO Y BRAVO-FERRER

INDEX: I. The legal value of the Charter. II. The applicability of the Charter to States. III. The problematic connection points. IV. The Charter and the Constitutions of the States. V. The inter partes effectiveness of the Charter. Bibliography.

I. THE LEGAL VALUE OF THE CHARTER

The formal enshrinement of fundamental social rights in the Charter of Fundamental Rights of the European Union has introduced a new instrument into the legal order of the Union and the Member States and has had a real impact on the content and development of the employment contract, which is affected by the rights recognised in the Charter (both the generic and the specific work-related ones it refers to¹).

¹ Thus, among others, the right to work (art. 15), freedom to conduct a business (art. 16), non-discrimination (art. 21), equality between men and women in terms of employment, work and pay (art. 23), integration of persons with disabilities (art. 26), the right to information and consultation of workers within the undertaking (art. 27), the right to collective bargaining and action, including strike action (art. 28), protection in the event of unjustified dismissal (art. 30), the right to work in conditions that respect health, safety and dignity, the right to limitation of maximum working hours, rest periods and annual period of paid leave (art. 31), prohibition of child labour and protection of young people at work (art. 32).

The binding legal value of the Charter and its possible horizontal effect on private relations is a topic of interest to practitioners of labour law. This is demonstrated by the increasing reliance on provisions of the Charter by the judicial bodies of the States, and the questions referred by them to the Court of Justice. Examples include the judgments relating to the termination of employment relationships of civil servants or interim workers, which are examined elsewhere in this book.

The Treaties of Amsterdam and Maastricht, which reinforced the Union's social objectives, failed to enshrine social rights. The issue had to be addressed outside the Treaties, by means of a "declaration" of rights with no binding legal value, the Charter of Fundamental Rights of the European Union of Nice, which, significantly, included, in addition to the classic civil and political rights, social rights by "twinning" them with the other fundamental rights. Its adoption opened up a wide debate on its possible impact on the field of industrial relations as a legitimisation of political action or a possible criterion for the jurisprudential interpretation of the Union's "social" legislation, leaving open the question of whether the Charter was limited to promoting social rights through EU rules or whether, moreover, it implied some guarantee of those, outside the sources of EU law.

In the unfulfilled draft of the Treaty establishing a Constitution for Europe, the fundamental rights of the Charter, including social rights, were integrated into Title II². The Treaty of Lisbon did not include the Charter within the reformed Treaties and in a compromise formula recognised its legal value as a Treaty, endowed with the highest rank in accordance with Article 6(1)(1) of the TEU, with a "hard law" nature that can be described *as sui generis*, as a declaration of rights that we Europeans share as members of the same political community (which has made the protection of fundamental rights flexible and "multi-layered" in a combination of unity and respect for national diversities³).

The integration of the Charter into the European Union's system of sources has represented a qualitative leap and has had effects on the employment contract and on labour relations. The social rights enshrined therein must be respected by the Union and by the Member States, including the courts, when

² The Advocates General, and to a lesser extent the Court of Justice, used the Charter "*soft law*" for the interpretation of EU law, without having made clear either the value of the Charter or the relationship of the fundamental rights recognised therein with those recognised in the European Convention on Human Rights and in the respective national Constitutions.

³ MASING, J.: "Unity and Diversity of European Fundamental Rights Protection", *European law review*, 4, 2016, p. 491 et seq.

they implement Union law, bearing in mind and in conformity with the social rights enshrined therein.

It must be clear that the Charter has a relative and complementary role in the legal systems of the Member States, which has not set out to standardise the level and content of the fundamental rights of the Member States⁴. Article 53 of the Charter provides that nothing in the Charter may be interpreted as restricting or adversely affecting the human rights and fundamental freedoms recognised, *in their respective* spheres, “by the constitutions of the Member States”. That is why the Charter has not turned the European Union into a “human rights organisation”, nor the Court of Justice into a second Court of Human Rights⁵, although the Union accepts and respects them and the Court of Justice interprets and guarantees them.

II. THE APPLICABILITY OF THE CHARTER TO STATES

Article 51(1) of the Charter provides that its provisions are addressed to the institutions of the Union and to the Member States “when they are implementing Union law”. In the latter case, States shall respect rights, observe principles and propose their application in accordance with their respective competences, but not in situations not regulated by that law⁶. Article 51(1) of the Charter is susceptible to a strict reading, which is based on a literal interpretation of the provision and reduces its scope to national implementing acts and rules, and a more flexible or open reading, which is the one that the Court of Justice has finally accepted. This broader notion has allowed for a more open and functional judicial interpretation of Article 51(1) which, as will be seen, has justified the application of the Charter to matters not subject to harmonisation or implementation and even to matters outside the competence of the Union, but which have an impact on Union law.

Whether or not such application is given was a subject already examined by the previous Community case-law on fundamental rights and to which the

⁴ Cf. KOKOTT, J. and SOBOTTA, C. “The Charter of Fundamental Rights of the European Union after Lisbon”, AEL 2010/6, p. 6.

⁵ LENAERTS, K. and GUTIERREZ-FONS, J. A.: “The Place of the Charter in the EU Constitutional Edifice”, *The EU Charter of Fundamental Rights. A Commentary*, Nomos/C.H.Beck/Hart Publishing, Oxford, 2014, p. 1561.

⁶ This doctrine has been reiterated in numerous judgments and orders, e.g. ECJ Order of 23 February 2016, *Garzón Ramos y Ramos Martín* (C- 380/15, EU:C:2016:112, 23-28).

Official *Explanation* relating to this provision refers ⁷, citing three emblematic cases, two of which are applicable, the Wachauf judgment (3 July 1989, *Wachauf* (C-5/88, EU:C:1989:321)) on a national measure implementing, applying or transposing a directive, and the judgment in ERT (18 June 1991, *ERT* (C-260/89, EU:C:1991:254)) on the “derogation” by a national law which implements Community law affecting the freedoms of movement of goods, the freedom to provide services and, in addition, the freedom of expression of the ECHR,⁸ and one of non-application, the Annibaldi judgment (18 December 1997, *Annibaldi* (C-309/96, EU:C:1997:631)), in which the Court of Justice declared itself incompetent because there was no Community regulation on expropriation, or on agricultural property.

Despite the continuity of *Article 51* of the Charter proclaimed by those *Explanations*, their interpretation by the Court has entailed a qualitative and quantitative change in the understanding of its scope, in a flexible and open interpretation of the concept of “when applying Union law”, one of the most sensitive and controversial issues in *the interpretation of the Charter*⁹, of particular importance, since in such a case, and only in such a case, the States must respect their rights, observe the principles and propose their application “in accordance with their respective competences”. This is without prejudice to the margin of appreciation that the Member State may have in each case.

From the Court’s case studies, it has been possible to identify three typical cases of application of the Charter to Member States¹⁰: when they “implement” or directly apply EU law, the rules of the Treaty or a regulation; when they do so indirectly or indirectly when applying an internal rule transposing a

⁷ *Explanations* relating to the Charter of Fundamental Rights (2007/C 303/02): “As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law w (judgment of 13 July 1989, Case 5/88 Wachauf [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 ERT [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 Annibaldi [1997] ECR I-7493)”.

⁸ The judgment stated that, when setting limits, States must respect fundamental rights, in this case, the freedom of expression recognized by the ECHR.

⁹ Cf. GROUSSOT X., PECH, L. and PETURSSON, G. T., “The Scope of Application of fundamental Rights on Member States ‘Action: In Search of Certainty in EU Adjudication’”, 2011, or <http://ssrn.com/abstract=1936473>.

¹⁰ According to Advocate General BOBEK, “...a national authority is likely to be acting within the scope of EU law *at least* in three typical scenarios. First, the national authority directly applies a source of EU law to a case before it, most frequently a regulation (the *direct application* scenario). Second, the national authority applies national law that transposes or implements an EU law measure or obligation. Although the national authority is likely to apply a source of national law to a case, EU law still remains in the background, certainly for the purposes of interpretation (the *indirect application* scenario). Third, the national authority finds itself in a situation in which a national rule makes use of the derogations or justifications to restrictions allowed by EU law (the *derogation* scenario). (*Opinion* of 7 September 2017, C-298/16, Ispas, ECLI:EU:C:2017:650).

directive or relating to a matter affected by it; even if there is no transnational element¹¹; and when State rules or measures imply the derogation or exception of the fundamental freedoms recognised in the Treaties, since by excepting Union law, States “are situated within it and must therefore also respect the fundamental rights recognised by the Charter”.

For the applicability of the Charter by the Member States, there are three possible interaction mechanisms between EU law and domestic law: a *complementarity* mechanism, where the national legislature exercises its own competence in an area within the competence of the Union, facilitating the application of EU law; a mechanism of *practical* effect, because of the effects that certain rules or measures of national competition may have on the effectiveness of European legislation; and a mechanism for *the functional relationship* between European and national regulation in a matter that is not a transposition of EU law affected by a rule of the former¹².

Member States must respect the fundamental rights of the Charter when they act as “agents” of European Union law, as the “executive branch” of the European governance system. Any national measure that “implements” or applies European Union law must respect the standard of fundamental rights set out in the Charter. The Charter also applies to limitations and exclusions by national rules or measures affecting EU law, in line with the doctrine established in the ERT case (judgment of 18 June 1991, *ERT*, C-260/89, EU:C:1991:254)). In such cases, the Court requires justification for the restriction of the fundamental right in the light of the objective pursued, with strict application of the principle of proportionality in order to prevent disproportionate interference affecting the very essence of those rights¹³.

The Charter has had an impact on the discretion or assessment of the Member States in the transposition or application of EU rules, in particular EU rules that establish minimum rules for environmental protection, labour and consumer protection. Those minimums must be respected by the States and, moreover, national improvements to those minimums must respect the rights and principles set out in the Charter where such increased protection affects other Union rules and is incompatible with the Treaty¹⁴.

¹¹ Judgment of 20 May 2003, *Österreichischer Rundfunk and Others* (C-465/00, C-138 and C-139/01, EU:C:2003:294).

¹² SAFJAN, M.: “Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of conflict?”, *EUI Working Papers, Law*, 2012/22, p. 89, <https://hdl.handle.net/1814/23294>

¹³ ECJ Judgment of 13 April 2000, *Karlsson* (C-292/97, EU:C:2000:202).

¹⁴ In the judgment of the ECJ of 14 April 2005, *Deponiezweckverband Eiterköpfe* (C-6/03,), the Court of Justice held that Article 176 TFEU authorises Member States to maintain or adopt measures of greater protection provided that they are compatible with the Treaty and notified to the Commission, and

The Court of Justice has not sought to extend the powers of the European Union, which the Charter prohibits, but at the urging of the Charter it has interpreted them extensively through the exercise of hitherto latent powers. This has been particularly the case in the field of equality and non-discrimination, in their implementation in directives and in their interpretation, or taking into account of the guiding principles recognised in the Treaties, or exercising the general powers recognised in Article 352 (action necessary to attain one of the objectives set out in the Treaties) and in Article 114, both of the TFEU (approximation of national laws for the establishment and functioning of the internal market).

The use of these articles has been strengthened by the recognition of the legal value of the Charter, so that, although the Charter does not transfer a general power to regulate the rights it recognises, its application in connection with existing powers has served to strengthen the EU's capacity to act on rights.

There is no case in EU law in which the fundamental rights of the European Union do not apply, but for that application there must be an applicable rule of EU law different from the provision of the Charter recognising the fundamental right¹⁵. A situation governed by Union law is required.

III. THE PROBLEMATIC POINTS OF CONNECTION

The increasingly frequent invocation of the Charter by individuals and national judicial bodies has significantly increased the number of judgments and orders in which the Court has had to rule on the scope of the Charter and has meant that the classic criteria, enforcement and exclusion, have proved insufficient to deal with the variety of cases brought before the Court, which is admitting a new sort of cases, that of national measures or rules which, even in

that it follows from the general scheme of Article 176 TFEU that the competence of the Member States to adopt more stringent protective is envisaged by Community law, since they must, in any event, be compatible with the Treaty. Nevertheless, it falls to the Member States to define the extent of the protection to be achieved. In order to ensure the application of the minimum requirements laid down in a Community directive [on the environment], the Community principle of proportionality requires that domestic law measures be appropriate and necessary in relation to the objectives pursued, but, inasmuch as other provisions of the Treaty are not involved, this principle is no longer applicable so far as concerns more stringent protective measures of domestic law adopted by virtue of Article 176 TFEU and going beyond the minimum requirements laid down by the Directive.

¹⁵ According to the ECJ, "...situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter", even if the Charter cannot in itself establish a competence of the Union (judgment, General Chamber, of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, &21)).

the exercise of their own State powers, have affected EU law, and that must respect the rights recognised by the Charter¹⁶.

This extension of the scope of application of the Charter to States, beyond the typical cases of execution, direct or indirect, or exclusion, has given rise to an open, undefined case that is not free from hesitation. We are not dealing with a perfectly defined situation, let alone a complete one, regarding the system of fundamental rights applicable in the area of the Union, and it remains problematic to determine when Union law is “applicable” and therefore the Charter itself.

The unclear determination of the non-equivalent concepts of application and field of application is not satisfactory, nor does it provide legal certainty. Some Advocates General have sought to provide the Court with novel criteria for determining when and to what extent EU law and, therefore, the Charter is applicable to the case. In his *Opinion* in *Åkerberg Fransson* (C-617/10), delivered on 12 June 2012¹⁷, Advocate General CRUZ VILLALÓN expressed the need for a complementary effort to rationalise and reorder those criteria, and argued that this should be done on the basis of a specific EU interest that underpins the presence of EU law in national law and in those where the legitimacy of the European *res publica* may be at stake¹⁸.

The judgment in *Åkerberg Fransson*¹⁹ merely stated that the action of the Member States when implementing EU law must be consistent with the requirements arising from the fundamental rights guaranteed by EU law, and that the fundamental rights of the Charter must be applied in all situations governed by EU law, but not outside of them. In addition, it declared that “*where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of*

¹⁶ See, in a case of refusal of asylum, the application of the rights recognised in the Charter in Articles 1 (human dignity), 4 (prohibition of degrading treatment), and 47 (fair trial), judgment of the ECJ, Grand Chamber, of 21 November 2011, *N.S. and others* (C-411/10 and C-493/10, EU:C:2011:865).

¹⁷ ECLI:EU:C:2012:340.

¹⁸ “In summary, I believe that a traditionally open provision of the kind laid down in Article 51(1) of the Charter calls for a basic determination of its meaning. That must be effected, first of all, by means of a determination of the different situations in which the transfer from the Member States to the Union of responsibility for guaranteeing fundamental rights is primarily likely to be justified. Secondly, I believe that an appraisal of the specific circumstances of each case must allow a final, definitive adjudication regarding the allocation of responsibility for guaranteeing the fundamental rights to either the Union or the Member States”.

¹⁹ ECJ judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105), which has heard about the possibility of not applying national provisions that infringe the *non bis in idem* principle recognised in Article 50 of the Charter, in a case relating to VAT.

the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised".²⁰

In his *Opinion in Ispas*²¹, Advocate General BOBEK argued for the need to draw a dividing line in this regard based on objective criteria of proximity between the national and EU rules, rather than a merely "material" or "thematic" connection being sufficient.

"The applicability of EU fundamental rights requires a more solid degree of connection, which goes 'above and beyond the matters covered being closely related'. That solid point of connection with EU law results from the fact that the applicable national legislation is intended to give effect to a provision of EU law or which may affect it, does not have to be explicit, nor does it require a complete European regulation of the matter or that the national legislation reflects its content, where the European legislation grants a margin of appreciation to the States²² or allows them to establish exceptions²³. Nor is it necessary for the European standard and the national standard to meet the same objectives, provided that there is a foreseeable connection of 'reasonable functional necessity'²⁴".

In a similar vein, the ECJ judgment of 6 March 2014, *Siragusa* (C-206/13, EU:C:2014:126), stated that, for the purposes of Article 51 of the Charter, the

²⁰ In this case, it held that EU law was applicable when it comes to tax surcharges and criminal proceedings for breach of VAT obligations, even though the rule on surcharges and criminal legislation had not been adopted to transpose Directive 2006/112.

²¹ Besides the merits of the case (access to the file in a VAT assessment tax procedure), what was questionable was whether or not it fell within the scope of EU law, since the tax rules applied were not implementation of any EU law.

²² The ECJ has held that when Member States have broad discretion under EU law, they must exercise it in accordance with that law, including the binding nature of and respect for the fundamental rights recognized by the Charter. (judgment of 9 March 2006, *Werhof*, C-499/04, EU:C:2006:168).

²³ Judgments of the ECJ, Grand Chamber, of 13 June 2017, *Florescu*, (C-258/14, EU:C:2017:448), and 16 February 2017, *PPU - C.K. and others* (C-578/16, EU:C:2017:127). According to the judgment of the ECJ, Grand Chamber, of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373) "The fact that Directive 2011/16 does not make express provision for penalties to be imposed does not mean that penalties cannot be regarded as involving the implementation of that directive and, consequently, falling within the scope of EU law. The concepts of "measures aimed at gathering information" within the meaning of Article 18 of the directive and "necessary measures to ensure the smooth operation of the administrative cooperation arrangements" within the meaning of Article 22(1) of the directive are capable of encompassing such penalties".

²⁴ Any national rule instrumental to the effective realisation of an EU law-based obligation on the national level, even if not specifically adopted for that purpose, will fall within the scope of EU law, *unless* the adoption and operation of that national rule is not reasonably necessary in order to enforce the relevant EU law. (*Conclusions*, Rev. 56).

concept of “application of Union law” requires a certain degree of connection of the matters in question or the indirect impact of one of them on the other, and has held that, in order to determine whether national legislation is related to the application of EU law, it is necessary to ascertain, *inter alia*, whether its purpose is to implement a provision of EU law, the nature of that legislation, whether it pursues objectives other than those laid down by EU law (even if it may indirectly affect the latter), and if there is specific legislation of Union law on the matter or that may affect it. The judgment recalls that “*the Court has found that fundamental EU rights could not be applied in relation to national legislation because the provisions of EU law in the subject area concerned did not impose any obligation on Member States with regard to the situation at issue in the main proceedings*”.

The absence of such a point of connection has made it possible to deny the application of the Charter in many and varied cases, a case-law of “non-application” that is extremely useful for drawing a negative line of the scope of application of the Charter, although its contour remains somewhat imprecise and uncertain, given the great diversity of matters or areas covered by EU law and the case-by-case nature of the reference for a preliminary ruling procedure, as a result of which the same national legislation can be considered to fall within the scope of EU law in some cases and not in others.

In a nutshell, the Charter does not affect “purely internal” or “non-unionized” situations, but only situations in which European Union law is applicable, mediately or immediately (an area that is not at all narrow in terms of labour or social matters, as is reflected throughout the content of this book).

Recent case law of the ECJ has insisted that the fundamental rights guaranteed by the EU legal order must be applied in all situations governed by EU law, but not outside them. And, consequently, that “the concept of ‘application of EU law’”, within the meaning of Article 51(1) of the Charter, presupposes the existence of a connecting link between an act of EU law and the national measure at hand in a higher degree than the proximity of the matters in question or the indirect effects of one of them on the other (judgments of 6 October 2016, *Paoletti and others* (C-218/15, EU:C:2016:748); of 24 February 2022, *Glavna direksia “Pozharna bezopasnost i zashtita na naselenieto”* (C262/20, EU:C:2022:117); Grand Chamber, of 29 July 2024, *protectus* (C185/23, EU:C:2024:657). In order to determine whether a national measure relates to the “application of Union law”, within the meaning of Article 51(1) of the Charter, it is necessary to determine, *inter alia*, whether that national legislation is intended to implement a provision of EU law; the nature of the legislation at issue and whether it pursues objectives other than those covered by EU

law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or rules which are capable of affecting it (judgments of 5 May 2022, *BPC Lux 2 and others* (C83/20, EU:C:2022:346); of 29 July 2024, *protectus* (C185/23, EU:C:2024:657)). The ECJ has held that EU fundamental rights are inapplicable in relation to national legislation since the provisions of EU law relating to the matter in question would not impose any specific obligation on the Member States concerning the situation at issue in the main proceedings (judgments of 6 March 2014, *Siragusa* (C206/13, EU:C:2014:126); of 10 July 2014, *Julían Hernández and others* (C198/13, EU:C:2014:2055); of 28 November 2024, *PT II* (C398/23, EU:C:2024:996)).

Directive 2003/88 of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time regulates the duration and pattern of night work (Articles 8 and 13), the protection of the health and safety of night workers (Articles 9, 10 and 12) and notification to the competent authorities (Article 11), but not the remuneration of night workers. ILO Convention No 171 of 1990 on night work does, but it has no binding legal value in the EU legal order, so that the increase in workers' pay for night work, at issue in the main proceedings, does not fall within the scope of Directive 2003/88 and cannot be regarded as implementing EU law. within the meaning of Article 51(1) of the Charter (judgment of 7 July 2022, *Coca-Cola European Partners Deutschland* C-257/21 and C258/21, EU:C:2022:529).

IV. THE CHARTER AND STATE CONSTITUTIONS

The Charter makes a significant distinction between rights and freedoms, on the one hand, and principles, on the other. With respect to the former, Article 52(1) provides that any limitation on the exercise of the rights and freedoms recognized by the Charter must be provided for by law and respect the essence of those rights and freedoms. The distinction between rights and principles is not always clear, especially when we move in the field of social or economic rights. The same article may include principles that can be developed in acts or rules that grant rights subject to judicial review and rights self-enforced by judicial bodies²⁵.

²⁵ BLACKSTOCK, J.: "The EU Charter of fundamental rights. Scope and Competence", *Eutopia Law*, 2012, <http://eutopialaw.com/2012/04/18/the-eu-charter-of-fundamental>.

The principles require specific development in order to be invoked before the courts for the purpose of reviewing the measures that develop them. Article 52(5) of the Charter provides that provisions containing principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union and by acts of the Member States when they are implementing EU law, and that those principles may only be invoked before a court in relation to the interpretation and review of the legality of such acts. When that principle is specified or developed by means of an EU rule, which is then transposed into domestic law, Article 52(5) of the Charter allows for an objective review of the legality of national rules or acts in the light of directives, even in an *inter privatos* conflict, which strengthens legal certainty regardless of whether or not that review allows the national court not to apply a provision contrary to the principle stated in the Charter²⁶.

The contrast between these provisions makes it possible to infer that, where it is not a question of principles but of rights and freedoms, they are “invokable” before a court, whether a court of the European Union or a national judicial body. But this conclusion gives rise to a double doubt: how to differentiate the principles of rights and freedoms and what is the scope of that allegation or invocation. The Charter, with the same legal value as the Treaties (Article 6(1) TEU), has, of course, a vertical effect vis-à-vis State authorities, including judicial authorities, but its horizontal effect, its possible invocation in relations between private parties, is much more doubtful. As we will see, the ECJ, after a complex evolution of its doctrine, has recognised horizontal effect to those of its provisions that proclaim rights and freedoms in an imperative and unconditional manner, which the EU directives, lacking horizontal effect, specify, and their consequent invocation in relations between private parties.

The Charter lacks the general and direct effect of the European Convention on Human Rights (ECHR), on which the Court of Justice itself, in accordance with Article 52(3) of the Charter, usually relies when it comes to rights recognised in both the ECHR and the Charter²⁷. The Court considers the rights enshrined in the ECHR to be a minimum level of protection that can be improved by EU law, thus creating a convergent but complex system for the pro-

²⁶ *Opinion* of Advocate General CRUZ VILLALÓN in *Association de médiation sociale*, delivered on 18 July 2013, C-176/12 (ECLI:EU:C:2013:491).

²⁷ In these cases, Article 52(3) of the Charter provides that, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention, which shall not prevent Union law providing more extensive protection.

tection of fundamental rights²⁸. In the judgments of ECJ, Grand Chamber, of 14 March 2017, *G4S Secure Solutions* (C-157/15, EU:C:2017:203) and of 15 July 2021, *WABE* (C-804/18 and C-341/19, EU:C:2021:594), the right to freedom of conscience and religion, recognised in Article 10(1) of the Charter, which entails the freedom to change one's religion or belief, and the freedom to manifest one's religion or belief, individually or in community with others, in public or in private, through worship, teaching, practice and observance of rites, corresponds to the right guaranteed in Article 9 of the ECHR, according to the *Explanations* to the Charter, and, in accordance with Article 52, paragraph 3 of the Charter has the same meaning and scope as the Charter.

On the other hand, Article 52(4) of the Charter establishes that, in so far as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions, and Article 53 of the Charter, with reference to the level of protection, determines that none of its provisions may be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised in their respective fields of application, inter alia, "by the Constitutions of the Member States".

An issue of undeniable magnitude is that of unity versus diversity in the protection of fundamental rights; that is, whether the same criteria apply to the Court of Justice and the national Constitutional Courts in weighing contrasting rights and in their practical balance and consistency. The Charter, by itself, does not displace the application of national constitutional protection of fundamental rights, which are even reinforced, unless there is incompatibility between the two. In this regard, the ECJ judgment of 11 September 2014, *A* (C-112/13, EU:C:2014:2195) has declared contrary to EU law to have the obligation to raise a question of unconstitutionality before referring a question for a preliminary ruling, as long as it has the effect of preventing ordinary courts from exercising their power or complying with their obligation to refer questions to the Court of Justice for preliminary ruling in order to guarantee judicial protection

²⁸ According to the ECJ judgment of 5 October 2010, *PPU - McB* (C-400/10, EU:C:2010:582), Article 7 of the Charter "contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights (see, by analogy, Case C-450/06 *Varec* [2008] ECR I-581, paragraph 48)". The judgment adds that Article 7 of the Charter must be read in a way which respects the obligation to take into consideration the child's best interests, recognised in Article 24(2) of that Charter, and taking into account the fundamental right of a child to maintain on a regular basis personal relationships and direct contact with both of his or her parents, stated in Article 24(3)". That leads it to examine whether "Article 24 of the Charter, respect for which is ensured by the Court, precludes the interpretation of Regulation No 2201/2003 which is set out in paragraph 44 of this judgment".

of the rights conferred by the legal order of the Union, should they consider that the applicable national provision is contrary to EU law.

When the Charter is applied to Member States, it finds a space “already occupied” by the declarations of rights and freedoms contained in the respective national Constitutions. In this area, the Charter “seeks to impose itself over the national Charters with a certain vocation of displacement, since the Charter does not annul national rights and freedoms, even in the scope of application of Union law”. As regards the possible contradictions between the Charter and the national Constitutions, the Charter operates directly and autonomously, and by virtue of its primacy it abolishes disparities, and “it cannot be predicated, in relation to it, that it is merely a hermeneutical element of the Constitutions, but by its insertion into the Community legal order it renders any other instruments of protection as secondary”.

On the other hand, the Charter has not sought to ensure the harmonisation of the fundamental rights of the Member States, but to “ensure a uniform application of other European Union rights”²⁹. Therefore, the protection of fundamental rights in the Charter must not lead to a “usurpation” of national competences, although, where applicable, it entails a limit or condition if there is a difference in criteria in the weighing up of contrasting rights and their practical consistency between the Court of Justice and the Constitutional Courts.

The Charter is being used by the Court not so much as a guideline for reviewing conventionality or “legality”, but as a criterion for the interpretation of regulations and directives, which develop principles and rights recognised by it, without having completely lost the previous perspective of discovery or judicial creation of fundamental rights as “general principles” of EU law. This does not cease to give rise to concern after the judgments of the ECJ, Grand Chamber, of 18 December 2007, *Laval un Partneri*, (C-341/05, EU:C:2007:809); Grand Chamber, 11 December 2007, *Viking* (C-438/05, EU:C:2007:772); and of 3 April 2008, *Rüffert* (C-346/06, EU:C:2008:189) which have given pre-eminent value to the integration of markets on social rights “displaced” by them or subject to them, a weighting that does not entirely coincide with that adopted by the Constitutional Courts on freedom of association and the right to strike, fundamental rights that must be respected by the fundamental right to freedom of enterprise. An emblematic case is that of the ECJ judgment, Grand Chamber, of 31 December 2016, *AGET Iraklis* (C-201/15, EU:C:2016:972)³⁰,

²⁹ KOKOTT, J. and SOBOTTA, C.: *op. cit.* p. 7.

³⁰ The ECJ examined the compatibility of Greek national legislation (which established the requirement of administrative authorisation for collective redundancies) with Directive 98/59/EC on collective redundancies, with the freedom of establishment of Article 49 of the TFEU, and with the freedom to

and the assessment it made on the limits to the freedom of enterprise and the protection against unjustified dismissal (both rights recognised in the Charter). The *AGET Iraklis* judgment insisted that national labour standards restricting economic freedoms must be justified on grounds of general interest and subject to an adequacy and necessity test to justify high standards of labour and employment protection. Although the European Union also has a social purpose (the protection of which justifies restrictions on the freedom of establishment and of undertakings by means of limits on collective redundancies), those objectives must be appropriate to the objective pursued, and must be consistent with EU law and respect the fundamental economic rights of employers, without limiting them beyond what is necessary to achieve the objective pursued. It considered that this would be the case under the Greek system of administrative authorisation requested for collective redundancies, unless its operative may result in the deprivation of the effectiveness of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, which, where appropriate, it was for the referring court to verify.

It is also of interest, in cases of adoption by private employers of regimes of political, philosophical and religious neutrality in relations with their clients and the prohibition of their workers from wearing Islamic headscarves, the weighing and strict proportionality assessment made by the aforementioned ECJ judgments of 14 March 2017, *G4S Secure Solutions* (C-157/15, EU:C:2017:203), and of 15 July 2021, *WABE*, C-804/18 and C-341/19, EU:C:2021:594) between the principle of non-discrimination and the right to freedom of thought, conscience and religion of women workers, guaranteed under Articles 21 and 10 of the Charter, on the one hand, and the right of parents to ensure the education and teaching of their children in accordance with their religious, philosophical and pedagogical convictions and the right to freedom to conduct a business, recognized in arts. 14.3 and 16 of the Charter, on the other. The *WABE* judgment also gave rise to the constitutional provisions of the States, in the case of the Basic Law of the Federal Republic of Germany on the right to religious freedom and its interpretation by the *Bundesverfassungsgericht*.

The Charter itself, as has already been said, in its Article 53 has sought to safeguard not only common national traditions, but also the operability of national Constitutions. The important judgment of the ECJ, Grand Chamber, of

conduct a business of Article 16 of the Charter. The Greek rule was a more protective rule than the minimum protection recognised by the Directive, and the problem arose both with regard to the freedom of establishment and, as far as the present case is concerned, to the freedom to conduct a business, recognised under Article 16 of the Charter.

26 December 2013, *Melloni* (C-399/11, EU:C:2013:107)³¹, has ruled for the first time on the interpretation of Article 53 of the Charter, on whether it establishes only a minimum standard of protection or whether it binds the Constitutional Courts in the Charter's scope of application, which must adapt their jurisprudence and exclude a higher degree of national protection of fundamental rights in order to refuse to surrender a convicted person *in absentia*. According to the judgment, it would otherwise cast doubts "on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision".

The judgment in *Melloni* has not established a general rule displacing domestic protection of fundamental rights by the Charter. Rather, it is based on the logic that improvements in the levels of protection of EU law are not acceptable when they adversely affect the Treaties and EU law itself. In the present case, the effectiveness of the European arrest warrant could be jeopardised if the Member States were granted a margin of discretion which, on the basis of fundamental rights recognised in their Constitution, would allow them to deny its effectiveness. The judgment in *Melloni* does not prevent the Charter from playing in other cases as a minimum instrument and allowing for the application of a higher national standard of fundamental rights, but rather states that the Charter allows for a cumulative application of fundamental rights provided that the level of protection dictated by the Charter as interpreted by the Court of Justice is not compromised, nor the primacy, unity and effectiveness of European Union law³², coinciding with what was stated in the judgment in *Åkerberg Fransson*, of the same date.

The judgment (Grand Chamber) of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936) has modulated the³³ *Melloni* doctrine. The issue was

³¹ On the question referred for a preliminary ruling by the Spanish Constitutional Court, in which, in relation to the European arrest warrant, it asked, *inter alia*, whether Article 53 of the Charter, in conjunction with the rights recognised in Articles 47 and 48 thereof, allows a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that derived from European Union law, in order to avoid an interpretation that restricts or adversely affects a fundamental right recognised by the Constitution of that Member State. This was thus a parallel between the fundamental rights of the Union and those proclaimed in the State Constitution, which did not imply a contradiction, but rather greater protection.

³² LENAERTS, K and GUTIÉRREZ-FONS, J.A.: "The Place of the Charter in the EU Constitutional Edifice", *cit.*, p. 1593.

³³ In response to the question referred for a preliminary ruling by the Italian Court of Justice on the possible non-application of the limitation rules of the Italian Criminal Code, which the ECJ had declared to be contrary to Article 325 TFEU as long as they prevented the imposition of effective and dissuasive penalties on a considerable number of serious VAT tax evasions affecting the financial interests of the Union (ECJ

whether an Italian judicial body should refrain from applying a limitation period provided for certain VAT tax evasion offences, which the Court of Justice itself had held to be contrary to Article 325 TFEU, in possible violation of the principle of legality in criminal matters under Article 25 of the Italian³⁴ Constitution. The judgment in *M.A.S.* recognised the need to guarantee the principle that offences and penalties must be defined by law as set out in Article 49 of the Charter, a rule which is imposed on States when they apply EU law and which forms part of the constitutional traditions of the Member States, with the same scope as the right guaranteed in Article 7(1) of the ECHR, requirements of foreseeability, precision and retroactivity that apply in the Italian legal system to the limitation regime. It therefore calls on the national court to consider whether the application of the *Taricco* judgment in Italy leads to a situation of uncertainty which undermines the principle of precision of the applicable criminal law, or the retroactive application of criminal legislation more severe than that in force at the time the offence was committed. Hence, invocation of the Charter has helped to guarantee the application of Article 25 of the Italian Constitution by giving primacy in the EU order to the rights recognised in the Charter over the mandates included in the TFEU, although with a severe warning to the State that it must comply with them by correcting domestic criminal legislation for the future.

The judgment of 15 July 2021, *WABE* (C-804/18 and C-341/19, EU:C:2021:594) found in the decision of Directive 2000/78 to empower States to adopt more favourable measures for the protection of the principle of equal treatment (Article 8(1)) the technical way to introduce the “most favourable” constitutional rules on the fundamental right of religious freedom, capable of objectively, legitimately and adequately justifying an indirect inequality of treatment, and its interpretation by the Constitutional Courts. However, the ECJ specified that the margin of appreciation that the EU legislature recognises to the States, in the absence of consensus at EU level on the “place accorded to religion and beliefs”, “must, however, go hand in hand with supervision, by the EU judicature, consisting in determining whether the measures taken at national level were justified in principle and proportionate”.

judgment, Grand Chamber, of 8 September 2015, *Taricco and others* (C-105/14, EU:C:2015:555), in which the ECJ has ruled on compatibility with Article 49 of the Charter with regard to the principle of retroactivity.

³⁴ The Corte Costituzionale therefore asked the Court whether Article 325 TFEU requires criminal courts to disapply national legislation on limitation periods which preclude, in a significant number of cases, the punishment of serious fraud affecting the financial interests of the European Union, or which imposes shorter limitation periods for fraud affecting the financial interests of the European Union than for fraud affecting the financial interests of the State, even where such disapplication is at variance with the overriding principles of the constitution of the Member State concerned or with the inalienable rights of the individual conferred by the constitution of the Member State.

V. THE “INTER PARTES” EFFECTIVENESS OF THE CHARTER

The “vertical” effectiveness of the rights recognised in the Charter has not given rise to great doubts. There is no shortage of judgments of the Court of Justice or the General Court that have applied them, either as an interpretative instrument or as a condition for the validity or recognition of a particular claim vis-à-vis the institutions of the European Union or the States implementing EU law. This shows the growing importance of the invocation of the fundamental rights recognised by the Charter in cases in which a public authority is concerned, operating not only as a criterion for interpreting and re-reading directives, but also with a certain direct “vertical” effect.

The question is different whether the Charter can have a “horizontal” effect, that is to say, whether it is applicable in relations between individuals when the application of European Union law is at stake. As has been the case with the social directives, this issue has arisen above all in the rights and principles of the Charter which affect work-related issues.

The issue has a certain parallelism with that of the possible invocation and direct effect of directives that affect the content or development of the employment contract³⁵.

The hermeneutical relevance of directives in the interpretation of our labour legislation is sufficiently well known and, moreover, will be highlighted throughout this book, but the obligation of the national court to use the directive when interpreting and applying the relevant rules of its legal system³⁶ can only be carried out when the domestic rule applicable to the case allows it and its limit is not to state the opposite of what the national law clearly establishes. Failing this, the Court of Justice has recognized the State’s liability to the individual harmed by the failure to transpose the directive that grants him rights.

³⁵ The well-known *Marshall* judgment (ECJ of 26 February 1986, *Marshall* (C-152/84, EU:C:1986:84)), among many others, has made it clear that the direct effect of the directive does not apply to relations between individuals and that the directive, by itself, does not impose obligations on private individuals, nor does it generate rights that can be invoked before the courts against other private subjects. As is well known, that doctrine has not prevented that, where a national labour law transposing the directive is applicable, it does not have to be taken into account both by the national court and by the Court of Justice in interpreting that internal rule, and even in detecting the possible contradiction of that rule with the directive due to the deficient transposition of that provision.

³⁶ Judgment of the ECJ, Grand Chamber, of 5 April 2004, *Pfeiffer and others* (C-397/01, EU:C:2004:584). The judgment entrusts the court with a practically impossible task: “when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104, is not exceeded”.

The Court has sought to moderate this limit by recognising the so-called exclusionary effect, initially applied in technical regulations, which implies that the Court does not apply a national rule contrary to the directive, although insisting that the directive does not create rights or obligations for individuals³⁷. The exclusion effect has been progressively accepted by the Court in the special treatment it has given to the directives on discrimination in employment³⁸, considering that its application is not only intended to exclude the discriminatory rule contrary to the directive or incompatible with it, but also to extend the treatment of the benefited³⁹ category to the injured parties. In application of Directive 2000/78, the Court has taken significant steps to remove differences in treatment on grounds of age, excluding the application of unequal treatment, as it infringes the right to non-discrimination, and the national court must ensure the full effectiveness of the directive enshrining it.

Non-discrimination is enshrined in the TFEU (which the ECJ has recognised as granting rights to individuals that the national court must protect by disapplying the national law which is contrary to it⁴⁰), as well as in the Charter with the legal value of the Treaties. Therefore, it was worth considering whether this treatment would be extended to rules of the directives implementing or applying the Charter. However, the Court, in classifying non-discrimination as a “general principle” and not as a fundamental right, did not initially recognise the possibility of direct invocation *inter privatos* of the Charter, nor the relevant directives.

The issue arose directly in the judgment in *Kücükdeveci*⁴¹, in which it was questioned whether the national court should disapply a rule contrary to Directive 2000/78⁴². In its judgment, the ECJ made precise reference to Arti-

³⁷ ECJ Judgment of 26 September 2000, *Unilever* (C-443/1998, EU:C:2000:496).

³⁸ According to the ECJ judgment of 12 December 2002, *Rodríguez Caballero* (C-442/00, EU:C:2002:752) when discrimination contrary to Community law is established, the principle of equality can only be guaranteed by granting the persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category, rebalancing the situation of lack of protection of the disadvantaged group, and to this end the national court must disapply any discriminatory national provision and extend to the members of the disadvantaged group the same regime enjoyed by other workers.

³⁹ Judgment of the ECJ, Grand Chamber, of 16 October 2007, *Palacios de la Villa* (C-411/2005, EU:C:2007:604).

⁴⁰ “It is for the national court to the full extent of its discretion under national law, to interpret and apply domestic law in accordance with the requirements of Community law and, to the extent that such an interpretation is not possible in relation to the Treaty provisions conferring rights on individuals which are enforceable by them and which the national courts must protect, to disapply any provision of domestic law which is contrary to those provisions” (ECJ judgment of 11 January 2007, *ITC* (C-208/05, EU:C:2007:16)).

⁴¹ Judgment of the ECJ, Grand Chamber, of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:21).

⁴² Advocate General BOT, in his *Opinion* (ECLI:EU:C:2009:429), had argued that “the Court should therefore, as it has done in regard to the general principle of Community law itself, accept that a directive

cle 21(1) of the Charter (“any discrimination based on any grounds such as [...] age”), and it recalled that Article 6(1) TEU provides that the Charter has the same legal value as the Treaties. The judgment held that the national legislation at issue must be interpreted in the light of the “general principle of Community law” of non-discrimination on grounds of age, as envisaged under Directive 2000/78/EC, and that, in a dispute between individuals, the national court must ensure, within the framework of its jurisdiction, the legal protection conferred on individuals by EU law and the full effectiveness of that law, rendering inapplicable (if necessary) any provisions of national legislation contrary to that principle”⁴³. Without directly applying Article 21 of the Charter, it accepted the effect of exclusion by providing national judges with an important instrument for enforcing the principle of non-discrimination. The subsequent reference to the Charter has given a more solid basis to its doctrine and it is expectable that in the future the Court will continue to draw from the Charter other “general principles” of the Union with an exclusionary effect.

The *Kücükdeveci* judgment was a significant step forward in facilitating the invocation and immediate effect of a prohibition included in a directive in development of a general principle of primary law enshrined in the Charter, in respect of which the courts must disregard a clear and precise national provision contrary to that principle, although, in that judgment, the ECJ did not even recognise the direct revocation of directives in horizontal disputes (nor that of the Charter itself).

The invocation and direct effect of the Charter was addressed more directly in the *Dominguez* case⁴⁴, which examined the direct applicability of

intended to counteract discrimination may be relied on in proceedings between private parties in order to set aside the application of national rules which are contrary to that directive”, and that enhanced reliance on Directive 2000/78 in disputes between individuals would help to guarantee fundamental rights in cases that will increase when the Charter of Fundamental Rights of the European Union acquires binding legal force.

⁴³ Vid. PREIS, U. and TEMMING, F. J., “Der EuGH, das BVerfG und der Gesetzgeber – Lehren aus *Mangold II*”, *Neue Zeitschrift für Arbeitsrecht*, 27, 2010, p. 185 et seq. For M. MAINGUY (“Jurisprudence *Mangold*, Acte II: l’arrêt, *Kücükdeveci* (ECJ, 19 January 2010 (C-555/07)”, MBDE v Droit et discriminations, 2010, blogs.parisnanterre.fr), the judgment in *Kücükdeveci* makes it possible to measure the importance of European Union law on labour law, and the difficulties of the national court as a European court in reconciling its national law with that of the European Union. With this precedent, the ECJ has provided national courts with new prerogatives to ensure respect for the principle of primacy and to compensate omissions in the transposition of directives, since national judges must exclude a clear and precise national provision contrary to a principle of Community law specified in a directive. According to D. SIMON (“L’invocabilité des directives dans les litiges horizontaux: confirmation ou infléchissement?”, *Europe: actualité du droit communautaire*, 20, 3, 2010, p. 4 et seq.), the judgment in *Kücükdeveci* implies that, in such cases, the directive may be invoked in a dispute between individuals to provoke an exclusion effect of the internal rule which is contrary to it.

⁴⁴ Judgment of the ECJ, Grand Chamber, of 24 January 2012, *Domínguez* (C-282/10, EU:C:2012:33) on the right to leave in relation with a sick leave situation and national legislation contrary to Directive 2003/88.

Article 31(2) of the Charter on the right of workers to a period of paid annual leave. The dilemma in this provision is whether it effectively enshrines a right of direct application between employers and workers or only an obligation of protection on the part of the Union and the Member States (which have a considerable margin of discretion in this regard), in which case the provisions transposing that obligation must be interpreted in accordance with the fundamental right recognised by the provision which would not be directly applicable between individuals. The *Domínguez* judgment avoided the issue, constraining itself to affirming the classic doctrine of interpretation in conformity with EU law and its limits, and declaring that, if such interpretation is not possible, the injured party may obtain compensation for the loss sustained, a step backwards from the *Küçükdeveci* judgment.

The question of the possible direct application of the Charter was re-examined in the *Association de médiation sociale (AMS)* case⁴⁵, in which the French Court of Cassation asked whether the Charter could be invoked in relations between individuals, where its contents have been specified by a directive⁴⁶. The ECJ's judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2) reiterated that the fundamental rights guaranteed in the EU legal order must be applied in all situations governed by EU law, and declared that the national legislation at stake was an application of Directive 2002/14 and that Article 27 of the Charter applied in the main proceedings. However, once it identified a contradiction between Article 3(1) of Directive 2002/14 and the national legislation which excluded certain categories of work-

⁴⁵ Judgment of the ECJ, Grand Chamber, of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2) on the incorporation by the competent trade union of representative bodies of the staff at AMS, where Article 27 of the Charter (according to which workers, or their representatives, must be guaranteed at appropriate levels, information and consultation in good time, where and under the conditions provided for in Union law and national laws and practices) was invoked with regard to the interpretation of Directive 2002/14. The internal rule excluded certain categories of workers from the calculation of the minimum workforce in contrast to Article 3(1) of the Directive.

⁴⁶ In the *Opinion* of Advocate General CRUZ VILLALÓN, it was stated that Article 51 of the Charter has not addressed “the very complex question of the effectiveness of fundamental rights in relations between individuals”, where the interpreter of the Charter finds himself on a nebulous horizon, since horizontal effectiveness has been applied to the fundamental freedoms of movement or to non-discrimination on grounds of sex, questioning whether other fundamental rights recognized in the Charter were of a lower status. CRUZ recognises that the horizontal effectiveness of fundamental rights operates differently with respect to each of them. Some are not addressed to individuals and others are, such as the right of workers to information and consultation “in the company” of Article 27 of the Charter, whose relevance in legal-private relations cannot be denied. Thus, it could be invoked in a dispute between individuals, as a principle with a mandate over public authorities and in their implementing acts, in the case of Article 3(1) of Directive 2002/14. Article 27 of the Charter would fulfil a refining function, allowing an objective review of the legality of national rules in an *inter privatos* conflict, and by empowering the national court not to apply the national provision contrary to the directive (the liability of the non-compliant State not being sufficient).

ers from the calculation for establishing representation in the undertaking, it insisted that the Directive could not be invoked in the context of a dispute between individuals, without prejudice to the obligation to interpret the internal legislation in the light of the Directive (which does not allow a *contra legem interpretation* of a provision that is not subject to an interpretation in conformity with the Directive, such as the French provision of the merits).

The judgment in *AMS* echoed the *Küçükdeveci* case-law on the possible application of a provision of the Charter in conjunction with the provisions of Directive 2002/14, and its possible application in relation to Article 27 of the Charter. However, in a dubious interpretation of Article 52(5) of the Charter, it held that the prohibition of Article 3(1) of Directive 2002/14 is addressed to the Member States and is not directly applicable, unlike the principle of discrimination on grounds of age (which is “sufficient in itself to confer on individuals an individual right which they may invoke as such”), without prejudice to the fact that the “injured party” may rely on the case-law of the Court in order to obtain, where appropriate, the reparation of the damage suffered⁴⁷.

The *AMS* judgment *has been widely criticised*⁴⁸, but it has positive aspects in that it confirmed the applicability of the Charter in line with the judgment in *Küçükdeveci*, amending the doctrine of the judgment in *Domínguez*, but without responding to the Advocate General’s solid arguments in favour of invoking the principles set out in the Charter, leaving its Article 27 inoperative. The ruling would have been the same if that article had not existed.

If Article 52 of the Charter confers on judges knowledge of the interpretation and legality of those “acts implementing the principles”, that interpretation and review of legality should lead to more rigorous results than those resulting from a breach or failure to transpose a directive. In any event, that doctrine cannot be considered as extensible to other rights recognised in the Charter, which are not of a clear principled nature and do not need to be specified, so that the *AMS* judgment left “ajar” the problem of the possible direct horizontal effect of the Charter on the employment contract.

⁴⁷ According to the operative part of the judgment, “Article 27 of the Charter of Fundamental Rights of the European Union, by itself or in conjunction with the provisions of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the French Labour Code, is incompatible with European Union law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision”.

⁴⁸ KROMMENDIJK, J., *After AMS: remaining uncertainty about the role of the EU Charter’s principles*, eutopialaw.com/2014, :<https://eutopialaw.com/2014/01/29/after-ams-remaininguncertainty-about-the-role-of-the-eu-charters-principles/>.

The possible application of the Charter, in relation to the prohibition of age discrimination, was re-examined in the judgment of the ECJ, Grand Chamber, of 19 April 2016, *Dansk Industri* (C-441/14, EU:C:2016:278)⁴⁹, which held that the principle of non-discrimination on grounds of age, envisaged under Directive 2000/78, “now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union”, must be regarded as a principle of general EU law, referring to the judgments in *Mangold* and *Kücükdeveci* (although Article 21 is drafted not merely as a principle but as a radical prohibition of any discrimination, in particular on the grounds, inter alia, of age). The downgrading of that right to non-discrimination in the Court’s interpretation to “principle” led it to assert that Directive 2000/78 “does not” in itself “enshrine” the general principle of non-discrimination on grounds of age, but merely specifies it in matters of employment and work, facilitating the practical application of the principle of equal treatment.

The judgment in *Dansk Industri*, marginalizing Article 21 of the Charter, examined whether the general principle specified by Directive 2000/78 “*must be interpreted as precluding, including in disputes between private persons, national legislation, such as that at issue in the proceedings before the referring court, which deprives an employee of entitlement to a severance allowance where the employee is entitled to claim an old-age pension from the employer under a pension scheme which the employee joined before reaching the age of 50, regardless of whether the employee chooses to remain on the employment market or take his retirement*”.

The Court considered it to be contradictory to the general principle specified by the Directive and held that, in order to ensure its full effect, the courts had to take all appropriate measures to ensure compliance with that obligation, in accordance with the principle of interpretation in conformity with EU law, amending its previous case-law, so that, if such an interpretation of national law in conformity with the objectives of the directive were not possible, The State Courts should ensure the legal protection of the directive by “*disapplying if need be any provision of national legislation contrary to that principle*”.

It is thus reiterated that the principle of non-discrimination on grounds of age confers on individuals a subjective right which may be invoked in labour disputes between individuals, which “*obliges national courts to refrain from applying national rules incompatible with that principle*”, a material effect

⁴⁹ The judgment examined whether the principle of non-discrimination on grounds of age specified in Directive 2000/78 could be directly applied to relations between individuals and how the direct application of that principle must be weighed against the principle of legal certainty and the principle linked to it, the principle of the protection of legitimate expectations.

similar to the direct application of the directive to the relationship between individuals. Invocation of the principle of protection of legitimate expectations cannot allow State courts to keep on applying national rules which are contrary to the general principle of non-discrimination on grounds of age, as specified in the Directive⁵⁰. But the *Dansk Industri* judgment once again missed the opportunity to clarify the possible invocability and direct applicability of the Charter in a relationship between individuals.

The Charter is increasingly invoked by labour courts that refer questions for a preliminary ruling, requesting the ECJ to rule on labour issues. Examples include the recent case-law on the termination of the employment contract or the employment relationship of interim workers, which is dealt with in another study in this book, or the contrast between the ECJ judgment of 30 June 2016, *Sobczyszyn* (C-178/15, EU:C:2016:502) and the ECJ judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914) on the right to paid annual leave under Directive 2003/88. The first one does not refer to the Charter; the second does so, answering the question referred for a preliminary ruling by the referring court, on Article 47 of the Charter, relating to the right to a fair trial, together with Article 7 of the Directive.

The fundamental right to an effective remedy and to a fair trial, recognised under Article 47 of the Charter, is a right vis-à-vis the State and has direct effect when the Charter is applicable, as confirmed by the judgment of the ECJ, Grand Chamber, of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257) in a case concerning discrimination in employment on the grounds of religion. The judgment held that the Charter was applicable since Directive 2000/78 was at stake and held that the national court is obliged to guarantee the provisions of Article 47 of the Charter, which precludes the application of any national rule that contradicts it.

The *Egenberger* judgment took a significant step forward in recognising the invocation and direct effectiveness of the Charter vis-à-vis the private employer, an entity belonging to the German evangelical church that had refused to employ an applicant on the grounds that she did not profess that religious confession. The question referred for a preliminary ruling asked whether it can be inferred from Article 4(2) of Directive 2000/78 that a particular religion of the candidate constitutes a genuine, legitimate and justified occupational requirement. This would depend on the nature of the worker's activities or the

⁵⁰ “Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation.”

context in which those activities are carried out in accordance with the principle of proportionality. The judgment held that, in the case at hand, the requirement was not essential, nor legitimate, nor justified. It draws relevant conclusions on the effectiveness of the Charter in relation to the prohibition of discrimination under Article 21(1) thereof, which the ECJ considers sufficient in itself and without the need for further development by other rules of EU law or national law to confer on individuals a right that can be invoked in an area governed by EU law, also when the different prohibited cases of discrimination “derive from contracts entered into between individuals”, which the state courts must guarantee, disapplying any internal rule that contradicts the prohibition of discrimination sanctioned by art. 21(1) of the Charter.

This doctrine was reiterated in the ECJ judgment, Grand Chamber, of 11 September 2018, *IR* (C-68/17, EU:C:2018:696) on the dismissal of the head of the internal medicine service of a hospital belonging to IR (a German Caritas company), for having contracted a second civil marriage after a divorce. The *IR* judgment denied that the nature of the activity imposed, as a genuine, legitimate and justified occupational requirement, respect for the ethics of the church or organisation in question, and reiterated that in a dispute between individuals the national court is required not to apply a national provision which cannot be interpreted in accordance with the prohibition of discrimination on grounds of religion laid down in Article 4(2) of Directive 2000/78 and enshrined in Article 21 of the Charter (which has the same legal status as the Treaties), which is mandatory and sufficient in itself to confer on individuals a right that can be relied on when EU law is applicable. The national court, if the domestic law does not permit an interpretation in conformity with EU law, is obliged to ensure non-discrimination on grounds of religion or belief pursuant to Article 21 of the Charter, disapplying, if necessary, any contrary national provision.

Invocation of the Charter in a dispute between individuals had initially arisen in cases relating to discrimination, Directive 2000/78 and Article 21 of the Charter. A new step, in relation to the right to annual leave under Article 31(2) of the Charter, was taken in the ECJ Judgment, Grand Chamber, of 6 November 2018, *Bauer and Broßonn* (C-569/16 and C-570/16, EU:C:2018:871), in which the right to remuneration for annual leave not taken in employment relationships terminated due to the death of the worker was raised. The first case was brought against a public employer and the second one against a private employer. In both cases, the questions referred for a preliminary ruling concerning not only the interpretation of Article 7 of Directive 2003/88, but also the interpretation of Article 31(2) of the Charter.

The judgment states that the German provision that prohibited the transferability of the right to compensation, which has “a strictly patrimonial nature” and, in the case of the heiress of the City Council employee, obliges the national body to refrain from applying that regulation, is contrary to Article 7 of the Directive. Yet, in the other case of an employment relationship between private parties, the judgment reiterates the lack of direct effect of Article 7(2) of Directive 2003/88, which “cannot therefore be invoked in a dispute between individuals in order to ensure the full effect of the right to paid annual leave and to set aside any contrary provision of national law”.

However, Article 31(2) of the Charter refers to financial compensation for holidays not taken at the end of the employment relationship. The judgment therefore asks whether Article 31(2) of the Charter can be invoked in a dispute between individuals “in order to require that the national court sets aside that national legislation and grants the deceased worker’s legal heirs an allowance, payable by the former employer, in lieu of paid annual leave not taken to which that worker was entitled under EU law at the time of his death”. Unlike Article 27 of the Charter (which was dealt with in the judgment of *Association de médiation sociale* case, denying its direct effect), the ECJ considers that Article 31(2) of the Charter is mandatory and does not need to be specified, so that it is sufficient in itself “to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter”, and requires the national court not to apply national legislation, such as that at issue, under which the death of the worker determines, with retroactive effect, the extinction of the rights relating to paid annual leave which he acquired prior to his death and prevents the heirs from receiving payment in lieu of.

The difference in the situation, whether public employer or private employer, is reflected in the statement that such an obligation which is imposed “on the national court is dictated by Article 7 of Directive 2003/88 and Article 31(2) of the Charter where the dispute is between the legal heir and an employer which has the status of a public authority, and under the second of those provisions where the dispute is between the legal heir and an employer who is a private individual”. The lack of horizontal effectiveness of the Directives is confirmed, but at the same time the horizontal effectiveness of the self-executing provisions of the Charter in labour disputes between private parties is affirmed.

A second judgment also of the General Chamber, ECJ of 6 November 2018, *Max-Planck Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874) raised the compatibility with Article 7 of Directive 2003/88

and Article 31(2) of the Charter of German legislation that determined the loss of annual leave not taken as well as of the allowance in lieu of if the worker had not submitted a request for leave within the corresponding year and before termination of the employment relationship, the referring court understanding that this legislation did not allow an interpretation in conformity.

Two questions were referred to the Court, the first relating to the compatibility of that legislation with EU law, the abovementioned provisions of the directive and the Charter, and, second, in case of incompatibility, “whether Article 7 of Directive 2003/88 or Article 31(2) of the Charter have direct effect in relations between individuals”.

With regard to the first question, the judgment considers that termination of the contract cannot lead to the termination of the right to leave when the worker has not actually had the opportunity to exercise it, recognising an employer’s obligation to ensure that workers effectively enjoy that right, which made the German provision in question incompatible with the corresponding provisions of the Directive and the Charter.

As to whether Article 7 of the Directive and Article 31(2) of the Charter could be invoked and applied directly to the case at hand, given the private legal nature of the Max-Planck Institute, the Judgment reiterates the previous doctrine of the lack of horizontal effectiveness of clear, precise and unconditional provisions of a Directive imposing obligations on individuals, holding that Article 7 of Directive 2003/88 cannot be relied on in a dispute between individuals in order to guarantee the full right to paid annual leave and to disapply any contrary national provision.

As regards the possible invocation of Article 31(2) of the Charter, the judgment reproduces verbatim the relevant part of the judgment in *Bauer and Broßonn* in order to affirm that possibility, stating that the referring court “must disapply the national legislation and ensure that, should the employer not be able to show that it has exercised all due diligence in enabling the worker actually to take the paid annual leave to which he is entitled under EU law, the worker cannot be deprived of his acquired rights to that paid annual leave or, correspondingly, and in the event of the termination of the employment relationship, to the allowance in lieu of leave not taken which must be paid, in that case, directly by the employer concerned”.

Afterwards, the ECJ judgment of 13 December 2018, *Hein* (C-385/17, EU:C:2018:1018) analysed again the compatibility with Article 7 of Directive 2003/88 and Article 31 of the Charter of a rule that allowed the collective agreement to take into account periods of reduction in working time for busi-

ness reasons when calculating the remuneration to be paid for annual leave, in a relationship between private parties.

The judgment held that national legislation was incompatible with Article 7 of the Directive and instructed the national court to interpret its legislation in the light and the letter of the Directive so that the remuneration for leave paid to workers was not less than the average ordinary remuneration that they received during periods of actual work. It also referred to the incompatibility of that rule with art. 31(2) of the Charter, without questioning its *inter privatos effect*, implicitly accepting the innovative doctrine of the two judgments rendered by the Grand Chamber on 6 November 2018. In addition, the judgment in *Hein* refused to limit its temporal effects, refusing to protect the legitimate expectations of employers by maintaining the previous case-law confirming the legality of those provisions. A conclusion that can also be extended to the cases examined by the Grand Chamber as regards the interpretation they have made on the direct effect, either of Article 7 of Directive 2003/88 or of Article 31.2 of the Charter.

The most recent case-law, encouraged by invocation of the Charter in the questions referred for a preliminary ruling, has continued to make use of the Charter in its judgments in social matters, both as an element of interpretation of directives and through the direct application of the provisions of the Charter. According to the President of the Court himself, approximately one case in ten has to do with the Charter, and fundamental rights are now at the heart of the preliminary ruling dialogue between the Court of Justice and national courts.

An example of this is offered by the ECJ Judgment of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43) of the Grand Chamber, which has heard a case of direct discrimination on the grounds of religion by Austrian legislation that granted a day of vacation, on Good Friday, only to members of certain churches. The referring court was uncertain whether such national legislation should be regarded as discriminatory in the light of Article 21 of the Charter read in conjunction with Articles 2 and 7 of Directive 2000/78/EC. The ECJ recognised the discriminatory nature of the Austrian rule, contrary to the provisions of the Directive, recalling that the Directive cannot create obligations on an individual, but, at the same time, that such discrimination is contrary to Article 21(1) of the Charter, which prohibits as a mandatory nature and as a general principle of EU law any discrimination based on religion, “sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law”. This obliges the ECJ to guarantee the legal protection offered by Article 21 of the Charter and to give full effect to that arti-

cle, ensuring that persons in the disadvantaged category have the same advantages enjoyed by persons in the privileged category, which it must do directly.

The direct application of Article 21 of the Charter has also been affirmed in relation to that Directive in a case of discrimination on grounds of age in the ECJ judgment of 8 May 2019, *Österreichischer Gewerkschaftsbund* (C-24/17, EU:C:2019:373) linking the provisions of Directive 2000/78 with Article 21 of the Charter in order to justify, not only the non-application of the discriminatory rule, but the right of the injured contract staff to enjoy the same advantages as favoured contract staff. This prohibition of discrimination on grounds of age has been interpreted in the light of the right to work recognised in Article 15.1 of the Charter, which results in support for the participation of older workers in working life.

Also in relation to Directive 2000/78, regarding the prohibition of discrimination based on sexual orientation, applying, in addition to Article 21(1) of the Charter, Articles 11(1) and 15(1) thereof, the ECJ judgment, Grand Chamber, of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI* (C-507/18, EU:C:2020:289) considered discriminatory conditions of access to employment and professional practice, in which, the hiring of homosexual people was excluded in public statements, and in this case recognized the right to obtain compensation.

Still in relation to Directive 2000/78, and the obligation it imposes on employers to make reasonable adjustments to ensure the right to work and the maintenance of employment of persons with disabilities and the principle of equal treatment, the ECJ judgment of 18 January 2024, *Ca Na Negreta* (C-631/22, EU:C:2024:53) applied Article 5 thereof, “read in the light of Articles 21 and 26 of the Charter” and “Articles 2 and 27 of the United Nations Convention on the Rights of Persons with Disabilities”, and disavowed as contrary to those provisions and discriminatory the Spanish legislation that makes the worker’s disability a cause for dismissal, without the employer being previously obliged to provide or maintain reasonable adjustments to allow the worker to retain his or her job, or to demonstrate, where appropriate, that such adjustments would entail an excessive burden.

Again, numerous judgments of the ECJ have directly applied the fundamental right to an annual period of paid leave, enshrined in Article 31(2) of the Charter, as well as “a principle of Union social law of particular importance”, specified in its duration by Article 7(1) of Directive 2003/88, in disputes between individuals: judgments of 25 November 2021, *job-medium GmbH* (C-233/20, EU:C:2021:960); of 13 January 2022, *Koch Personaldienstleistungen* (C-514/20, EU:C:2022:19); of 22 September 2022, *Fraport* (C-518/20 and

727/20, EU:C:2022:707); of 22 September 2022, *LB (Prescription du droit au congé annuel payé)* (C-120/21, EU:C:2022:718); of 27 April 2023, *Bayerische Motoren Werke* (C-192/22, EU:C:2023:347); of 9 November 2023, *Keolis Agen* (C-271/22 to C-275/22, EU:C:2023:834); and of 14 December 2023, *Sparkasse Südpfalz* (C-206/22, EU:C:2023:984). The decisions of these judgments use various formulas on the application of the Charter. Without wishing to be exhaustive, in *job-medium GmbH*, Article 7 of the Directive, read in conjunction with Article 31(2) of the Charter, must be read as precluding a provision of Austrian law under which no financial allowance is due for paid annual leave not taken corresponding to the last year of employment when the worker terminates the employment relationship early and unilaterally without just cause, it being not necessary for the national court to verify whether the worker was not able to enjoy the days of vacation to which he was entitled to. In *Koch Personaldienstleistungen*, Article 7(1) of Directive 2003/88, interpreted in the light of the fundamental right enshrined in Article 31(2) of the Charter, precludes a provision of the German Framework Collective Agreement on temporary agency work, which did not take into account as hours of work performed those ones corresponding to the period of paid annual leave of the worker to determine the threshold of hours worked that entitles him to an overtime supplement. In *Fraport*, both provisions, of the Directive and of the Charter, conflict with a provision of the German Federal Holiday Act which allowed for the termination of an employee's right to paid annual leave, acquired during a reference period of actual work prior to a persistent situation of absolute incapacity for work or incapacity for work due to illness, at the end of a carry-over period authorised by national law or at a later date, even if the employer had not offered the employee, at the appropriate time, the possibility of exercising that right. In *LB*, both provisions also preclude German national legislation which provides that the right to paid annual leave acquired by a worker in respect of a reference period is time-barred at the end of a period of three years from the end of the year in which that right arose, where the employer has not enabled the worker to exercise that right effectively. In particular, the judgment in *Keolis Agen* recalls that “*the applicants in the main proceedings are therefore entitled to rely on the right to paid annual leave, enshrined in Article 31(2) of the Charter and given specific expression by Article 7 of Directive 2003/88, with regard to their employer, irrespective of its status as a private undertaking ...*, and it is for the referring court to disapply national legislation that is contrary to those provisions of EU law”.

The ECJ order of 10 October 2023, *Dirección 000 and others* (C-795/22, EU:C:2023:783) ruled that Article 7 of Directive 2003/88 and Article 31(2) of

the Charter preclude the Spanish regulation on the limitation of the right to paid annual leave one year after the end of the annual reference period, “if the employer did not effectively enable the employee to exercise that right, even in the event that the employee, before the termination of the employment relationship, has not instituted a procedure that produces the effect of interrupting the limitation period”. In the decision of the ECJ judgment of 19 December 2024, *Loredas* (C531/23, EU:C:2024:1050), arts. 3, 5 and 6 of Directive 2003/88/EC read “in the light” of art. 31(2) of the Charter must be interpreted as precluding Spanish legislation, and its interpretation by the national courts or an administrative practice, which exempts domestic employers from establishing a system to measure the working time of domestic workers.

In other cases, the Charter is not so much directly applied but used to interpret a Directive, for example in the field of parental leave (ECJ judgment of 25 February 2021, *Caisse pour l’avenir des enfants* (C-129/20, EU:C:2021:140)), or for the broad interpretation of Directive 2008/104/EC on temporary agency work (ECJ judgment of 14 October 2020, *KG* (C-681/18, EU:C:2020:823)), or as “relevant context for interpreting Directive 2000/78” and its prohibition of discrimination on grounds of religion or belief (judgments of the ECJ of 15 July 2021, *WABE* (C-804/18 and C-341/19, EU:C:2021:594); and of 13 October 2022, *S.C.R.L.* (C-344/20, EU:C:2022:774)).

With these judgments, the Court of Justice has taken far-reaching steps to ensure the effectiveness of the fundamental rights recognised in the Charter as refers to the employment contract, by accepting their invocation and horizontal applicability in contracts between private parties, where the relevant provision of the Charter is capable of direct application and the provisions of national law are contrary to a directive (which makes the Charter applicable to the case) and to the Charter itself, not being feasible its interpretation it in conformity.

The legal value of the Charter and its relationship with the principle of primacy has revalued the role of the fundamental rights recognised in the Charter not only when European Union law is applicable, as the interpretation of the Charter has had an impact beyond the strict scope of EU law and has generated a renewed dialogue between the Court of Justice and national courts, especially the Constitutional Courts, in what has been called the “European constitutional communion”, reinforcing the idea that the European Union is above all a union of justice and rights⁵¹.

⁵¹ SPAVENTA, E. and SCHÜTZE, R., *EU Law and Human Rights*, Oxford University Press, 2nd ed., 2023.

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CHAPTER 2

THE LEGAL STATUS OF THIRD-COUNTRY NATIONALS

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INDEX: I. EU immigration law. II. Directive 2203/109/EC on the status of non -EU nationals who are long-term residents. III. The new Directive on a single application procedure for a single permit (Directive EU 2024/1233, OF 24 April 2024).

I. EU IMMIGRATION LAW

The right to “freedom of movement and residence within the borders of each State” is a universal right recognized in article 13.1 of the 1948 Declaration of Human Rights, which further adds, in its next paragraph, that “Everyone has the right to leave any country, including his own, and to return to his country”. But this right does not find a correlative obligation on the part of States to permit or facilitate immigration in their territory, with the exception of the right to refuge and asylum. The entry and access to the territory of foreigners to a given country is considered an exercise of sovereignty. Hence, it is possible to understand the complete absence of an immigration policy in the EU for too many years, even though this is an area of activity that affects all Member States and for which clearly a superior action is needed that goes beyond the strictly national level.

The EU’s common policy on migration and asylum was defined a few months after the entry into force of the Amsterdam Treaty (May 1, 1999), at the European Council held on October 15 and 16, 1999 in *Tampere* (Finland). It is

there that several lines of action are specified: - the establishment of a common regime for legal migration, ensuring fair and non-discriminatory treatment for third-country nationals who reside legally in the EU, facilitating their social integration (with specific rights such as the right to work, either for oneself or others, or the possibility of obtaining nationality after prolonged residence); co-operation with the countries of origin of the immigration flow, establishing policies of cooperation with those countries; and combating illegal immigration.

The first regulatory actions are concretized in Regulations aimed at informing on the criteria for visa requirements for third-country nationals to access the EU territory, governed by the principle of reciprocity in general. But there are also specific actions against illegal immigration through various Directives, as well as some actions for managing economic migration flows. Focusing exclusively on the latter, a Regulation is approved that establishes a uniform model or document for residence permits for third-country nationals¹ and, with a substantive and not merely formal content, a series of Directives covering specific groups of third-country nationals are approved: Directive 2003/86/EC on the right to family reunification; Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents; Directive 2004/114/EC on the conditions for the admission of third-country nationals for the purposes of studies, pupil exchanges, unremunerated training or voluntary service; Directive 2005/71/EC to facilitate the admission of researchers to the EU and, in December 2007, the proposal for a directive² on a single procedure for the application of a single residence and work permit in the territory of a Member State for third-country nationals is presented, which will subsequently lead to the adoption of Directive 2011/98/EU of the European Parliament and of the Council, of 13 December 2011, of the single EU permit.

Currently, the Treaty of Lisbon, signed on December 13, 2007, amending the Treaty on the European Union and the Treaty Establishing the European Community, renamed as the Treaty on the Functioning of the Union (TFEU), merged the three existing pillars and clarified the Union's competences by distinguishing between exclusive, shared and a third group of complementary competences where the secondary role of the Union's action prevails through actions that support, coordinate or complement the policies developed by the member

¹ Regulation (EC) No 1030/2002 of 13 July 2002 establishing a uniform model for residence permits for third-country nationals and specifying aspects such as colour, type of printing, materials, date of issue, spaces for comments on the type of residence permit and legal situation of the person concerned "in particular, if said interested party is authorized to work".

² Commission proposal of 23 October 2007 COM/2007/0638 final. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0638:FIN:EN:HTML>

countries. The current Articles 79 and 80 TFEU provide for the general framework of this common policy, establishing the legal basis for EU action.

Most of the EU's efforts in recent years have focused on maximizing the benefits of legal migration and providing protection to those who need it, while at the same time combating irregular migration and efficiently managing borders. This study is limited to the examination of EU measures that seek to promote legal immigration by attracting migratory flows managed in an organized manner and, more specifically, to the two most relevant initiatives in this area:

- The legal status of long-term residents (Council Directive 2003/109/EC of 25 November 2003, as amended by Directive 2011/51/EU) and whose text is pending modification, with a proposal for amendment by the Commission³, Parliament's first reading⁴ and a Council position⁵.

- The single procedure for applying for a single residence and work permit (Directive 2011/98/EU of the European Parliament and of the Council of May 11, 2011, recently recast in the new Directive (EU) 2024/1233 of the European Parliament and of the Council of 24 April 2024.

II. DIRECTIVE 2003/109/EC ON THE STATUS OF NON -EU NATIONALS WHO ARE LONG-TERM RESIDENTS

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents allows non-EU citizens to stay and work in the EU indefinitely. It was introduced in 2003 as a mechanism to encourage legal migration and the integration of non-EU citizens. Once the permit and the legal status attached to it have been granted, the long-term resident has the right to move and work in any other EU Member State. This Directive was amended in 2011, by Directive 2011/51/EU, of 11 May, to include non-EU citizens, as refugees or stateless persons, who enjoy international protection.

As a preliminary point, the Directive proceeds to delimit some concepts (Art. 2), such as that of third-country national in reference to any person who is not a citizen of the Union, a long-term resident, as any third-country national who obtains the permit regulated by the Directive, “first Member State” as the one that grants that long-term resident permit for the first time and “second

³ Brussels, 27.4.2022, COM(2022) 650 final, 2022/0134(COD).

⁴ https://www.europarl.europa.eu/doceo/document/A-9-2023-0145_ES.html

⁵ Brussels, 28 November 2023 (OR. en) 16000/23.

Member State” as any other Member State other than the one already mentioned and in which that long term resident exercises the right of residence or, finally, “family member” by referring the concept to the Family Reunification Directive. The definition of family member made by the Directive is not intended to limit the right to equal treatment of long-term residents established in the Directive itself, but only to define that concept for the correct understanding of the provisions that mention it (ECJ 25-11-2020, *Istituto Nazionale della Previdenza Sociale (INPS) v. VR*, C303/19). The reform of the Directive carried out in 2011 (Directive 2011/51/EU) incorporates persons enjoying international protection into the scope of the Directive, so a reference to the Directive applicable in this area (Directive 2011/95/EU) is inserted.

Directive 2003/109/EEC has two clear objectives. The first is to provide third-country nationals who have been legally and continuously resident in one of the EU Member States for a period with a set of rights and responsibilities comparable to that of EU citizens in some specific areas. Hence, as stated in Article 1(a), the objective is to establish the terms for conferring and withdrawing long-term residents status to those third country nationals who are legally resident in its territory, as well as to regulate the rights inherent in said status. But secondly, another important objective is to enable the mobility of those who have obtained this EC (EU) long-term residence permit to another EU member country, without having to obtain a visa or follow other national criteria. In the words of Article 1(b), the Directive also seeks to establish the conditions of residence in different Member States.

1. Personal, territorial and temporal scope

The Directive has been in force since January 23rd, 2004. The EU countries were required to incorporate it into national law by no later than January 23rd, 2006. The legislation does not apply from the outset in the United Kingdom, Ireland, or Denmark, which have special provisions in the field of immigration and asylum policy. After the United Kingdom left the EU, it became a third non-EU state as of February 1st, 2020.

In relation to its personal scope of application, the Directive makes it clear that it seeks to regulate the status of third-country nationals who are legally residing in a Member State on the basis of a situation that is not merely temporary. The Directive excludes from its scope those categories of third-country nationals who, because of the length of their stay or the uncertainty of their situation, cannot be considered long-term residents. This is consistent with the

objective of the Directive to seek maximum equality in certain areas between foreigners with proven roots in a Member State and their own nationals.

Thus, the Directive applies to third-country nationals legally residing in the territory of a Member State (Art.3(1)). However, it explicitly states that it does not apply (Art.3(2)) to, among other groups, foreigners who reside in order to pursue studies or vocational training, to those who reside exclusively for temporary reasons, or who have a pending application for temporary or international protection. It should be noted that since 2011 people who enjoy international protection have been included, but only after their status has been recognized.

The exclusion of persons residing in a MS for reasons of a temporary nature (Art. 3(2)(e)) had been interpreted too broadly by some Member States, but the Court has stated that it is an autonomous concept of EU law, which must be interpreted uniformly in the territory of all Member States and that it does not include the residence of the third-country national under Article 20 TFEU in the territory of the Member State of which the Union citizen concerned is a national (ECJ Grand Chamber 7-9-2022, C-624/20, *E.K. v Staatssecretaris van Justitie en Veiligheid*)⁶, and should be understood as referring only to those cases in which the residence, although legal and uninterrupted, does not reflect a priori a desire to settle permanently in the Member State (ECJ Judgment 18-10-2012, C-502/10, *Singh*), these are residences limited in time and of short duration that do not allow the third-country national to settle permanently in the territory of the MS in question. Such excluded jobs include cases of providing services as *an au pair*, seasonal workers, workers providing cross-border services, or employees posted to provide a service, and those “cases where the residence permit is formally limited”, an indeterminate concept that does not include fixed-term residence permits granted to members of a specific group of people, whose validity, although it can be extended unlimitedly, does not offer any prospect of obtaining a residence permit of indefinite duration (ECJ Judgment 18-10-2012, C-502/10, *Singh*). In the Judgment of the Court of Justice (Fifth Chamber) of June 20, 2024 (Case C-540/22), the Court highlights that Article 3(2)(e) of Directive 2003/109/EC excludes posted workers from the application of the long-term resident status. This means that third-country nationals posted by a service provider cannot ben-

⁶ The Judgment of the Court of Justice of the European Union (First Chamber) of April 25, 2024, in the joined cases C-420/22 and C-528/22, examines the interpretation of Article 20 TFEU and its connection to fundamental rights in the context of residence rights for third-country nationals in the EU. Although the case does not fall within the scope of Directive 2003/109/EC, the Court emphasizes the importance of protecting the residence rights of third-country nationals, especially when their expulsion would impact EU citizens with whom they have family ties. The ruling also reinforces the requirement to provide reasons for decisions and the right to effective judicial protection, particularly in cases where administrative decisions are based on classified information.

efit from the extended residence rights granted by the directive to other third-country nationals who reside more permanently within the EU.

Foreigners who enjoy diplomatic status (Art.3(f)) and those who are covered by any of the bilateral or multilateral international treaties affecting these matters (such as the Association Agreement with Turkey, Agreement with Morocco and Tunisia, Council of Europe Convention on the Status of Migrant Workers, Geneva Convention on Refugees, etc. when they contain more favorable rules) are also excluded from the personal scope of the Directive.

2. The status of long-term resident in the first Member State

2.1. REQUIREMENTS

Chapter II is devoted to the regulation of the European long-term resident's permit. It examines the requirements, the procedure for obtaining it, the rights that its granting entails and the cases of loss or withdrawal of the permit as well as its consequences.

The regulation contained in the Directive is limited to obtaining an "EU" long-term permit. This clarification is important because, except for Austria, Italy, Luxembourg and Romania, most Member States retain their right to issue pure national permits for permanent residence or for an unlimited duration (Art. 13). The coexistence of permits is thus allowed, but what is not allowed is for a Member State to grant a family member a "European" long-term resident's permit under different, albeit more favorable, conditions than those set out in the Directive (ECJ 17-7-2014, C-469/13, *Tahir*). In any case, only EU long-term resident status grants the right to reside in other Member States; this advantage is not available with national permits-EU status.

The mandatory requirements for obtaining a "European" (EU) long-term permit are: (a) proof of long-term residence, (b) proof that there are regular and sufficient fixed resources to avoid recourse to the country's social assistance, as well as health insurance covering all risks, (c) not to constitute a threat.

2.1.1 *Continuous and legal residence*

Five years of legal and uninterrupted residence in the Member State where the EU long-term residence permit is to be applied for are required. To calculate this period, a series of rules are established. On the one hand, it is

established that the years taken into account must be those immediately prior to the application for long-term resident status. But it is specified that, among them, periods of residence for strictly temporary reasons in the territory of a MS (already excluded from the scope of application of the Directive) will not be taken into account, unless the temporary residence has been carried out for study or vocational training, in which case the stay is counted, but only in 50%, i.e. only half of the period of residence. Similarly, at least half of the period from the date on which protection was applied for and the granting of the residence permit is also considered for persons who have been granted international protection, with the entire period being counted when the wait has exceeded 18 months (Art.4(2)(2)). Periods of legal residence of diplomatic personnel are not counted.

On the other hand, the calculation of the legal and uninterrupted period does not mean that it is not possible to leave the Member State temporarily, since the Directive understands that the foreigner may be absent in certain circumstances without this interrupting his period of residence, i.e. the permitted absences are counted as a period of residence for the purposes of the five years required. The resident is allowed to be absent from the territory for a period of less than six consecutive months or no more than ten months in total over the five-year period. For special or exceptional circumstances, but in any case temporary, Member States are allowed to extend the six-month period, but in such cases such an extension cannot be taken into account for the calculation of the required 5-year period, unless the periods of absence were due to work-related reasons, including the provision of cross-border services, in which cases it is acceptable for Member States to take such absences into account.

2.1.2 *Sufficient stable and regular resources, as well as health insurance as mandatory requirements*

In addition to the legal and continuous residence, the third-country national must provide proof that he has sufficient stable and regular resources to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. The degree of fixity, regularity or sufficiency of the resources is not specified. It is only established that the Member States will evaluate these resources according to their nature and regularity, being able to take into account the amount of minimum wages and pensions prior to the application for long-term resident status (art. 5.1.a). For the ECJ, the concept of resources differs from the concept of in-

come contained in other rules in which reference is made to the personal resources of a third-country national. Therefore, the origin of the resources is not a decisive criterion, and the resources may come from a third party, including from employment exercised without the necessary permits (ECJ 2-10-2019, C-93/18, *Bajratari*, albeit in relation to the concept contained in Directive 2004/38/EC).

In any case, what the economic resources must have is a certain permanence and continuity over time (ECJ 21-4-2016, C-558/14, *Khachab*, in relation to Directive 2003/86/EC) and, although the Member States may indicate an amount as a reference, in order for it to be considered a proportionate requirement, the ECJ has required that the specific situation of each applicant must be assessed in any case (ECJ 4-3-2010, C-578/08 *Chakroun*, in relation to Directive 2003/86/EC on family reunification). Within the sufficiency of resources, it is allowed, on an optional and non-mandatory basis, that Member States may require proof that adequate accommodation is available (art. 7.1.2). Also mandatory and common is the requirement that the applicant for long-term resident status must have health insurance that covers all the risks normally insured for the nationals of the Member State themselves (art. 5.1.b).

As an optional measure, Member States are allowed to demand that integration measures be complied with (art. 5.2). Knowledge of the language, orally and in writing, or basic knowledge of society, greatly facilitates communication with nationals of the Member State, fostering interaction and the development of social relations, as well as facilitating the access of third-country nationals to the labour market and vocational training. Therefore, this type of integration measures, in themselves, do not violate equality in relation to the nationals of the country, nor do they jeopardize the achievement of the objectives pursued, but, on the contrary, they can contribute to the achievement of these; even when failure to pass the exam within a certain period means leading to the imposition of a fine. However, a State regulation may be contrary to the objectives of the directive if the arrangements for implementing integration are disproportionate and jeopardise the objectives of the directive. This requires an examination of the level of knowledge required, accessibility to the courses and materials necessary to prepare for the examination, the amount of fees and tuition fees, the imposition of high fines which may be imposed each time the deadline for passing the socio-cultural or civic examination, irrespective of whether they have taken the examination many times or never and the amount of which is added to the costs to prepare it, as well as specific individual personal cir-

cumstances that may concur such as age, illiteracy or level of education (ECJ Judgment 4-6-2015, C-579/13, *P&S*). The Directive is infringed by national legislation that obliges third-country nationals, when applying for the issuance or renewal of a residence permit, to pay a fee ranging from 80 to 200 euros and eight times higher than that required to obtain a national identity document (ECJ Judgment 2-9-2015, C-309/14, *CGIL v. INCA*).

2.1.3 *Not to constitute a threat to public policy, public security or public health*

In any event, it is an essential condition that the third-country national does not constitute a threat to public policy or public security, both at the time of application for status and to maintain it. When taking the relevant decision, the competent authorities shall consider the severity or type of offence against public policy or public security, or the danger that emanates from the person concerned, while also having proper regard to the duration of residence and to the existence of links with the country of residence (art. 6.1, 12.2.d). The Directive provides for the possibility of refusing status on these grounds but does not impose an obligation to refuse it. In any case, the mere existence of a criminal record of the applicants, regardless of its nature, is not sufficient to deny long-term resident status, but a case-by-case assessment must be carried out to verify that the person in question currently represents a real and sufficiently serious threat to a fundamental interest of society (ECJ 3-9-2020, C-503/19, 592/19, *UQ and SI v. Sub-delegation of the Government in Barcelona*). The threat to public health that allows the application to be denied will be determined in each case by the World Health Organization (reference to art. 2.21 of EU Regulation 2016/399). The refusal shall not be founded on economic considerations.

2.2. ACQUISITION OF LONG-TERM RESIDENT STATUS

Once the third-country national meets all the above-mentioned requirements, he/she may apply to the MS for the granting of long-term resident status before the competent authorities of the MS “in which he/she resides”, accompanied by documentation proving that he/she meets the mandatory requirements of the Directive as well as the optional requirements that are expressly allowed to the MS when they have decided to implement them (Art. 7.1.2).

The competent authorities shall verify the documentary evidence submitted by the third-country national. Also, the competent national authorities shall

give the applicant written notification of the decision as soon as possible and in any event no later than six months from the date on which the application was lodged. In exceptional circumstances linked to the complexity of the examination of the application, this period may be extended, although without indicating a maximum period that will depend on each Member State.

In any case, the applicant shall be informed of the decision adopted, as well as of the rights and obligations incumbent on him/her. In the absence of an express resolution at the end of the period, the consequences will be those regulated in each national legislation. But if the applicant meets the required conditions and does not represent a threat to public order and security, the Member State concerned “shall”, without further options, grant the status of EU-MLR (Art. 7.3).

The positive decision grants EU long-term resident status, and the person concerned must be informed of the rights and obligations that it entails. Long-term resident status is permanent (Art. 8(1)), without prejudice to possible withdrawal or loss (Art. 9). As the ECJ points out, the permanent nature of this status is the general rule, and Article 9 is to be interpreted as an exception and therefore subject to strict interpretation (ECJ 20-1-2022, C 432/20, ZK Landeshauptmann von Wien, nr. 32).

The granting of the status entitles the person concerned to obtain a “EU long-term resident’s residence permit”, valid for at least five years (which MS can extend), automatically renewable upon expiry (Art. 8.2). As regards the format of this long-term resident-EU residence permit, it can be issued in the form of a sticker or as a separate document and must in any case conform to the existing EU uniform format and rules (Regulation (EC) n. 1030/2002) (art. 8.3). Under the heading “Type of permit”, the Member States shall enter “Long-term resident-EC” (understood as EU).

The decision may, however, be rejected. In this case the national authorities shall notify the third-country national concerned in accordance with the notification procedures under the relevant national legislation. The notification shall specify the redress procedures available and the time within which he/she may act (art. 10, art. 20).

For beneficiaries of international protection, the aim of the Directive is to ensure compliance with the principle of non-refoulement. Thus, when international protection is granted, the MS granting the protection and the date on which the protection is granted must be indicated in the “observation” section of the common format for long-term residence permits to inform the other MS of the context of protection given by the State which granted the protection in the first place. In case the protection is subsequently revoked, although the EU

long-term resident status is not lost, Member States may remove the observation of the permit. On the other hand, each time the migrant moves to another Member State, the observation informs the second Member State about the protection status, which is relevant for the purposes of the centralized information that authorities must have at their disposal.

In the event that an EU long-term resident of a first Member State lives in a second Member State for more than 5 years and acquires EU-MLR status in that second Member State, it is provided that the permit issued by the second Member State will include the “same observation” (international protection granted by the Member State concerned and on the appropriate date), perpetuating the explanatory purpose of the initial observation on protection granted by the first Member State. However, before the second Member State enters the remark on the long-term resident residence permit, it must contact the Member State mentioned in that remark to provide information as to whether the long-term resident is still a beneficiary of international protection. The requested Member State shall reply no later than one month after receiving the request for information. If such international protection has been withdrawn by a final decision, the second State must not enter the remark (art. 8.5).

The “remark on international protection” does not transfer responsibility for international protection to the second member State. When, in accordance with the relevant international instruments or applicable national law, which are the normative instruments that can do so, responsibility for the international protection of the long-term resident has been transferred to the second Member State after the long-term resident’s EU residence permit has been issued, then the second Member State shall amend accordingly the remark - “observation” - no later than 3 months after the transfer (Art. 8.6).

2.3. THE SCOPE OF LONG-TERM RESIDENT STATUS: EQUAL TREATMENT AND PROTECTION AGAINST EXPULSION

Long-term residents enjoy equal treatment with nationals of the country in a variety of areas (Art. 11), although some of these may be limited by Member States:

Employment. Specifically, in access to employment and self-employment activity (Art. 11.1.a), provided such activities do not entail the exercise of public authority, and that the job is not reserved by the Union or national law to nationals, EU or EEA citizens (Art. 11.3.a). Equality also applies to

employment and working conditions, including remuneration and dismissal arrangements, where no details are given.

Education and vocational training, including study grants, although Member States are allowed to require in such cases proof of appropriate language proficiency. Training and access to university may be subject to the fulfilment of specific educational prerequisites (art. 11.3.b), or that the beneficiary lies within the territory of the Member State concerned (art. 11.2). Equality is also proclaimed from the recognition of professional diplomas, certificates and other qualifications, in accordance with national procedures (art. 11.1.c).

Social security, social assistance and social protection (art.11.1.d) as defined by national law. However, here too, inequality is legitimized by allowing Member States to limit equal treatment to core benefits in social assistance and social protection (Art. 11.4). This concept has been clarified by the ECJ, which states that equality encompasses benefits that allow people to meet their basic needs, such as food, housing or health (ECJ Grand Chamber 24-4-2012, C-571/10, *Kamberaj/Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES)*) so that knowledge of the language cannot be required to qualify for a housing allowance if it is considered basic assistance in the country (ECJ 10-6-2021, C-94/20, *Land Oberösterreich v. KV*). Equality requires granting long-term residents a family allowance, in the nature of a social security benefit, which takes into account the members of the family unit residing in a third country and not in the territory of the Member State granting the allowance, where the State granting the benefit, in transposing the Directive, has not made use of the derogation from equal treatment allowed by the Directive itself (ECJ 25-11-2020, *Istituto Nazionale della Previdenza Sociale (INPS) v. VR*, C 303/19)

Taxation and tax benefits, as well as access to goods and services⁷, including “procedures for access to housing”, although in all these cases Member States may require that the person applying for the benefit be in their territory.

Freedom of association and membership, including trade unions and business associations, without prejudice to national provisions on public order and public security. In order to exercise it, Member States may require that the long-term resident national be present in their territory.

⁷ The ECJ judgment 28-10-2021, C-462/20, ASGI declares that national legislation that excludes third-country nationals from enjoying a “family card” that allows them to obtain discounts or price reductions on the purchase of goods and services offered by public or private entities that have concluded an agreement with the government of that Member State does not preclude Directive 2003/109 provided that the aforementioned card is not which falls, in accordance with the national legislation of that Member State, within the concepts of “social security”, “social assistance” or “social protection”.

Finally, equality is projected in the right to free access to the whole of “the territory of the MS” in question, within the limits imposed by national legislation for security reasons. Limitation on the MS granting the long-term resident permit which, however, may be extended to that of other MS when the requirements and conditions set out in Chapter III of the Directive are met. Member States may decide to grant to additional benefits to other areas (Art. 11.5).

In any event, where the status of long-term resident has been granted because the MS has granted the foreign national international protection, the limitations on equal treatment should be without prejudice to compliance with the Directive on the status of beneficiaries of international protection.

In addition to the above-mentioned rights of equality, the Directive grants an additional advantage to those who hold long-term resident status regulated in Article 12 and which consists of enhanced protection against expulsion. Enhanced protection consists of limiting the possibility of termination of the regular status of long-term EU residents exclusively and only when they constitute a real and sufficiently serious threat to public policy or public security. In order to ensure such enhanced protection, it is expressly provided that before adopting the expulsion measure, Member States must take into account the specific case and assess, in particular, the duration of residence in the territory, the age of the person concerned, the consequences for the person holding the EU long-term residence permit and for the members of his or her family, as well as links with the country of residence or the absence of links with the country of origin (art. 12.3). The directive is therefore precluded by the judicial interpretation of legislation providing for the expulsion from the country of any third-country national holding a long-term residence permit who has committed an offence punishable by a custodial sentence of at least one year, if those factors are not taken into account and it is considered that it is not necessary to examine whether he or she poses a real and sufficiently serious threat for public order or security, nor take into account the factors mentioned in art. 12.3 (ECJ 7-12-2017, C-636/16, *Wilber López Pastuzano*; ECJ Judgment 11-6-2002, C-448/19, *WT*). The reinforced protection of art. 12.3 is unconditional and sufficiently precise, as it does not establish any requirement and unequivocally obliges Member States to guarantee respect for the established requirements and guarantees of reinforced protection, i.e. it has direct effect and can be invoked against the competent public authorities (ECJ 14-3-2024, C752/22, *EP v. Maahanmuuttovirasto*).

Where the beneficiary of the EU-DLR status enjoys international protection, if the MS that decides to expel him or her is different from the one that granted him or her such protection, he or she must consult with the MS record-

ed in the observation of the permit whether that person is still a beneficiary of such protection in that MS; a response that must be issued within one month of receiving the request for information (art. 12.3bis).

If the long-term resident is still a beneficiary of international protection in the Member State mentioned in the remark, that person shall be expelled to that Member State, which shall, without prejudice to the applicable Union or national law and to the principle of family unity, “immediately readmit, without formalities, that beneficiary and his/her family members”. Notwithstanding the return to the MS granting international protection, the provision also allows the MS that adopts the decision to end the regular situation to “return” the EU-RLD to a country other than the MS that granted such protection, provided that this responds to international obligations and the resident concerned constitutes “a danger to the security of the Member State in which he is located” or “having been convicted by a final judgment of a particularly serious crime”, constitutes “a danger to the community of that Member State” (Art. 12.3c).

In any event, in the face of decisions to end the regular situation, the EU-RLD must be guaranteed the right to lodge the judicial or administrative remedies legally provided for in the MS adopting the decision, as well as the right to legal aid under the same conditions as nationals of the MS in which he resides, when it lacks sufficient resources.

All these protections are “without prejudice” to the duty of the Member States to respect the principle of non-refoulement in accordance with their international obligations, so that European harmonization should not prevent its compliance.

2.4. THE WITHDRAWAL OR LOSS OF THE STATUS

Long-term residents shall no longer be entitled to maintain long-term resident status in the following cases (Art. 9):

a) When they have obtained it fraudulently. This concept is not defined in the Directive and will depend on national legislation. Where long-term resident status has been granted to third-country nationals based on forged documents, the fact that they were unaware of the fraudulent nature of the documents does not prevent the Member State concerned from withdrawing that status, pursuant to that provision (CJ 14-3-2019, C-557/17, *Staatssecretaris van Veiligheid en Justitie v Y.Z. and Others*).

b) Where an expulsion measure has been adopted, which can only happen where the EU long-term resident poses a “real” and “sufficiently serious” threat to public policy or public security (although it is left to the Member States to decide that those who lose their right to retain resident status because they pose a threat to public order because of the seriousness of the offences, they do not necessarily have to be expelled; i.e. the Directive requires the loss of long-term resident status on this ground, but national legislation may decide does not automatically entail removal);

c) In the event of absence from the territory of the European Union for a period of 12 consecutive months, although any physical presence of a long-term resident in the territory of the EU, even if it is short and does not last more than a few days within that period of 12 consecutive months, has been considered to be sufficient to prevent the loss, by that resident, of his or her right to long-term resident status (ECJ Judgment 20-1-2022, C-432/20, ZK *Landeshauptmann von Wien*) and the Directive itself even allows Member States not to withdraw the status in superior absences due to specific or exceptional circumstances.

d) When the *right of free movement* - inherent in the status of these beneficiaries - is exercised and a new EU long-term resident status in another Member State is recognized. In other words, the recognition of the statute in the second MS leads to the loss of the statute that had been acquired in the first (Article 9.4.1). In any case after six years of absence from the territory of the Member State that granted long-term resident status the person concerned shall no longer be entitled to maintain his/her long-term resident status in the said Member State /Art. 9.4.2), although the Member State concerned may provide that, for specific reasons, the statute is maintained despite such absences of more than 6 years (art. 9.4.3).

In these cases of free movement, the MS concerned can exchange information to verify the loss or withdrawal of status. Likewise, if the absence of the first State is more than 6 years and the right to maintain the status of long-term resident has been lost, the second Member State may reject the application for renewal of a residence permit on the grounds that the right provided for in Chapter III of the Directive has been lost (ECJ 29-6-2023, Joined Cases C-829, C-129/22, *TE, UK, v. Stadt Frankfurt am Main and Stadt Offenbach am Main*).

e) When the status of long-term resident has been obtained on the basis of *international protection* (art. 9.3bis), the MS can withdraw the status of EU-RDL in the same cases that could already be done, that is, in the event of rev-

ocation, termination, denial of the renewal of international protection, although it is now also added that in the event of “cessation” of such protection.

Two of the above-mentioned causes allow for the recovery of status by the third-country national. Specifically, when the status has been lost due to having obtained another one in a second MS or when the beneficiary has been absent and has ceased to have his or her main residence in the territory of the EU for more than 12 months in a period of 5 years. In such cases, Member States that have granted the status must mandatorily establish a simplified procedure for the recovery of long-term resident status. This procedure should be applied when the residence in another MS that caused the absences was for the purpose of carrying out studies.

3. The residence permit and the legal status of the long-term resident in a second State

Although most Member States have long-term or permanent national permits governed by their own rules, obtaining EU long-term resident status in one Member State allows the holder and his family members to reside in another Member State for a period of more than three months without obtaining a visa, provided that a number of conditions set out in Chapter III of the Directive are met. Only while the long-term resident permit is valid in one Member State, can the right to a residence permit in another State of the Union be enjoyed, so that when the status in the first Member State is lost, the second Member State can refuse such a permit (ECJ Judgment 29-6-2023, Joined Cases C-829, C-129/22, *TE, RU, v. Stadt Frankfurt am Main and Stadt Offenbach am Main*).

This mobility within the territory of the EU constitutes a significant difference in relation to strictly national permits. However, there are many exceptions provided for in the Directive itself to be able to speak of a right in the strict sense, since it is not automatic and is largely subject to broad state discretion.

To exercise this right, mobility must respond to causes, some specified, but with an enormously open nature. Thus, residence in the second Member State may be due to the exercise of an economic activity either as an employee or as a self-employed person, apart from the provision of cross-border services, the pursuit of studies or vocational training or for “other purposes”. However, where residence is justified in the exercise of an economic activity, the Directive allows Member States to first examine the situation of their labour market and apply their national procedures to fill vacancies or for exercising such activities, and may also give preference to Union citizens, to third-country nationals when provided by

Community legislation as well as to third-country nationals who reside legally and receive unemployment benefits in the Member State concerned (Art. 14.3).

In addition, in case of exercise of an economic activity as an employee, Member States may request proof of the employment contract, a statement by the employer that they are hired or a proposal for an employment contract, under the conditions provided for by national legislation, and, in the case of self-employment, proof that the person concerned has the necessary resources to do so presenting the necessary documents and permits (art. 15.4.a). In case that the mobility is due to the completion of studies or vocational training, it can also be requested the evidence of enrolment in an accredited establishment in order to pursue studies or vocational training (art. 15.4.b).

In addition to these possible requirements, the common conditions to be met by the person concerned are identical to those which were required of him to obtain the status of long-term resident in the first Member State, such as the requirement of having sufficient fixed and regular resources and sickness insurance (Art. 16.4). Optionally, States may require integration measures, unless they have already been required to obtain long-term resident status in the first State. A language course may also be required. In any case, the applicant may not pose a threat to public order or security (art. 17) or to public health (art. 18).

The application for a residence permit with all the requirements (including a long-term resident permit from the first Member State, including, where appropriate, proof of adequate accommodation if provided for by national law⁸) and documents required by domestic law to obtain a residence permit must be made as soon as possible and no later than three months after entering the territory of the second Member State, but it is allowed that the Member States may accept that the long-term resident submits the application for a residence permit to the competent authorities of the second Member State while still residing in the territory of the first Member State (Art. 15.1).

The right to settle in another Member State extends to the nuclear family of the long-term resident where the family is already established in the first Member State and does not pose a threat to public order and security or to public health. Proof may be required that the family member was already resident as such in the first Member State and that they have resources and health insurance covered by the long-term resident or their own.

⁸ If the Member State has not transposed this possibility into its domestic law, it cannot refuse to apply for or renew the residence permit of a third-country national who already holds the status of long-term resident in another Member State on the ground that that national has not attached to his application documents proving that he has adequate accommodation (ECJ 29-6-202, Joined Cases C-829/21 and C-129/22, *TE and Others v. Stadt Frankfurt am Main and Stadt Offenbach am Main*).

Once the application is complete, the national authorities have a period of four months from its submission to process the application, which may be extended for a further three months if the required documents were not submitted or there are exceptional circumstances (art. 19). If the applicant fulfils the conditions, the second Member State must issue the long-term resident with a residence permit renewable upon expiry upon application, where appropriate. Likewise, a permit of the same characteristics and of the same duration shall be issued to the members of their family. Obtaining a residence permit gives the holder the right to equal treatment with nationals of the state of residence in the same areas and under the same conditions as the long-term residence permit in the first Member State. However, national legislation may limit access to work activities other than those for which the permit was requested for a maximum period of 12 months if this was the reason that led to the option of mobility. Similarly, it is allowed for the Member States to regulate at national level the conditions of access to an economic activity by those who applied for a residence permit to carry out studies or for different reasons. The second State must notify the first Member State of the grant.

Where the person who makes use of mobility to another State enjoys international protection, the transfer of responsibility is excluded from the scope of this Directive. This means that requests for transfer of responsibility for protection will continue to be governed by the 1951 Geneva Convention and, where appropriate, by the refugee provisions of the European Agreement on the Transfer of Responsibility concluded within the framework of the Council of Europe. The Directive provides for special rules for beneficiaries of international protection when the second Member States “assumes” responsibility for or “grants” international protection in accordance with applicable national or international rules, i.e. when there is a transfer of international protection. What is sought, basically, is that the information contained in the residence permit of the long-term resident (art. 19 bis) be modified when the responsibility for international protection changes⁹.

In such a case, the observation that must be included in the EU long-term resident permit should be adapted to warn other States about who ultimately assumes responsibility for compliance with the obligations of no return. Thus, when the second Member State assumes responsibility for the international protection of the first Member State, the second Member State should ask the

⁹ THYM’s comprehensive commentary is followed D., “Long Term Residents Directive 2003/109/EC”, Kay Hailbronner and Daniel Thym (eds.): *EU Immigration and Asylum Law. Commentary*, 2nd edition (C.H. Beck/Hart/Nomos, 2016), pp. 511 ss.

MS that issued the EU long-term resident residence permit to amend the observation contained in that permit to bring it into line and to prevent other Member States from misinterpreting who has ultimate responsibility for compliance with non-refoulement obligations. The second paragraph of the provision, on the other hand, refers to cases in which the second Member State grants international protection that the first Member State had not recognized in advance. In this case, the observation must also be modified to adapt it. In both cases, the MS that issued the EU-MLR permit must issue an amended one within a maximum period of three months after receipt of the request from the second MS.

Finally, the residence permit may be withdrawn or not renewed from its holder. The grounds for adopting a decision of this nature are listed (Art. 22): a) if the permit holder represents a threat to public order or public security; (b) if he/she no longer fulfils the conditions under which the permit was granted¹⁰; c) if she/he is not lawfully residing in the Member State concerned. The wording used in Article 22(1) referring to the power to refuse to renew or withdraw a residence permit granted under the provisions of Chapter III of that directive could suggest that that provision refers only to a situation in which it is a question of withdrawing or not renewing such a permit. However, for the ECJ, this provision expressly refers not only to measures refusing to renew or withdraw, by the second Member State, a residence permit granted in accordance with the provisions of Chapter III, but also to other measures such as, precisely, the decision to expel the territory of that Member State. That literal and contextual interpretation of Article 22(3) of Directive 2003/109 is also corroborated by the purpose of that provision. In so far as it proceeds from a delimitation of the respective scopes of Article 22(1) and (3) of Directive 2003/109, depending on whether it is an expulsion from the territory of the second Member State or an expulsion from the territory of the European Union and the enhanced protection against expulsion of variable geometry resulting from it, makes it possible to avoid a gap in the “enhanced protection against removal” regime whose implementation is sought by Article 22 of that Directive, and, therefore, to ensure the effectiveness of that regime (ECJ Judgment 14-3-2024, C-752/22, *EP v Maahanmuuttovirasto*).

In fact, (art. 22.3) the withdrawal or non-renewal of the permit implies that the long-term resident and the members of his family must leave the terri-

¹⁰ The enjoyment of the right to long-term resident status in the first Member State is a prerequisite for a third-country national wishing to reside in the territory of a second Member State (Articles 14(1) and 19(2)). *Vid.* ECJ Judgment 29-6-2023, joined cases C-829, C-129/22, *TE, RU, v. Stadt Frankfurt am Main and Stadt Offenbach am Main*.

tory of that State, being able to move to a third Member State or return to the territory of which he was granted the status of long-term resident EU. In the latter case, the State which granted the status is required to readmit them immediately and without formalities and to communicate its decision to the second Member State. The second Member State may decide to return the third-country national outside the territory of the EU for serious reasons of public policy or public security, where the third-country national has not yet obtained long-term resident status, but in this case it must consult the first Member State and take all necessary measures to implement the return decision. It is a system of enhanced protection, in line with Article 12 of the Directive, and of variable geometry, more favourable than that provided for in the Removal Directive.

Article 22(3) must therefore be interpreted as meaning that the enhanced protection against expulsion enjoyed by third-country nationals who are long-term residents under that provision is applicable in the context of the adoption of a decision to remove them from the territory of the European Union by a second Member State on grounds of public policy or public security, where such a third-country national, on the one hand, remains in the territory of that Member State in breach of a ban on entry into that territory and, on the other hand, has not submitted to the competent authorities of that Member State an application for a residence permit in accordance with the provisions of Chapter III of the Directive (ECJ 14-3-2024, C-752/22, *EP v Maahanmuuttovirasto*, examining the question whether a third-country national who is a long-term resident in a Member State enjoys enhanced protection against removal from the territory of the Union in another Member State to whose territory he has moved in breach of an entry ban).

III. THE NEW DIRECTIVE ON A SINGLE APPLICATION PROCEDURE FOR A SINGLE PERMIT (DIRECTIVE EU 2024/1233, OF 24 APRIL 2024)

1. **The need to simplify the procedure for applying for a single permit to reside and work in a Member State**

As part of the Tampere program, an attempt was made to adopt a Directive proposing a common legal framework at European level for the admission of economic migrants. The proposal for a directive on the conditions of entry and residence of third-country nationals for reasons of employment and

self-employed economic activities¹¹ sought two objectives. On the one hand, to define the criterion of “access” based on the needs of the internal labour market, so that the non-EU foreigner could only have access to the job if the position for which he/she requested the permit could not be filled by MS nationals or by other workers with preference in employment. On the other hand, it sought to establish a single procedure to obtain a combined residence and work permit, overcoming the dual system applied by many States that obliges these foreigners to follow different parallel procedures - residence and work. Some basic rights were also specified for those who held this single permit in areas such as working conditions, trade union rights or Social Security benefits. In the face of resistance in the Council, the proposal would end up being withdrawn in 2006.

In 2007¹², a new proposal was presented by the Commission which abandoned the regulation of the criteria for access to the labour market and limited itself to establishing procedural rules that would allow the establishment of a single procedure for the issuance of a permit, also a single one, allowing third-country nationals to reside and work legally in the EU, recognizing basic and common rights for third-country workers who reside legally in the territory of a Member State.

But it will not be until the Treaty of Lisbon enters into force and the unanimity requirement is eliminated that the obstacles can finally be overcome and Directive 2011/98/EU of 13 December 2011, OJEU of 23-12-2011 (L 343) is approved, establishing a single procedure for applying for a single permit authorizing third-country nationals to reside and work in the territory of a Member State and establishing a common set of rights for third-country workers legally resident in a Member State.

In ten years of implementation, in addition to some complaints received by the Commission on its implementation (in particular, in relation to non-compliance with the legal deadlines for the issuance of the single permit or in relation to Social Security issues), the 2019 implementation report¹³ highlighted some shortcomings and inconsistencies in the Directive. The main problems identified focused on three areas: (1) a complex and inefficient application procedure and unclear rights which, in some cases, lengthened procedures and reduced the attractiveness of the EU for third-country nationals; (2) the exclusion of certain categories of migrants from the scope of the Directive and not

¹¹ Brussels, 11.7.2001 COM(2001) 386 final 2001/0154 (CNSCOM(2001) 386. https://www.europarl.europa.eu/meetdocs/committees/empl/20020416/doc02a_en.pdf

¹² COM(2007) 638 final Brussels, 23-10-2007.

¹³ Brussels, 29.3.2019 COM(2019) 160 final.

covered by any other EU legal instrument; 3) the lack of protection of workers against exploitation. For all these reasons, it was recommended to present legislative measures to simplify, rationalize, complement and, in general, improve EU legislation in this area.

As part of the set of measures on skills and talents that was proposed as a follow-up to the Commission's Communication of 23 September 2020 on the New Pact on Migration and Asylum, the revision and recasting of Directive 2011/98/EU was proposed. The reform and recast proposal were made by the European Commission on 24 April 2022¹⁴ with the aim of simplifying and clarifying its scope. The legal basis for this proposal lies in Article 79(2) TFEU, which empowers the European Parliament and the Council to act in accordance with the ordinary legislative procedure and to adopt measures on: (a) the conditions of entry and residence and the rules on the issuance by Member States of visas and long-term residence permits; and (b) the definition of the rights of third-country nationals legally residing in a Member State, including the conditions governing freedom of movement and residence in other Member States.

The content of the Directive was nuanced during the Swedish Presidency and reached during the Spanish Presidency on 20 December 2023¹⁵, being finally published the recent Directive (EU) 2024/1233 of the European Parliament and of the Council of 24 April 2024 establishing a single procedure for applying for a single permit authorizing third-country nationals to reside and work in the territory of a Member State and establishing a common set of rights for third-country workers legally residing in a Member State, (recast).¹⁶

The new Directive, which entered into force 20 days after its publication and gives Member States two years to transpose it into their legal system, repeals as of May 22, 2026 the hitherto applicable Directive (D. 2011/98/EU) so that references to the repealed Directive must be understood to be made to the new Directive in accordance with a correlation table contained in its Annex II (art. 19).

On a regular basis, and for the first time by 21 May 2029, the Commission shall submit a report to the European Parliament and the Council on the implementation of this Directive in the Member States, proposing any amend-

¹⁴ Brussels, 27.4.2022 COM(2022) 655 final 2022/0131. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2022:655:FIN>

¹⁵ The amendments made in both presidencies and a comparative text between Directive 2011/98/EU and the new Directive can be found in the entry published on Tuesday, April 30, 2024, in the blog of ROJO TORRECILLA E. <http://www.eduardorjotorrecilla.es/2024/04/directiva-ue-20241233-del-parlamento.html>

¹⁶ OJEU-L-2024-80617.

ments it considers necessary. In addition, by 30 June 2028 and each year thereafter, Member States shall submit to the Commission (Eurostat) statistics on the number of third-country nationals who have applied for a single permit, who have been granted the single permit and who have had the single permit renewed or withdrawn during the elapsed calendar year (Art. 17).

2. Purpose of the Directive and scope

The reform does not change the purpose of the Directive, which is none other than to establish a single application procedure for the issue of a single permit authorizing third-country nationals to reside for the purpose of working in the territory of an MS, as well as to regulate a common set of rights for third-country workers legally residing in an MS (regardless of whether they are the purposes of their initial admission to the territory of that Member State), based on equal treatment with nationals of that Member State (Art.1.1).

The reform does not modify the purpose of the Directive, which is none other than to establish a single application procedure for the issuance of a single permit authorizing third-country nationals to reside for the purpose of working in the territory of a MS, as well as to regulate a common set of rights for third-country workers legally residing in a MS (regardless of the purpose of their initial admission to the territory of that Member State), based on equal treatment with nationals of that Member State (Art.1.1).

The definitions in Article 2 remain unchanged, although the strictly employment nature of the concept of “third-country worker” is reinforced, which refers to any third-country national who has been admitted to the territory of a Member State, who is legally resident there and who is authorized, in the context of an employment relationship (specifying the previous concept of “paid relationship”), to work in that Member State in accordance with national law, “collective agreements” (added) or practices. The Commission’s proposal to introduce a definition of employer to include employment or temporary work agencies and whose aim was to “increase legal certainty and strengthen the protection of third-country workers” is not finally accepted, but it does not seem that such employers should be excluded, as clarified in Recital 8, which states that all provisions of this Directive concerning employers should equally apply to such agencies.

As in the previous Directive, it does not affect the competences of the Member States to regulate the access of third-country nationals to their labour markets (Art. 1.2), including the contingent volume of persons, or the national

procedures for the recognition of academic qualifications (Recitals 13 and 23). On the other hand, it continues to be a minimum Directive in that it fits into more favourable provisions established in national law, with the more favourable provisions contained in the applicable international instruments prevailing, where appropriate (Art. 15).

As regards the scope of application of the Directive, it is maintained, although the references to the Directives that regulate some expressly excluded situations are updated. The Directive continues to have a very broad spectrum as it applies to three categories of third-country nationals: to those who apply for residence in an MS for the purpose of working; to those who have been admitted to a Member State for purposes other than work, are authorized to work and are holders of a residence permit (mostly family members who are beneficiaries of the right to family reunification and whose work authorization, at least for the first year, will depend on the decision of the Member State on the basis of the situation on the national labour market: Art. 14 Directive 2003/86/EC on the right to family reunification); and third-country workers who have been admitted to a Member State for the purpose of working in accordance with Union or national law.

Exclusions (Art. 3.2) continue to be based on family reasons (exclusion of family members of EU citizens who have exercised or are exercising their right to free movement within the territory of the EU, or those who enjoy equivalent free movement rights under agreements between the Union and its Member States or of the EU with third countries), for productive reasons (exclusion of workers posted or transferred by their company, seasonal workers, or *au pairs*, self-employed workers, employed as seafarers on ships registered in or sailing under the flag of a Member State), or for reasons of national or international protection (excluding those who are authorized to reside in a MS on the bases of temporary protection or who have applied for authorization to reside there on those bases and are awaiting a decision on their status except as regards the right to equal treatment regulated in Chapter II, which should apply to them if, in accordance with the law applicable to protection, such beneficiaries who are third-country nationals have the right to work in accordance with the national law), or because they are long-term residents in accordance with Directive 2003/109/EC that regulates this permit and the possession of a globally more privileged and specific legal status.

Most of these exclusions are justified by the fact that their specific legislation already provides for the right to work in the host State, because they do not consider their work to be part of the country's labour market (posted or transferred within the company), or because they are very exceptional situations.

The possibility that Member States may decide that Chapter II does not apply to third-country nationals who have been either authorized to work in the territory of a Member State for a period not exceeding six months or who have been admitted to a Member State for the purpose of study, remains (art. 3.3), as well as the express provision that Chapter II of the Directive (requirements for obtaining the single permit and single procedure) does not apply to third-country nationals who are allowed to work on the basis of a visa (art. 3.4) because in this case these requirements have already been fulfilled.

3. Single application procedure and issuance of the single permit

The new Directive 2024/1233 seeks to simplify the procedure for applying for a single permit to both work and reside in the EU.

Who should apply for the permit remains a matter for the Member States (employer, third-country national or any of them), as well as the determination of to whom it should be applied to, i.e. the competent authority responsible for receiving applications and issuing the single permit. On the contrary, it is a harmonizing imperative to allow the application to be submitted from the territory of a third country or from within the EU in the case of holders of a valid residence permit in that territory. Whereas previously only when the application had to be submitted by the third-country national, Member States were obliged to allow it to be submitted from a third country or, where provided for by national law, from the territory of the MS in which the third-country national was already legally present, it is now established that the application “shall be considered and examined either when the third-country national is residing outside the territory of the Member State to which that third-country national wishes to be admitted, or where that third-country national is already residing in the territory of that Member State as a holder of a valid residence permit” (Art. 4.2); that is, regardless of the national forecast and who the applicant is determined in each MS, in all of them the application must be examined whether the non-EU foreigner is outside the territory or inside legally present in its territory.

It is allowed, however, that MS may accept in their national law applications for a single permit submitted by other third-country nationals who are lawfully present in their territory (now without reference to a specific residence permit).

Once the application has been examined, as always, the Member States must take the decision to issue (or, where appropriate, to amend or renew the single permit) in a single administrative act combining a residence permit and

a work permit. If the MS issues single permits only in its territory, it shall issue the third-country national with the “requisite visa to obtain a single permit” (Art. 4.4).

Completed application submitted, in order to avoid duplication of work and prolongation of the procedures, Member States should endeavor to require applicants to submit the relevant documents only once and only carry out one substantial check of the documents submitted by the applicant for the issuing of both a single permit and, where applicable, the requisite visa to obtain a single permit (Recital 16).

Therefore, it remains essential to provide MS with adequate information on all the documents necessary to proceed with the application, but also on the applicable fees, the conditions of entry and residence, including rights, obligations and procedural guarantees including legal remedies, as well as providing information on workers’ organizations in national law (Art. 9). In addition, and in general, it is foreseen that employers should be required to inform workers of the essential aspects of the employment relationship in accordance with EU Directive 2019/1152 on transparent and predictable conditions in the EU (Recital 24). Information on the general aspects of residing and working in the country must not only be given to the interested parties but also to the public (Art. 16), and Member States must provide - through sources accessible in third countries - easily accessible and regularly updated information on these issues.

The decision on the application must be taken as soon as possible and, in any case, at the latest within 90 days of its submission, which may be extended for an additional period of 30 days when there are exceptional and duly justified circumstances related to the complexity of the application (Arts. 5.2.2 and 8.3), which must be communicated to the applicant. In the event of a change of employer by the holder of a single permit, an additional extension of 15 days is possible, but it should be duly justified.

In this way, the previous period of 4 months is reduced to 90 days (3 months) that was given to the authorities, to speed up the resolution. This period includes the time it takes for the MS to check the labour market situation, a verification that is only allowed “in connection with an individual application for a single permit” (Art. 5.2.2).

However, the deadline for adopting a decision on the application does not include a general check of the labour market situation that is not linked to a specific and individual application for a single permit. Nor does it include the time required for the recognition of professional qualifications as the Directive is independent of the national procedures on the recognition of diplomas (Recital 18).

The 90-day period is suspended, however, as was the case before, when the application is incomplete according to the criteria specified in national law, in which case the competent authority shall notify the applicant in writing of the additional information or documents required, setting a reasonable deadline to provide them. If the additional information or documents is not provided within the deadline set, the competent authority may reject the application (Art. 5.4).

The decision shall be notified in writing to the third-country national or to the employer when it is the latter who has submitted the application (art. 5.3), but in the latter case, as a novelty, it is added that MS shall ensure that the employer informs the third-country national about the status of the application and its outcome. In a timely manner. If no express decision is issued, the consequences of silence are determined by the legislation of each Member State.

Where the application for the issuance (modification or renewal) of the single permit is refused, as well as the decisions withdrawing the single permit, they must be reasoned and notified in writing. The decision rejecting the application to issue, amend or renew or a decision withdrawing a single permit shall take account of the specific circumstances of the case and respect the principle of proportionality. A negative decision shall specify the court or administrative authority where the person concerned may lodge an appeal and the time limit therefor (art. 8).

If the requirements are met, as in the previous regulation, Member States shall issue the single permit to third-country nationals who apply for admission and to third-country nationals already admitted who apply to renew or modify their residence permit or who have been admitted and apply for the renewal or modification of their permits (art. 4.5) in the same uniform form as the one referred to in the previous regulation. (EC Regulation No 1030/2002).

As before, Member States may indicate additional information related to the employment relationship of the third-country national in paper format or store such data in electronic format (Art. 6.1.2), such as the name and address of the employer, the place and type of work, hours of work and remuneration or remuneration. The only novelty introduced is along the lines of ensuring the right to data protection by recognizing the right of the third-country national to verify personal information contained in that permit and, where appropriate, to have it corrected or deleted.

When issuing the single permit Member States shall not issue additional permits as proof of authorization to access the labour market (Art. 6.2), i.e. as before, it is a single permit that combines the right to residence and serves as proof of authorization to access the labour market.

Member States may require the payment of fees for the processing of application, but the level of fees required shall not be disproportionate or excessive. If the fee is paid by the employer, the employer shall not be entitled to recover such fees from the third-country national (art. 10).

In cases where MS issue residence permits for purposes other than work (Art. 7), the provisions of the Directive apply only to the format of such permits and without prejudice to the rules on procedures for admission and issuance of such permits. Thus, the uniform permit form maintains that it must be stated whether the person is authorized to work, regardless of the type of permit in question, and the possibility for MS to also include additional information relating to the employment relationship. But as a novelty, the possibility is also incorporated in this case that the third-country national to whom the residence permit is issued has the right to verify all that information, as well as to request its rectification or deletion.

4. Rights conferred, the right to equal treatment (arts. 11-14)

The issuance of the single permit entitles its holder during its period of validity, at least, to a series of rights. The already known (art. 11.1) rights to enter and reside in the territory of the MS that issued the single permit, provided that the holder meets all the admission requirements in accordance with national law, the right to enjoy free movement within the State within the limits provided for by national law, the right to carry out the specific activity that has been authorized by the single permit or to be informed of their own rights, whether conferred by the EU or by national law, remain unchanged.

The absolute novelty on this point focuses on the exercise of the right to work, as it is now allowed that the holder of a single permit can change employers during the period of validity of the single permit (art. 11.2). Member States may subject the right of a single permit holder to change employer to any of the conditions:

a) to prior notification to the authorities. In such a case, the holder's right to change employers may be suspended for a maximum period of 45 days from the date of notification to the competent authority in order to allow the latter to verify within that period whether the labour market conditions or the compliance with the minimum period of attachment to the initial employer, if any, are met, but also to verify whether the requirements of the EUD or the national are still met. During this period of 45 days, the competent authorities

could oppose the change of employment. Nothing is said about what happens when they do not oppose or oppose after the deadline; absence of regulation that should lead to the understanding that once it has been overcome, they can no longer oppose it, since the useful effect of the Directive is to speed up the procedure for these permits.

b) require that a change of employer be subject to a check of the labour market situation if the Member State concerned carries out checks of the labour market situation, for applications for a single permit

c) and even to the establishment by national legislation of a minimum period during which the single permit holder is required to work for the first employer before allowing the change (art. 11.3), although, in the latter case, the minimum period indicated may not exceed the duration of the employment contract or the period of validity of the permit and, in no case, it can exceed 6 months. However, the MS that have regulated this limitation on labour mobility must allow the change of employer in duly justified cases of serious breach by the employer “of the contractual conditions of the employment relationship”. The reference to contractual conditions is striking because it does not seem to include serious breaches of the law or the collective agreement. Understood in this way, the limitation is incoherent - giving worse treatment to the breach of law or agreement than the contractual breach - so it must be understood as referring to conditions of the employment relationship in a broader sense, regardless of the source from which they come, as recital 32 seems to corroborate when it states that the right to equal treatment must include the working conditions “established in Union law, national law, collective agreements and practices of a Member State under the same conditions as nationals of the Member State concerned”. The national prohibition, where appropriate, on changing employers is a clear limitation on mobility and promotion in the labour market that prevents the full implementation of the principle of equality, but it could be justified on the other hand, because it can ensure that there are no uncontrolled illegal assignments by giving stability and some time to third-country nationals to know their rights and the labour market.

Another relevant novelty is the establishment of specific rules to be applied in the event of unemployment of the holder of the single permit which were not contemplated before. Thus, art. 11.4 warns that unemployment may not constitute a reason for withdrawing a single permit, but “provided that” any beginning and end of unemployment is notified to the competent authorities, and unemployment does not exceed a certain duration. Specifically, the permit cannot be withdrawn if the total period of unemployment does not ex-

ceed 3 months during the period of validity of the single permit, or 6 months after two years of permit. However, MS may allow the holder of the single permit to remain unemployed for a longer period, but MS may also decide in their national legislation that single permit holders who are unemployed for a period of more than 3 months must provide evidence that they have sufficient resources to support themselves without recourse to the MS social assistance systems. If during the allowed period of unemployment the single permit holder finds a new job with a new employer and the MS has made the change of employer subject to one of the above conditions, the single permit holder must be allowed to remain in the territory even if the allowed period of unemployment has expired¹⁷, until the competent authorities verify the situation of the labour market or if the legislation is conditional on a minimum period of permanence and the employment contract has been breached (art. 11.4). If the breach gives reasonable grounds to believe that the permit holder has been subjected to “particularly exploitative working conditions”, i.e. working conditions, including those resulting from sex or other discrimination, which are grossly disproportionate to the conditions of employment enjoyed by legally employed workers, and, for example, affect the health and safety of workers and violate human dignity, the period of authorized unemployment must be extended by three months (Art. 11.6).

On the basis that there is no horizontal Union legislation and that the rights of third-country nationals vary according to their nationality and the Member State in which they work, the Directive nevertheless seeks to reduce the existing inequality of rights between Union citizens and third-country nationals working legally in a Member State and to supplement the existing acquis on immigration establishing a set of rights for third-country nationals who do not yet have long-term resident status, but a single permit. The aim of the regulation in this area is to establish a “minimum level” of equality of conditions in the Union and to recognize that third-country nationals contribute with their work and the taxes to the EU economy, while reducing the unfair competition that may result from the possible exploitation of non-EU foreigners. The right to equal treatment with respect to national workers is maintained in the same areas as before the reform, although it is extended or specified in some of them.

¹⁷ This possibility to remain in the territory of the MS issuing the single permit is also allowed when the permit lapses during the procedure for its renewal, at least until the competent authorities take a decision on the application for renewal (Art.11.5).

In summary, equality applies to: employment and working conditions, including as regards pay, dismissal, working hours, leave and holidays, and equal treatment of men and women, as well as in matters of health and safety at work; in the right to strike and trade union action and freedom of association; membership and participation in workers' or employers' organizations or any professional organization, including the rights and benefits that such organization may provide, such as the right to negotiate and conclude collective agreements; in vocational education and training; the recognition of diplomas, certificates and other professional qualifications, in accordance with applicable national procedures; branches of social security¹⁸; social assistance¹⁹; tax benefits, provided that the worker is deemed to have his or her tax residence in the Member State concerned; access to goods and services and the procurement of goods and services offered to the public, including procedures for access to public and private housing provided for in national law; without prejudice to the freedom of contract in accordance with Union and national law; advisory and information services provided by the employment offices (art. 12.1). Although nothing is expressly stated, other benefits provided for in EU law granted to workers where no reference is made to any difference in treatment on grounds of nationality should also be understood as applying to third-country nationals with a single permit, as is the case in relation to wage guarantees arising from business insolvency²⁰.

¹⁸ In the field of social security, there are some interesting pronouncements of the CJ: ECJ de 25-11-2020, C-302/19, *Istituto Nazionale della Previdenza sociale v. WS*; ECJ (Grand Chamber) 2-9-2021, C-350/20, *O.D. and Others v Istituto nazionale della previdenza sociale* (INPS); ECJ 28-10-2021, C-462/20, *ASGI. The absence of an autonomous and uniform definitions under EU law of the concepts of "social security", "social assistance" and "social protection" and the reference to national law, in that provision, relating to those concepts do not mean that the Member States may undermine the effectiveness of Directive 2003/109 when applying the principle of equal treatment provided for in that provision* (ECJ Grand Chamber 29-7-2024, joined cases C-112/22 and C- 223/22, p. 35. The Court of Justice of the European Union (ECJ) ruling in Case C-664/23 examines the application of Article 12(1)(e) of Directive 2011/98/EU in a case where a third-country national holding a single permit in France applied for family benefits for his children, two of whom were born outside France and entered the country irregularly. The denial of the request was deemed discriminatory because the requirement to prove the children's regular entry is not imposed on French or EU citizens. Moreover, France failed to invoke or justify any of the exceptions to the principle of equal treatment provided in Article 12(2) of the Directive.

¹⁹ Article 11(1)(d) of Council Directive 2003/109/EC, read in the light of Article 34 of the CFREU precludes legislation of a Member State which makes access for third-country nationals who are long-term residents to a social security, social assistance or social protection measure conditional on the requirement, which also applies to nationals of that Member State, of having resided in that Member State for at least 10 years, the final 2 years of which must be consecutive, and which provides for a criminal penalty for any false declaration regarding that residency condition; a national penalty mechanism is not compatible with the provisions of Directive 2003/109 where it is imposed in order to ensure compliance with an obligation which itself does not comply with those provisions: ECJ Grand Chamber 29-7-2024, joined cases C-112/22 and C- 223/22.

²⁰ ECJ 5-11-14, C-311/13, *Tümer*.

The right to equal treatment in the areas covered by the Directive should be guaranteed not only to third-country nationals admitted by a Member State for the purpose of work, but also to those admitted for other purposes and who have subsequently gained access to the labour market, including members of a worker's family admitted on the basis of family reunification or third-country nationals admitted for the purposes of research, studies, internships, volunteering, student exchange programmes or educational or *au pair projects*.

Despite this broad proclamation of the principle of equality, the Directive allows EU countries to restrict equal treatment in certain matters (access to education/training, social security benefits, such as family benefits or access to housing), on the same terms as it was allowed until now, although introducing in the limitation of the right to housing the rental of a private dwelling, which cannot be limited within the limits provided for by national law (art. 12.2.d.ii).

The right to equal treatment is, in any event, without prejudice to the right of the Member State to withdraw or refuse to renew the residence permit issued under this Directive, the residence permit issued for purposes other than work or any other authorization to work in a Member State (Art. 12(3)); which means that the guarantee of equal treatment enjoyed by third-country nationals protected by the Directive in the exercise of the rights referred to in Article 12 thereof does not imply a guarantee of indefinite stay in the Member State granting the permit, which retains the power to withdraw or not renew the corresponding permit when any circumstance arises that allows and/or requires it.

To strengthen equality and compliance with the Directive by avoiding possible labour abuses, especially in sectors where there is a greater risk of labour rights violations, two new provisions are introduced (now Art. 13 and 14), which provide that Member States must establish effective, proportionate and dissuasive sanctions against employers who fail to comply with the obligations of the Directive

It also provides for the need for member states to ensure effective mechanisms through which workers from third countries can lodge complaints against their employers, either directly, through third parties (trade union organizations, significantly) or through a competent authority. Among these measures, emphasis is placed on workers' organizations being able to intervene on behalf of the employee in any administrative or judicial proceedings aimed at enforcing the Directive and the national provisions applicable for its implementation, and on the guarantee of indemnity against retaliation in reaction to a complaint within the company.

CHAPTER 3

THE CONCEPT OF EMPLOYEE

CAROLINA MARTÍNEZ MORENO

INDEX: I. Towards a common and expansive concept of employee. II. The concept of “employee” in the EU. 1. The performance of a “real and effective” activity as a employee. 2. Participation in an “economic activity” and the notion of employer. 3. The irrelevance of an eventual inactivity. 4. The exclusion of marginalised activities. 5. The particular case of family jobs. III. Employed persons, self-employed persons and service providers. IV. The uniqueness of cases involving directors and administrators of commercial companies. 1. Has the ECJ gone beyond the sphere of the employment contract? 2. Is there a different conception of the subordination note under the ECJ’s case law.

I. TOWARDS A COMMON AND EXPANSIVE CONCEPT OF EMPLOYEE

The purpose of this chapter is not to carry out a detailed analysis of the regulation included in each Community regulation in relation to its subjective scope of application or its scope *ratione personae*. The aim is to try to find out whether it has been possible to arrive at a concept of employee that is specific to EU law. And, if so, what would be its contours and defining elements, and how this might affect domestic law.

Until recently, it was held that the delimitation of the scope of labour law, and the determination of the persons covered by the concept of employee, was strictly a matter for each Member State. Likewise, it was understood that European employment law only provided some instrumental references with the sole purpose of specifying the scope of application of each rule as well as guaranteeing its useful effect.

Thus, for example, in judgment of 23 March 82, *Levin* (C-53/81, EU:C:1982:105) the ECJ states that the concept of employee coined by national law may never be used to circumvent the application of Community rules, nor to act against the objectives of the Treaty. Or in the conclusions of the Advocate General in the “*Ruhrland-klinik*” case (judgment 17 November 2016, *Betriebsrat der Ruhrlandklinik* C-216/15, EU:C:2016:883); Opinion of 6-7-16), according to which “the EU legislature intended to preserve the power of the Member States to determine the persons falling within the scope of the concept of ‘employee’....”, which does not mean that the scope of that concept cannot be defined, in the specific case, for the specific purposes provided for in Directive 2008/104/EU on temporary agency work. In a similar way, judgment 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82) concerning whether Directive 2003/88 on working time applies to a volunteer firefighter. The statute does not define the notion of employee, but the ECJ insists on the need to assign it an autonomous and specific scope within EU law.

The reason to create a separate and autonomous notion of employee lies in the need to ensure that the regulation fulfils its specific purpose and preserves its useful effect. These objectives would not be achieved with notably disparate national regulations and practices that would imply the risk of leaving important groups outside the norm.

This position of the ECJ is reiterated on numerous occasions, in relation to other Community regulations: those relating to protection of pregnant workers, collective redundancies, working time arrangements or the rights of workers with fixed-term contracts. The result has been a variety of “finalist” concepts of employee, and, ultimately, the formation of a concept of EU law itself, material and expansive, but not univocal. It is also intended to coexist as harmoniously as possible with national concepts.

Certainly, this process has not been completed; and in the most recent milestones of the EU’s institutional activity, we can notice a certain trend towards the universalization of the notion of employee. A tendency to define the concept in such a way as to extend this consideration to all persons with any connection to the labour market, however tenuous it may be; to all those who actually carry out any activity in favor of a third party, regardless of the singular nature of the relationship, its qualification or its nature under national law. The aim is to provide

protection and coverage for all forms of human labour, including new activities and emerging jobs (which, in most cases, are atypical and precarious).

This trend can be seen more universally in the Preamble of the European Pillar of Social Rights adopted at the Gothenburg Social Summit on 17 November 2017 (point 15). The principles enshrined therein in relation to workers concern all employed persons. Irrespective of their status, the type of employment and the duration of their employment. The definition of the Community concept of “employed person” revolves around this idea.

In any case, the determination of whether or not an employment relationship exists will have to take into account and be in accordance with the case law of the ECJ in each case. It is not in vain that the Community concept of employee is a concept that has been shaped by case law. This conclusion also follows from the provisions of certain legislation. As a matter of example, Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, Article 1(2) of which, in describing its subject matter and purpose, refers to the establishment of minimum rights applicable to “every employee in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State”, while taking into consideration the case law of the Court of Justice. Something similar applies to the Proposal for a Directive of the European Parliament and of the Council on improving working conditions at work on digital platforms presented by the Commission on 9 December 2021,¹ which was formally endorsed adopted by the Parliament on 24 April 2024. It states that, for the purposes of establishing the existence of an employment relationship, account shall be taken of its definition in the law, collective agreements or practice in force in the Member States, with consideration to the case-law of the Court of Justice.

II. THE CONCEPT OF “EMPLOYEE” IN THE EU

The concept of employee in EU law is essentially a notion raised through a case method.² Above all, the provisions on free movement and protection of migrant workers have enabled the ECJ, from its first precedents, to gradually shape this Communi-

¹ COM(2021) 762 final 2021/0414 (COD) [<https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52021PC0762>]

² O'BRIEN, CH., SPAVENTA, E. and DE CONINCK, J.: *Comparative Report 2015. The concept of worker under Article 45 TFEU and certain non-standard forms of employment*, European Commission, April, 2016 (accessed 14-12-17).

ty notion of “employed person”. It has done so with this expansive vocation, in such a way as to include any person with citizenship of a Member State who moves around the territory of the Union and has some connection with the labour market. Such notion applies even if they are not currently employed, if they have previously worked, or intend to do so in the more or less near future. In this sense, the “*Vatsouras and Koupatantze*” case (judgment of 4 June 2009, *Vatsouras* C-22/08, EU:C:2009:344), refers to the need to maintain a “real link with the labour market” in order to be able to speak of a genuine worker. More recently, the “*Gusa*” judgment (20 December 2017, *Gusa*, C-442/16, EU:C:2017:1004), insists that a national of a Member State - a self-employed plasterer - who, after residing and working as a self-employed person in another Member State (Ireland) for around four years, abandons that activity due to a lack of work and registers as a jobseeker, continues to be a “employee”. For the ECJ, it is necessary to give a Community meaning or scope to the notion of employee, regardless of national differences and variations, so that the rules on free movement do not lose their *raison d’être* (among others, judgments of 19 March 1964, *Unger* C-75/63, EU:C:1964:19; 23 March 1982, *Levin* C-53/81, EU:C:1982:105; and 3 June 1986, *Kempf*, C-139/85, EU:C:1986:223).

Let us see what elements, requirements or circumstances are decisive to qualify as a employee in Community case law, and what exceptions or exclusions are allowed.

1. The performance of a “real and effective” activity as a employee

The key for the ECJ is that the person carries out - or wishes to carry out - a “real and effective” activity as an employed person; that the person performs, for a certain period of time, for another person and under his direction, certain services in return for which he receives remuneration (case, “*Hava Genc*” – judgment of 4 February 2010, *Genc* C-14/09, EU:C:2010:57; with reference, *inter alia*, to the “*Lawrie-Blum*” case - judgment 3 July 1986, *Lawrie-Blum* C-66/85, EU:C:1986:284). In the specific case of Ms Genc, the ECJ considers that the court was able to determine whether the constituent elements of an employment relationship were present. That is, “the subordination and the payment of remuneration.” (Case C-456/02 *Trojani*, 7-9-04, EU:C:2004:488).

In the order issued in “*Yodel Delivery Network*” case (order of 22 April 2020 *Yodel Delivery Network Ltd* C-692/19, EU:C:2020:288), for the purposes of the application of Directive 2003/88 on working time, it ruled out the consideration as a employee of a self-employed parcel delivery driver, who may subcontract his services and have substitutes or assistants, refuse or limit the

orders entrusted to him, work for competing companies and set availability time slots, charging according to the number of parcels delivered. The ECJ assumes that each State has the competence to define the type of relationship which has been held. And in this case, national legislation excluded an employment relationship if there is no personal service. But it insists that the specific circumstances of the case must be analysed for the purposes of the Community concept.

The fact that the working time is very short and does not reach a certain threshold, or that the level of income falls below a subsistence minimum, are not relevant factors for the purposes of attributing worker status to the person. Even when the earnings obtained have to be supplemented by other sources of income, whether private or from public aid (with references to judgments of 3 June 1986, *Kempf*, C-139/85, EU:C:1986:223; 31 May 1999, *Bettray* C-344/87, EU:C:1989:226; and 30 March 2006, *Mattern and Cikotic* C-10/05, EU:C:2006:220). The impact of short working hours is raised again in the judgment of 13 July 1989, *Rinner-Kühn* C-171/88, EU:C:1989:328; this time for the purpose of applying Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ L 45, p. 19). The ECJ considers that the exclusion from the scope of the German legislation on protection during sick leave of persons who, like Ms Rinner-Kühn (an hourly cleaner), worked less than 10 hours per week or 45 hours per month may constitute discrimination on grounds of sex. Provided that such an exclusion affects a much higher number of women than men, and unless the Member State proves that such a scheme is based on objective factors, unrelated to any discrimination based on sex.

Nor can the short duration of the activity, in itself, leave the person carrying it out outside the rules on free movement, as reasoned in the aforementioned “*Vatsouras and Koupatantze*” case (judgment of 4 June 2009, *Vatsouras* C-22/08, EU:C:2009:344), which in turn refers to the judgments on the ECJ cases 26 February 1992, *Bernini* (C-3/90, EU:C:1992:89); and 6 November 2003, *Ninni-Orasche* (C-413/01, EU:C:2003:600). In the case of Ms Bernini - an Italian resident in the Netherlands - the question was whether she had acquired the status of employee for the purpose of receiving aid to study architecture in Naples. Ms Bernini had worked in the Netherlands as a paid trainee in the design department of a furniture factory for a period of 10 weeks. Ms Ninni-Orasche - who was also applying for a study grant - after some years unemployed, worked as a waitress for a short period of time in a Member State other than her own (Italy) and, having obtained a qualification which gave her access to university in the host country, remained in search of a new job corre-

sponding to that higher level of qualification. This allegedly ancillary nature of the activity does not prevent the ECJ from asserting her status as a worker.

On what can be considered as a “real and effective” activity, two judgments pertaining Directive 2003/88 on certain aspects of the organization of working time (OJ L 299, p. 9) are of interest. The first one, the judgment of 14 October 2010, *Union Syndicale Solidaires Isère*, (C-428/09, EU:C:2010:612) which considers included inside its scope of application the persons covered by educational participation contracts at issue in the main proceedings. Despite those persons carry out occasional and seasonal activities at holiday and leisure centres and work a maximum of 80 days per year. The “*Fenoll*” case (judgment of 26 March 2015, *Fenoll* C-316/13, EU:C:2015:200), concerning the scope of Directive 2003/88 and the application of Article 31(2) of the Charter in relation to the right to annual leave. The case concerned a disabled person providing services in a centre for social integration. The ECJ states that the Directive in question does not envisage its own definition of worker, nor does it refer to national concepts, so that it is necessary to take the autonomous concept of EU law. A concept which seeks to ensure that the rules reach all persons who provide services under the conditions of paid employment, even if, in the light of national law, the relationship has a *sui generis* legal nature. In the same sense, and with express reference to the *Fenoll* judgment, the aforementioned judgment 21 February 2018, *Matzak* (C-518/1, EU:C:2018:82) also on application of the Working Time Directive to a volunteer firefighter. On the relevance of periods of voluntary work as a firefighter, judgment 7 July 2022, *Zone de secours Hainaut-Centre case* (C-377/21, EU:C:2022:530). It addresses how should the time spent as a part-time volunteer be calculated for seniority pay. It concludes that the entire period of service, and not only the periods of actual activity, should be taken into account. On the irrelevance of the nature attributed to the legal relationship under national law, judgment 20 November 2018, *Sindicatul Familia Constanța* (C-147/17, EU:C:2018:926).

In Mr Fenoll’s case, it is established that he received various benefits for a certain period of time (at least, five consecutive years). During that time, he also received paid annual leave. Notwithstanding the fact that he also enjoyed medico-social support because of his disability, and that his remuneration was extremely low. The ECJ recalls that in the “*Bettray*” case it had rejected the possibility of considering as “real and effective” activity that one which would be exclusively or predominantly aimed at the re-education and reintegration of persons who are unable to work normally (in the case at hand, it was a person suffering from drug addiction). However, in the “*Fenoll*” case, the activities carried out by the disabled people at these help centres have some useful and

productive results as well. It will therefore be for the national court to determine whether these services can normally be included within those one which are traded on the labour market.

It should be noted that in the “*Fenoll*” case, as on many other occasions, the fact that the employee has enjoyed certain typical employment rights, such as paid annual leave, is considered to be evidence of his true status as a employee. As in the “*Ruhrlandklinik*” case (judgment of 17 November 2016, *Betriebsrat der Ruhrlandklinik* C-216/15, EU:C:2016:883), where the fact that Ms K had enjoyed some of these same rights and was covered by German social security protection, is used as evidence. The use of this system of indicia is to be found in the European Parliament’s request to the Member States to take account of ILO Recommendation 198 on the employment relationship (2006). It incorporates this and other indicators, such as the integration of the person into the organization of the enterprise, performance of work at a specific time or place, worker’s availability, provision of tools, machinery or materials by the employer, regular remuneration, or weekly resting periods.

The ECJ insists on the need for real and effective, rather than marginal, performance in the “*Governo della Repubblica italiana*” case (judgment of 16 July 2020, *UX v Governo della Repubblica italiana* C-658/18, EU:C:2020:572). It decided that a magistrate (*giudice di pace*) who has actually carried out significant judicial activity during the reference period can qualify as a “fixed-term worker”, for the purposes of receiving the relevant remuneration during annual leave pursuant to Directive 1999/70/EC. In a similar vein, with regard to the equal treatment principle in comparison with ordinary judges and protection abuse in temporary employment, judgment 7 April 22 *Ministerio della Giustizia and Others*, C-236/20, EU:C:2022:263 (applying Directive 2003/88/EC, on working time; Directive 97/81/EC on part-time work; and Council Directive 1999/70/EC on fixed-term work).

2. Participation in an “economic activity” and the notion of employer

A related element to that of the performance of a real and effective activity is that of participation in an economic activity, as well as what is to be understood by the latter. Perhaps this would make it possible to differentiate what we consider to be friendly, benevolent or neighbourly work from real salaried work. This could be applicable to the misnamed “collaborative economy”. The problem arose in the “*Ruhrlandklinik*” case, in which a charity made Ms K available to a clinic to work as a nurse in return for a monthly remuneration

calculated in accordance with the usual criteria applicable in the health services business. The issue was whether the European rules on temporary agency work were applicable. The ECJ concluded that that entity did indeed carry out an “economic activity” consisting of offering services on the market for the secondment of nursing staff to healthcare establishments, in return for financial compensation covering staff and administrative costs. The fact that it was non-profit-making or that it took the legal form of an association does not preclude from reaching such conclusion.

In the “*Udo Steymann*” case (judgment of 5 October 1988, *Steymann* C-196/87, EU:C:1988:475), the same type of question arose in relation to work carried out within a religious community (which the ECJ extended to any other type of community based on a spiritual or philosophical source of inspiration). The person concerned carried out plumbing work in that community and participated as in the commercial work carried out by the congregation as well. In return, the latter provided for the material needs of its members, irrespective of the type and extent of the work carried out by them. The ECJ holds that, to the extent that these advantages could be the *quid pro quo*, albeit indirect, for a real and effective activity, the work carried out by the community should qualify as an economic activity within the meaning of Article 2 of the Treaty.

To conclude this section, the judgment in the case “*AFMB and Others*” (judgment of 4 June 2020, *AFMB e.a. Ltd v. Raad van bestuur van de Sociale verzekeringsbank* C-610/18, EU:C:2020:565) deserves special attention. The application of Regulations No 1408/71 and 883/2004 on social security for migrant workers is analysed to determine who is to be regarded as the employer and whether an fraud practice and an abuse of rights occurs. In the case, a Cypriot company contracts with Dutch transport companies for the management of its fleet of trucks in the Netherlands and hires drivers resident in the Netherlands. The issue at stake is whether Cypriot or Dutch law is to be applied. The Advocate General’s Opinion begins by noting that EU law does not define the concept of employer and that the regulations on the coordination of social security systems do not envisage an express reference to the law of the Member States. It then refers to the case-law of the ECJ, according to which, in the light of the requirements of both the uniform application of EU law and the principle of equality, that concept must be given an autonomous and uniform interpretation throughout the EU. That must be sought by taking account of the context of the provision in which that concept is used and the objective pursued by the coordination regulations. The Advocate General also emphasises the importance of an autonomous interpretation by the fact that the concept of employer is the connecting factor for the application of the conflict-of-law

rule aimed at designating the social security legislation of a single State as the applicable law. It is clear that such an objective is not achieved if the differences between the laws of the Member States lead to different legal systems. In this respect, he considers that it would be an excessively formalistic solution to rely solely on the existence of a contractual relationship, which would entail the risk of circumventing the protection offered by the coordination regulations. In other words, it would frustrate the purpose of the mechanism set out in those rules. On the contrary, a criterion must be adopted which takes into account the reality of workers in the single market and the current complexity of employment relations, in particular in order to avoid contributing to circumvention practices; the conclusion is that the employer in the case of employed drivers of heavy goods vehicles in international road transport is the transport undertaking which has employed the person concerned. It is the one for which the driver is employed for an indefinite period of time; for which he remains fully available. And it is the one which exercises the effective powers of management over the employee and to which the wage costs are actually borne. In this case, the Dutch companies, and not the Cypriot AFMB.

3. The irrelevance of any inactivity

The existence of an effective link to the labour market or employment need not be excluded when a person has ceased his/her activity, or is currently and temporarily inactive. Provided that his or her purpose is to remain in a position to engage in work.

Thus, for example, in the judgment 12 May 1988, *Martínez Sala C-85/96*, EU:C:1998:217, the question arises whether the applicant should be considered as a “employee” within the meaning of Regulation No 1408/71. Ms Martínez, born on 8 February 1956, is a Spanish national who has lived in Germany since May 1968. She was employed in Germany from 1976 to 1986, with various interruptions, and then from 12 September 1989 until 24 October 1989. From the latter date she received social assistance assistance paid by the City of Nuremberg and by the Landratsamt Nürnberger Land under the Bundersozialhilfegesetz (Federal Law on Social Assistance). The question is whether in 1993 Ms Martínez was still a worker within the meaning of Article 7(2) of Regulation No 1612/68 and Articles 1 and 2 of Regulation No 1408/71. That is to say, for the purposes of the application of the rules then in force on freedom of movement and social security for employed persons, self-employed persons and members of their families moving within the Community.

The ECJ explains that, for the purposes of freedom of movement, once the employment relationship has ended, the person concerned loses the status

of employee. But such status may produce certain effects after the relationship has ended, and someone who is genuinely seeking work may also be classified as a employee (with reference to the “*Lawrie-Blum*”, “*Lair*” and “*Antonissen*” judgments). As far as social security legislation is concerned, it is not even necessary to prove the existence of an employment relationship. It is sufficient to be insured for some contingency under a compulsory or optional insurance pursuant to a general or special social security scheme.

On the significance of periods of inactivity, the judgment in the “*Jessy Saint Prix*” case (judgment of 19 June 2014, *Saint Prix* C-507/12, EU:C:2014:2007) considers that Article 45 TFEU must be interpreted as meaning that a woman who has stopped working or looking for work due to the physical limitations resulting from the end of pregnancy and childbirth retains the status of “employee”. And provided that she has not definitively abandoned the intention to return to work, and finds employment within a reasonable period of time after the birth of her child. In similar terms, and with a criterion of firm protection for the worker, the “*Daknevičiute*” case (Judgment of 19 September 2019, *Daknevičiute* C-544/18, EU:C:2019:761). The case concerned a Lithuanian beautician who had worked in the United Kingdom as an employee and then as a self-employed person, an activity in which she ceased due to the physical limitations resulting from the end of her pregnancy and subsequent childbirth. For the purposes of obtaining certain benefits, the ECJ held that she continued to maintain her status as a self-employed worker, provided that she had resumed that activity or found another activity, whether self-employed or employed, within a reasonable period of time. She had been engaged in sporadic marginal activity after the birth of her child. The ECJ further held that the loss of such status as a result of maternity would discourage women from moving freely.

In the “*Piscarreta*” case (judgment of 20 July 2017, *Piscarreta Ricardo* C-416/16, EU:C:2017:574), concerning the application of Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001, L 82, p. 16), it is stated that the rights and obligations arising from the employment contract are transferred to the transferee as a result of the transfer of the business (Art. 3(1), first paragraph of the Directive). Without prejudice to the national court’s verification of the situation of a worker on leave.

A unique case is analysed in the judgment on the “*Sari Kiiski*” case (judgement of 29 September 2007, *Kiiski* C-116/06, EU:C:2007:536), where, for the purposes of the application of Directives 92/85/EEC and 96/34/EC on the protection of the health of pregnant women and parental leave, the ques-

tion arises as to whether Ms Kiiski can qualify as a “pregnant employee”. The person concerned, who was a teacher in an educational establishment in an official capacity, was inactive when she applied for a change in her parental leave arrangements as a result of her new pregnancy. The ECJ finds, first, that Directive 92/85 does not exclude from its scope the situation of workers who have already taken childcare leave. Secondly, the right of pregnant workers to protection against risks is not subject to the condition that the pregnant woman is necessarily exposed to such risks. The ECJ wishes to state that the protection of women during pregnancy requires harmonisation with the right to parental leave, and that perhaps the amendment of the parental leave arrangements was necessary in order to guarantee the right to protection of the health of pregnant women.

In a similar vein, judgment of 4 October 2018, *Dicu* C-12/17, EU:T:2018:616, referring to the Kiiski case, insists that a worker on parental leave remains a worker. And, for the purposes of recognition of family benefits, judgment 1 August 2022. *Familienkasse Niedersachsen-Bremen*, C-411/20, EU:C:2022:602, also refers to a citizen of another EU Member State who is still inactive during the first three months of his stay in the country.

4. The exclusion of marginal activities

The situations that the ECJ considers to fall within the scope of an employed person are, as we have seen, very different. However, the possibility of excluding very small-scale activities, or activities carried out on a very small scale, has been accepted. Purely marginal and ancillary activities, as in the case of so-called *casual workers*, so far excluded in some countries from the scope of application of labour law. This national diversity is the main problem when it needs to be established what is meant by “marginal”.³ The solutions given by the ECJ also point to the fact that a person only works a very small number of hours can be an indicia of such marginal character (to give just one example, in the “*Hava Genc*” case – judgment of 4 February 2010, *Genc* C-14/09, EU:C:2010:57). At the same time, however, it must be considered that this does not in itself exclude the possibility of continuing to attribute to that person the status of a employee.

³ This is highlighted by O'BRIEN, CH., SPAVENTA, E. and DE CONINCK, J.: *Comparative Report 2015: The concept of worker under Article 45 TFEU and certain non-standard forms of employment*, cit. [accessed 14-12-17].

The judgment in the “*Megner and Scheffel*” case (judgment of 14 December 1995, *Megner* C-444/93, EU:C:1995:442) concerned two female cleaners who worked 10 hours per week and whose monthly pay did not exceed one seventh of the monthly reference base. The German Government did not consider them to be in the labour force for the purposes of the application of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24). The ECJ recalls that the concept of employee for the purposes of the protection of migrant workers has a Community scope (*Unger* judgment); it holds that the Directive in question must apply to the active population, including self-employed workers, workers whose activity is interrupted by illness, accident or involuntary unemployment, jobseekers, as well as retired and disabled workers; and concludes that persons in “minor employment” are within the concept of the labour force, rejecting the Government’s claim that such employment may be excluded from social protection legislation (old-age and sickness insurance and unemployment contributions).⁴

I think the clear trend is to consider these minor and atypical jobs as part of the notion of employment relationship. The fight against precariousness and exploitation requires guaranteeing “on-demand” or “on-demand” workers, “*casual*” workers and *crowdsourcing* workers basic labour rights.⁵

5. The particular case of family work

In the judgment of 8 June 1999, *Meeusen*, C-337/97, EU:C:1999:284, the ECJ has questioned whether the fact that a person is married to the director and sole owner of the share capital of the company for which he works precludes that person from being classified as a “worker” within the meaning of Article 48 of the EC Treaty and of Regulation No 1612/68.

The ECJ recalls that in its judgment of 27 June 1996, *Asscher* C-107/94, EU:C:1996:251, it held that the director of a company of which he is the sole shareholder does not exercise his activity in the context of a subordinate relationship, and cannot be considered as a “employee” within the meaning of Article 48 of the Treaty. However, it then goes on to reason that this solution cannot automatically be extrapolated to his spouse, and that the personal and

⁴ It rejects, however, that the fact that such legislation affects more women than men is discriminatory, since the national legislature could reasonably have considered that such legislation was necessary in order to achieve a social policy objective which is not discriminatory on grounds of sex.

⁵ Again, it is noted in O’BRIEN, CH., SPAVENTA, E. and DE CONINCK, J.: *Comparative Report 2015: The concept of worker under Article 45 TFEU and certain non-standard forms of employment*.

property relations between spouses arising from the marriage do not exclude the existence, within the organisation of the company, of a relationship of dependence characteristic of an employment relationship.

Slightly more complex is the case analysed in the judgment 26 July 2017, *Hälvä and others* C-175/16, EU:C:2017:617, in relation to Directive 2003/88 concerning certain aspects of the organisation of working time (OJ 2003, L 299, p. 9), which contains an exception in relation “family workers” (Art.17(1)(b)).

The defendant in the main proceedings has the status of a ‘children’s village’, in which the applicants are responsible for the day-to-day running of a house and for the care and education of the children staying there in conditions similar to those of a family. The work is carried out in continuous 24-hour periods, which may be spread over several days. But with the right to one day off per week and an average of two weekends off per month. For this purpose, the director of the establishment draws up a list. The interested parties are claiming compensation for overtime, evening, night, Saturday and Sunday work for the period 2006 to 2009. The basic issue is application of the Finnish working time regulations to these ‘surrogate mothers’.

In order to determine whether or not there is subordination or dependence and, consequently, an employment relationship, the ECJ takes into account the following facts: (1) during the periods in which they are responsible for the management of a household, the “relief parents” have a certain degree of autonomy in the allocation of their time, in the organisation of their tasks, their travel and their periods of inactivity. There does not seem to be, in practice, any control by the employer; 2) however, the relief parent is obliged to respect the habits already acquired or the patterns established by the “foster parents”, and to draw up a report on how he/she has implemented the programme of assistance and training established for each child. This can be considered or constitute an instrument of control by the employer; and 3) the periods of inactivity still are time at the disposal of the employing entity. The ECJ concludes that the working time of the “relief parents” as a whole has a duration predetermined, which cannot be freely determined. Nor does the exclusion or exception relating to “family work” apply.

A different concept, that of “professional foster carers”, is the subject of judgment 20 November 2018, *Sindicatul Familia Constanța* C-147/17, EU:C:2018:926, as regards to application of Directive 2003/88 on working time as well. It emphasises, on the one hand, the autonomous scope of the concept of worker, which is essentially characterised by the subordinate status. And, in the specific case, it concludes that these professional foster carers are classified as workers, since their work of ensuring the upbringing, care and

education of children entrusted to them by a public authority is carried out in return for payment, and under the supervision and evaluation of the competent public service. However, application of regulations on mandatory resting periods is ruled out, being incompatible with an activity that involves carers integrating the child left under their care into their home and family for a sustained period of time. Living together as a family and caring for the people who make up this living unit does not allow for interruptions.

III. EMPLOYED PERSONS, SELF-EMPLOYED PERSONS AND SERVICE PROVIDERS

In addition to the concept of an employee, it is necessary to distinguish between a self-employed worker and another figure known in the EU as a “service provider”.⁶ The distinction appears in the ECJ case 15 June 2006, *Commission v. France* C-255/04, EU:C:2006:401, regarding the regulation that, with the aim of avoiding concealed employment and fraud, rules the activity of artists in France. It consists of imposing the presumption of salaried status when the artist is established and provides regular services of that kind in his/her Member State of origin. It is disputed in the case whether such an imposition could constitute an obstacle to the freedom to provide services in France by imposing greater burdens on the companies that hire them (with the result that France is condemned).

On the other hand, the judgment of 4 December 2014, *FNV Kunsten Informatie en Media*, Case C-413/13, EU:C:2006:401, contributes to the distinction between a employee, a self-employed service provider and a bogus self-employed person. It is questioned whether agreements reached by certain workers’ organisations setting minimum fees for self-employed service providers who, under a contract for work or services, carry out the same activity for an employer as employees, may fall outside the scope of Art. 101(1) TFEU (free competition). The ECJ classifies such self-employed persons as genuine undertakings, and rejects that the actions of the organisations representing them and acting on their behalf can be regarded as genuine trade union activity; or that the agreements reached are the genuine result of collective labour bargaining. So they cannot escape the scope of Art.101.1 TFEU. Unless the service provider is a “bogus self-employed person”. And for this purpose the case law is used, according to which an independent economic operator can be

⁶ The difference in common law between “employee” and “worker”.

assimilated to a employee when he does not determine his behaviour on the market autonomously, but depends entirely on his principal; he does not bear any of the financial and commercial risks resulting from the activity, and operates as an auxiliary integrated into the principal's undertaking (Judgment of 14 December 06, *Confederación Española de Empresarios de Estaciones de Servicio* C-217/05, EU:C:2006:784, App. 43 and 44; and judgment of 20 December 2017, *Asociación profesional Elite Taxi/Uber* C-434/15, EU:C:2017:981; the activity carried out by the platform is also classified as a transport activity by judgment of 10 April 2018, *Uber France*, C-320/16, EU:C:2018:221).

The ECJ insists that the fact that a person is classified under national law as a “self-employed provider” does not preclude him from being classified as an “employed person” for the purposes of EU law if his/her independence is fictitious and conceals what is to all intents and purposes an employment relationship (judgment of 13 January 2004, *Allonby*, C-256/01, EU:C:2004:18). In particular as regards their freedom to determine their working hours, their place of work and the content of their work, their non-involvement in the commercial risks of that employer (judgment of 14 December 1989, *Agegate*, C-3/87, EU:C:1989:650) and their integration into the company during the period of the employment relationship (judgment of 16 September 1999, *Becu and others*, C-22/98, EU:C:1999:419). All of which will be for the referring court to verify.

IV. THE UNIQUENESS OF CASES INVOLVING DIRECTORS AND ADMINISTRATORS OF COMMERCIAL COMPANIES

The compatibility between the status of director or member of the board of directors of a commercial company and that of an employee for the purposes of applying EU social law rules is first raised and addressed in judgments of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674 and 9 July 2015, *Balkaya* C-229/14, EU:C:2015:455. More recently, in the “*Bosworth and Hurley*” case (judgment of 11 April 2019, *Bosworth and Hurley*, C-603/17, EU:C:2019:310), and in judgment of 5 Mayo 2022, *HJ v Ministerstvo práce a sociálních věcí*, C-101/21, EU:C:2022:356).

The substantive issue in the “*Danosa*” case was whether or not the rules on the protection of pregnant women against dismissal provided for in Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ L 348, p. 1) applied to a

member of the board of directors of a Lithuanian limited liability company (LKB).

Ms Danosa was removed from her position as the sole member of that board of directors when she was pregnant. In order to decide that question, the ECJ took into consideration the fact that she had provided services to LKB on a regular basis and in return for remuneration, carrying out the duties of a member of the board of directors; it concluded that she had the status of a ‘pregnant worker’ and was entitled to the guarantees against dismissal during pregnancy. It is irrelevant to the ECJ that Ms Danosa was the only member of the management body and that she was responsible for drafting its rules of procedure. The objective of the Directive would not be achieved if the protection depended on the formal classification of her relationship under national law, or on the choice between one type of contract or another at the time of her recruitment.

It should be noted that Lithuanian national law provides for the possibility of entering into an employment contract with the members of the executive bodies of limited liability companies, where they have not already been engaged under a civil contract (Labour Code Art. 44); and that Lithuanian social security legislation considers members of the boards of directors of commercial companies as employees;⁷ while the Lithuanian Commercial Code⁸ defines the board of directors as the executive body of the company, but subject in certain cases to a supervisory board, whose powers include the possible suspension of the mandate of the members of the management body (Arts. 221 and 224).

In the “*Balkaya*” judgment, the ECJ addresses two questions for a preliminary ruling. The first one is whether a member of the management of a limited liability company, who carried out his activity under the direction and control of another corporate body and received remuneration in return, must be taken into account in the calculation for the purposes of collective redundancy; the second is whether a person who performs real work within the undertaking in the context of a traineeship in return of which he receives financial assistance from a public body can be regarded as a employee for the same purposes.

The ECJ insists on the need to adopt an autonomous and uniform concept of worker in the Union’s legal order if the aim is to ensure that the European rule fulfils its purpose. Otherwise, the thresholds provided for in Di-

⁷ Art.1.c) Likums par valsts sociālo apdrošināšanu, Latvijas Vēstnesis, 1997, No 274/276.

⁸ Komerclikums, Latvijas Vēstnesis, 2000, No. 158/160.

rective 98/49 would be at the disposal of the Member States, and this would make it possible to alter the scope of application of the aforementioned rule and deprive it of its full effectiveness (see judgment of 18 January 2007, *Confédération Générale du Travail and others* C-385/05, EU:C:2007:37, nr. 47). The ECJ also recalls that, according to settled case law, the nature of the relationship cannot have any consequences whatsoever as regards the status of employee for the purposes of EU law (Judgment of 20 September 2007, *Kiiski* C-116/06, EU:C:2007:536, nr. 26 and the case law cited). Thus, the non-employment classification that German case law attributes to the relationship of an administrator cannot be an obstacle to considering him to be a “employee”, provided that he meets the requirements that, according to the ECJ itself, define the figure and the employment relationship.

On the second question, the answer is even more categorical: “the concept of ‘employee’ in EU law extends to a person who serves a traineeship or periods of apprenticeship in an occupation”. This is not undermined by the fact that the productivity of the person concerned is low, that he does not perform a complete task, that he works only a limited number of hours per week and that his pay is limited (see, in particular, judgments of 3 July 1986, *Lawrie-Blum* C-66/85, EU:C:1986:284, nrs. 19 to 21; 26 February 1992, *Bernini* C-3/90, EU:C:1992:89, nrs. 15 and 16; 19 November 2002, *Kurz* C-188/00, EU:C:2002:694, nrs. 33 and 34; and 17 March 2005, *Kranemann* C-109/04, EU:C:2005:187, nr. 13). The ECJ concludes by stating that neither the legal context of the “employment” relationship under which a vocational training or work placement is carried out, nor the origin of the resources intended for remuneration of the person concerned (funding through public subsidies) can have any consequences whatsoever with regard to the person’s status as a worker (judgments of 31 May 1989, *Bettray* C-344/87, EU:C:1989:226, nrs. 15 and 16; 26 November 1998, *Birden* C-1/97, EU:C:1998:568, nr. 28; and 19 November 2002, *Kurz* C-188/00, EU:C:2002:694, nr. 34).

Although, in the “*Bosworth and Hurley*” case (judgment of 11 April 2019, *Bosworth and Hurley*, C-603/17, EU:C:2019:310), the ECJ concludes that, under EU law, the contract between a company and a director lacks subordination, so that there cannot be a contract of employment, especially when the director may have been the one who drafted the contract and who controls the day-to-day management of the company’s affairs, as well as his own duties.

However, most recently, in judgment of 5 Mayo 2022, *HJ v Ministerstvo práce a sociálních věcí*, C-101/21, EU:C:2022:356, the ECJ holds that EU law - specifically Directive 2008/94/EC on protection against corporate

insolvency - precludes a person who simultaneously performs the functions of director and member of the board of directors from being classified as an employee for the purposes of applying the guarantees of European law to that person. This was the case of an architect who, as a director of the company, was promoted to the position of chairman of its board of directors. The management of a commercial company and membership of its board of directors does not, in itself, make it possible to exclude or presume the existence of an employment relationship. All the more so when the person who manages the company does so on the basis of an employment contract validly concluded under national law. Even if he has acquired the status of a member of the management body.

1. **Has the ECJ gone beyond the sphere of the employment contract?**

This ECJ case law immediately gave rise to the idea that the thesis of the incompatibility of a double relationship, commercial and employment, had been overcome. And that the door had been opened to the inclusion of directors in the field of labour law.

But what the ECJ says does not depart from the Community concept of employee coined by its own case law, which takes into account the material conditions under which services are provided. Thus, an employment relationship exists when a person performs, for a certain period of time, for the benefit of another person and under his direction, certain services in return for which he/she receives remuneration. If the situation in which the person finds himself meets these requirements, the fact that national law attributes a specific nature or a *sui generis* character to the relationship is irrelevant for the purposes of classifying him/her as a worker under European Union law. This would have the effect rendering irrelevant any exclusions from the concept of employee which might be made by national legislation.

The same conclusion applies to the formal qualification as a self-employed person under national law, if it merely disguises a genuine employment relationship, and where independence is only fictitious.

In short, for EU law the concept of employee is material and objective. Without prejudice to the fact that there may be “borderline” cases, such as independent service providers, civil servants or staff subject to an administrative or statutory regime. Incidentally, some EU social rules apply to them.

That the concept of “employee” is still under construction in the doctrine of the ECJ, and in an expansive manner, is evidenced by the “*HK/Dan-*

mark” case (judgment of 2 June 2022, *HK v Danmark and HK/Privat*, C-587/20, EU:C:2022:419), which invokes precisely the breadth of the concept of “workers” in order to consider Directive 2000/78 applicable, establishing a general framework for equal treatment in employment and occupation, holding as contrary to such directive national legislation - in this case, the statutes of a trade union - which restricts eligibility for the presidency of a trade union on grounds of age.

2. Is there a different conception of the subordination note under the ECJ’s case law?

The ECJ understands that the question of the existence of a relationship of subordination must be answered according to the circumstances of each specific case.⁹ In the “*Danosa*” case, it reasoned that the fact that the interested party is a member of a board of directors of a share capital company does not in itself exclude the possibility that she may be in a situation of subordination in relation to that company. It is necessary to examine the conditions under which the board member was recruited, the nature of the functions entrusted to him/her, the framework in which they are exercised, the scope of his/her powers and the control he/she is subject to within the company, as well as the circumstances in which he/she may be dismissed.

In that regard, the ECJ finds that a member of a management body such as the board of directors in the ‘*Danosa*’ and ‘*Balkaya*’ cases actually provides services to the respective share capital company in return for remuneration and carries out his activity under the direction of another body, whose powers include the power to dismiss him. They are therefore covered by the material concept of employee. Note the presence of a further argument, in the “*Danosa*” case, which concludes that it is for the national court to establish the circumstances of the dispute and to examine whether the dismissal agreement was essentially based on the applicant’s pregnancy. It concludes that anti-discrimination protection must apply irrespective of whether the person concerned falls within the scope of Dir 92/85/EEC, Dir 76/207/EEC or even Dir 86/613/EEC, which applies to self-employed workers. The legal status of Ms Danosa’s relationship would have been irrelevant, since protection against discrim-

⁹ A comparative view of the scope of the subordination note in B. GRANDI, “Let’s deconstruct the meaning of dependent work to enlarge the scope of labour law”, at https://works.bepress.com/barbara_grandi/ (accessed 14-12-17).

ination on grounds of sex –as in the case of pregnancy– would apply in any event.

The anti-discrimination protection of EU law extends even to self-employed persons –in this case, against discrimination on grounds of sexual orientation– as it is corroborated by the ECJ of 12 January 2023, Case C-356/21, in relation to a Polish television freelancer who had his work terminated after posting a video with his same-sex partner on the YouTube channel.

The rationale is similar in the “Balkaya” judgment, which refers repeatedly to the reasoning and decision in the “Danosa” case. On this occasion, and referring to Directive 98/59 on collective dismissals, the starting point is that the fact that a person is a member of a management body of a capital company does not *per se* exclude the concurrence of a subordinate position; a circumstance that must be assessed in the light of all the factors already mentioned (form of contract, nature of the functions, framework in which they are exercised, scope of the powers, control exercised within the company, and conditions under which the person may be dismissed). Here too, the key to the solution is that in Germany a member of a management body carries out his activity under the direction or control of another body of the company, so that the ECJ considers that he can be classified as an “employee” within the meaning of EU law (with reference to the “*Danosa*” judgment, nrs. 51 and 56).

The judgment of 5 Mayo 2022, HJ *v Ministerstvo práce a sociálních věcí*, C-101/21, EU:C:2022:356 is even simpler and clearer, as it concerned a managerial employee who subsequently acquires the status of a member of the management body.

CHAPTER 4

WORK CONDITIONS AND GENDER-BASED WAGE DISCRIMINATION

SUSANA RODRÍGUEZ ESCANCIANO

INDEX: I. The marginalization of women in the workplace as a starting point. II. The evolution of EU policies. The transition to gender equality as a fundamental right. III. Directive 2006/54/EC. Objective scope. IV. Undervaluation of women's wages. 1. The worrying statistical reality. 2. Key legislative milestones. Directive 2023/970 as the latest development. 3. Work of equal value. 4. The worrying exogenous factors. The commitment to transparency

I. THE MARGINALIZATION OF WOMEN IN THE WORKPLACE AS A STARTING POINT

As is well known, the labour market presents a series of defining features that clearly show the worse condition of the female labour force compared to that of men. It should not be hidden that within the European Union, even today, women constitute a secondary workforce, in which unemployment has a greater impact, especially when they preferably provide their services in feminized occupations (“pink collar”) and that, precisely because of this, they are considered to be low-skilled and are characterized in many cases by instability and low pay. when they do not fall squarely into the informal economy or into

“black work”. The difference in remuneration with men remains, without the presence of that “glass ceiling” that causes very few positions located at the top of the professional classification system to be occupied by women either.

To all these inequalities is added the one caused by the care of dependent people, understood as those who for a prolonged period of time require help to carry out certain daily activities (dressing, eating, grooming...). Their care leads the female workforce, in many cases, to choose between work or family life. All this without forgetting that the responsibility for caring for children still falls mainly on women, which often leads to difficulties in maintaining their employment and fewer possibilities to resume their professional careers late, which logically results in a decrease in care by the Social Security system.

As if this were not enough, the profound changes that are hitting the markets have accentuated the disadvantaged situation of women, as they are unequally affected by the expansion of the business decision-making space and the level of temporality, contingency, partiality, precariousness, outsourcing and erosion of the quality of jobs, which have less disturbed male workers. All this without forgetting that the intensification of subordination at work and its control through algorithms, the insecurity corresponding to the flexibility in the conditions given over to the determination of unilateral business power, the greater mobility or the high irregularity in the distribution of time dedicated, have particularly affected women.

In view of such a discouraging reality (occupational segregation, wage undervaluation, overqualification and underutilization of skills, lower social benefits, precariousness, work overload, narrowing of the options for insertion and maintenance of employment...), it is increasingly important not to consider equality at work as a mere idea or postulate of good intentions; on the contrary, it must be projected as an idea-force from European regulations to the constitutional text, passing through the implementing labour legislation in all its manifestations, always being endowed with a double aspect for the sake of effective anti-discrimination protection: positive (promotion of conditions for its achievement) and negative (removal of obstacles).

II. THE EVOLUTION OF EU POLICIES. THE TRANSITION TO GENDER EQUALITY AS A FUNDAMENTAL RIGHT

For some time now, it has been necessary to thoroughly review the socio-legal position of women, of workers in general, of the roles attributed to each one, in whose unequal distribution lies the reason for the preterition in all fields of labour relations, and, of course, and in a more accentuated way, in that

of the individual employment relationship. There is no doubt that a legislative intervention aimed at the mere formal recognition of equality in the provision of services cannot but have – if any – a very limited effect, which is to make it possible to require other types of interventions aimed at achieving real parity in access to and maintenance of a decent job, objectives that have long been postulated at the international level, the Convention on the Elimination of All Forms of Discrimination against Women of the United Nations Assembly of 1979, which consolidates the idea that discrimination on grounds of gender violates “the principles of equality of rights and respect for human dignity”, as well as, but not limited to, two ILO Conventions, No. 111 of 25 June 1958 on non-discrimination in respect of employment and occupation and No. 183 of 15 June 2000 on the revision of the Maternity Protection Convention of 1952. The ILO has once again taken a leading role in this issue, launching a 2015 “Resource Guide on Gender in Employment and Labour Market Policies”, which denounces that gender concerns have not yet been fully integrated into mainstream policies, and urges States to develop efforts to promote and strengthen capacities on gender issues. How to mainstream gender issues in the formulation, implementation, monitoring and evaluation of employment and labour market policies. This is without forgetting that the United Nations World Summit held in New York between 25 and 27 September 2015, prior to the celebration of the 70th General Assembly, concluded with the adoption of the Sustainable Development Goals, number 5 of which refers to achieving “gender equality and empower all women and girls”.

In the Community framework, it is necessary to highlight several texts of great importance, marked by an evolution of European social policy aimed at satisfying the need to advance responses to the successive changes in the labour markets and in employment. The safeguarding of equal treatment between women and men, especially in matters of employment and social security, was not originally generally recognised in the Treaty on the European Economic Community, Article 119 of which referred only to equal pay and also in relation to equal work. As is not difficult to guess, this precept had a markedly economic purpose, being designed as a mere safety clause in order to avoid possible *social dumping* of female labour.

In its limited formulation, Article 119 was for many years scarcely operational, until a new “constitutional” approach to equality took place, which to a large extent occurred as a result of the work of legal engineering carried out by Community doctrine and jurisprudence, in an attempt to alleviate the disregard in the Treaty. In that exercise, the Court proceeded to give direct horizontal effect to the right not to be discriminated against on grounds of sex, and to

extend its material scope of application outside the walls of equal pay, and finally recognised that right as fundamental in all aspects of professional life, even beyond.

The acceptance of the principle of non-discrimination, recognised in the European Convention for the Protection of Human Rights, signed in Rome on 4 November 1950, in the European Social Charter of 1961, and in the Community Charter of the Fundamental Social Rights of Workers of 1989, as a fundamental social right, is reinforced by the Treaty of Amsterdam, which entails “the constitutionalisation at Community level of measures for social integration, in general, and especially aimed at women”.

This Treaty gave real impetus to the effective protection of gender equality at Community level and to the recognition of the right to parity between women and men as a true prerogative of the individual, beyond the economic and professional spheres, being incorporated as a “cross-cutting objective of the various policies and spheres of action of the Community, at the same time, empowering States to establish measures aimed at facilitating the exercise of professional activities by the under-represented sex, that is, women, or to avoid or compensate for disadvantages in their professional careers. Specifically, it assumes the second paragraph of Article 23 of the Charter of Fundamental Rights of the European Union of 2007, belonging to its Title III, entitled “equality between men and women”, which recognizes the fundamental right to formal equality before the law (Article 20), as a principle that prohibits all discrimination, and, in particular, that exercised on grounds of sex (Article 21), and orders to guarantee equality between women and men in all areas, “including employment, work and pay” (Article 23).

Subsequently, the TFEU included provisions on equality in the regulation of social policy (Title X, Articles 151 to 161), the objectives of which included the improvement of living and working conditions, equality through progress, adequate social protection and the fight against exclusion (Article 151), making express reference to the Union’s obligation to support and complement the action of the Member States with regard to equality between men and women in terms of job opportunities (Article 153.1). Along these lines, Article 157 of the TFEU includes the commitment of each Member State to guarantee the application of equal pay for the same work or of equal value, while adopting specific measures such as the offer of advantages specifically aimed at facilitating the exercise of their work activities and advancement in their professional careers. In more cautious language, Article 10 TFEU states that “in the definition and implementation of its policies and actions, the Union shall endeavor to combat all discrimination on grounds of sex”.

The principle of equality and non-discrimination between men and women has also been present in successive instruments of secondary legislation, including Council Directive 75/117/EEC of 19 February on the implementation of the principle of equal pay for men and women¹, now repealed; Council Directive 76/207/EEC, of 9 February 1976 on the application of the principle of equal treatment for men and women with regard to access to employment, vocational training and promotion, and working conditions² or Directive 79/7/EEC of 19 December on the progressive implementation of the principle of equal treatment for men and women in matters of social security, also repealed; more recently, Directive 92/85/EC, of 19 October, on improving the safety and health at work of pregnant workers, workers who have recently given birth or are breastfeeding; Directive 2006/54/EC of the European Parliament and of the Council of 5 July on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation³ (which recasts, *inter alia*, Directives 75/117/EEC, 76/207/EEC, 86/378/EEC of 24 July 1986) on the implementation of the principle of equal treatment for men and women in employment and occupation schemes. Social Security professionals; Directive 97/80/EC of 15 December on the burden of proof in cases of discrimination based on sex and its amendments; Directive 2019/1152/EC of 20 June on transparent and predictable working conditions in the European Union; Directive 2019/1158/EC of 20 June on work-life balance for parents and carers; Directive 2022/2381/EC of 23 November on a better gender balance among directors of listed companies and related measures; Directive 2022/2041/EC, of 19 October, on adequate minimum wages in the European Union or Directive 2023/970/EC, of 10 May, which reinforces the application of the principle of equal pay for men and women for the same work or work of equal value through pay transparency measures and mechanisms for their compliance.

In addition, the European institutions have been designing a myriad of programmes and strategies, the most significant of which are: the European Parliament Resolution of 3 October 2017 on women's economic empowerment in the public and private sectors; the European Pillar of Social Rights, which includes among its essential principles that of equal treatment and opportunities between women and men, which must be guaranteed and promoted in all areas, including with regard to participation in the labour market, work-

¹ OJ L 45, 19-2-75.

² OJ L 39, 14-2-76.

³ OJ L 204, 26-7-06.

ing and employment conditions and professional careers, with express reference to equal pay; or the European Strategy for Gender Equality 2020-2025, which includes the gender equality perspective as a strategic objective in all future institutional action.

On the other hand, and as in other areas of the legal system, equality and non-discrimination on grounds of sex has had the invaluable help and impetus of the jurisprudence of the Court of Justice of the European Union, whose pronouncements have contributed in a fundamental way to its dissemination, protection and improvement, having been the start of multiple advances and revisions that have gradually been incorporated into the normative *acquis* of the European Union and have assessed the future of internal regulations. This Court has considered the right to equal treatment for men and women as ‘a fundamental right’, recognizing the direct effect of the provisions of Article 14(1)(c) and Article 15 of Directive 2006/54/EC, which penalize the prohibition of discrimination on grounds of sex in employment and working conditions, including dismissals, as well as those of remuneration, and the right of women to return to a job under non-unfavourable conditions after maternity leave⁴.

III. DIRECTIVE 2006/54/EC. OBJECTIVE SCOPE

Since the violation of the right to discrimination between male and female workers is an attack on human dignity and its recognition an essential principle of EU law, the observance and guarantee of which is the responsibility of national judicial bodies and the Court of Justice of the European Union itself, Directive 2006/54/EC is characterized by its breadth of contents, entailing the extension of the principle of parity to all working conditions, from hiring to the development of the relationship and up to dismissal, while also covering vocational guidance and training initiatives. Without any doubt, the European legal system enshrines the principle of equal treatment and prohibits all discrimination on grounds of sex, both direct and indirect in the workplace, the terms used in this regard by the aforementioned Directive being very clear, which defines the first form of discrimination as that in which a person is, has been or could be treated less favorably on the basis of sex. And the second as one in which an apparently neutral provision, criterion or practice places persons of a certain sex at a particular disadvantage compared to persons of another sex, unless that provision, criterion

⁴ ECJ 6-3-14, Napoli C-595/12.

or practice could be objectively justified by a legitimate aim and the means to achieve that aim are appropriate and necessary.

This prohibition of discrimination, supported by multiple pronouncements of the European Court of Justice, is manifested in different aspects:

1. In the conditions of access to employment⁵ (including offers),⁶ self-employment or employment, including selection criteria⁷, conditions of contract, professional hierarchy or promotion⁸.

2. Access to all types and levels of vocational guidance, training and retraining, as qualification is an issue intimately connected with equal treatment in access to (and maintenance) of employment, as well as necessary to guarantee its full effectiveness.

3. In the conditions of employment and work, including those of dismissal⁹ and remuneration, not only for the same work but for work of equal value¹⁰.

4. In the affiliation and participation in workers' or employers' organizations, or in those whose members exercise a specific profession, including the benefits that they may offer.

5. In the prohibition of sexual harassment and harassment based on sex, insofar as it constitutes a consequence of the inequality of women in the workplace that violates their dignity and can have serious effects on the health, confidence, morale and performance of those affected, also causing serious damage to their job prospects and expectations, depriving and hindering adequate integration into the labour market.

6. In the safeguarding of equal treatment in the judicial sphere¹¹ through the so-called "clauses of effective jurisdictional protection of the principle of equality of the sexes", which are maintained "even after the termination of the relationship in which the discrimination has allegedly occurred". The Court of Justice of the European Union has even recognised the possibility of filing an

⁵ ECJ 11-7-95, Meyers C-116/94.

⁶ ECJ 7-12-00, Schnorbus C-79/99.

⁷ ECJ 2-10-97, Kording C-100/95.

⁸ ECJ 11-1-00, Kreil C-285/98.

⁹ ECJ 26-2-86, Marshall I C-152/84; 8-11-90, Handels C-179/88; 14-7-94, Webb C-32/93 or 22-02-18 Porras Guisando C-103/16. The latter considers legislation that does not preventively prohibit the dismissal of pregnant or breastfeeding workers to be contrary to European Union law and limits itself to providing for its nullity when it is considered illegal.

¹⁰ ECJ 3-2-00, Mahlburg C-207/98; 9-11-90, Dekker C-177/88; 31-5-95, Royal Copenhagen C-400/93 o 17-9-02, Lawrence y otros C-320/00.

¹¹ ECJ 19-4-84, Von Colson y Kamman C-14/83; 13-5-86, Bilka C-170/84; 17-10-89, Danfoss C-109/88; 13-12-89, Ruzius-Wilbrink C-102/88; 27-6-90, Kowalska C-33/89; o 9-2-99, Seymour-Smith y Pérez C-167/97.

extemporaneous claim within two weeks against a dismissal given that the worker was pregnant¹².

7. In the protection of equal treatment in the field of social protection, both for legal and professional regimes, in the sense of the absence of any direct or indirect discrimination on grounds of sex in relation to the scope of application and conditions of access to them, the obligation to contribute and the calculation of benefits, or, in short, the duration and maintenance of the right to these¹³. Special mention should be made of an order of the Court of Justice of the European Union, which considers that Italian national legislation is discriminatory on grounds of sex, by virtue of which workers, hired as dancers, who reach the retirement age (45 years for both women and men), are entitled to work, for a transitional period of two years, an option that allows them to continue developing their professional activity until the age limit to remain active, set at 47 years for women and 52 years for men¹⁴. The establishment of different retirement ages (60 years for women and 65 for men) for the purpose of enjoying a pension plan¹⁵ or for the purpose of accessing early retirement (65 for men and 60 for women)¹⁶ has also been considered discriminatory, although it is considered in accordance with EU law that access to voluntary early retirement is conditional on the amount of the pension being at least equal to the amount of the minimum pension that would correspond to the age of 65¹⁷. The European Court of Human Rights has also considered discriminatory the establishment of a lower age of compulsory retirement for female civil servants compared to that established for male civil servants¹⁸.

Finally, it has been referred to the national judicial body to assess whether a rule prohibiting the compatibility of two total permanent disability pensions when they are from the same regime, while it is admitted when they are from different regimes, is or is not discriminatory because it places women at a particular disadvantage¹⁹.

Recently, the Court of Justice of the European Union has not admitted the request for a preliminary ruling made by the Labour Court number 1 of Seville

¹² ECJ 27-06-2024, TC/Firma Haus Jacobus C-284/23.

¹³ ECJ 26-2-86, Roberts C-151/84; 13-3-91, Cotter y otros C-377/89; 27-10-93, Steenhorst-Neerings C-338/91; 22-11-12, Elbal Moreno C-385/11; 11-4-13, Soukupová C-401/11; 9-11-17, Espadas Reicio C-98/15.

¹⁴ ECJ 7-02-18, Maturi C-142/17 y 143/17.

¹⁵ ECJ 07-10-19, Safeway C-171/18.

¹⁶ ECJ 05-11-19 Commission v. Poland C-192/18

¹⁷ ECJ 21-01-21 BT c. INSS C-843/19.

¹⁸ ECHR 10-12-1022, Moraru and Marín v. Romania.

¹⁹ ECJ 30-06-22, KM c. INSS C-625/20.

(Spain), by Order of 28 September 2022, in which the possible collision with EU law of the absence of an extension of maternity leave in single-parent families was raised.

For its part, the European Court of Human Rights has considered discriminatory the denial of parental leave to care for a child to a male police officer, since the legislation understood that for paternal enjoyment there must be objective reasons why the mother could not take care of the child, reasons that had been understood in the previous proceedings that did not exist when the mother, that she was hospitalized, refused to raise her²⁰.

Be that as it may, Directive 2006/54 has given a green light to two-way positive action by allowing Member States to maintain or adopt measures ‘with a view to ensuring in practice full equality between men and women in working life’ (Article 3). However, and despite all these advances, much remains to be done to ensure that the promotion of equality between men and women is a strategic element that is definitively integrated into all EU policies, and even more so into all State policies. The promotion of legislation adapted to the specific protection and promotion needs of women workers must therefore continue to develop and, above all, expand in the future, insofar as the condition of women themselves continues to be a source of harmful consequences and discrimination.

IV. UNDERVALUATION OF WOMEN’S WAGES

1. The worrying statistical reality

It is an incontrovertible reality that women’s salaries are lower than men’s and that women’s presence is lower in occupations with high remuneration²¹. Of course, there are women who receive very high salaries and men whose salaries are very modest, but the large numbers highlight a significant wage gap. They are so well known, but it is worth repeating in this context the data provided by the statistics: on average the wage gap (defined according to the indicator prepared by Eurostat as the difference in the average hourly wage received by women with respect to the average salary of men) continues to be an endemic evil in the European Union, as it reaches the parameter of 12.7 per cent.

This deplorable reality, which reflects the horizontal segregation (by sectors of activity) and vertical segregation (in promotion or in professional ca-

²⁰ ECHR 19-03-2024, B.T c. Rusia.

²¹ ILO: *Global Wage Report 2016/2017*. Geneva, 2017, p. 86.

reer) and which contrasts with a scarcity of complaints, claims and litigation, has not been avoided by more efforts that have been made from the regulatory point of view, which has begun with the generic recognition of the right to formal equality linked to salary and the performance of equal work and concluded with the transformation into material equality, which, as such, is connected to a broad concept of remuneration and to work of equal value, endowed with direct effectiveness.

2. **Key legislative milestones. Directive 2023/970 as the latest development**

In this evolution, it is worth mentioning as the most significant steps, apart from other international instruments of more generic content, the United Nations Convention on the Elimination of All Forms of Discrimination against Women of 1979, whose article 11 d) imposes the duty on the States Parties to ensure to women, under conditions of equality, “the right to equal remuneration, including benefits, and equal treatment with respect to work of equal value, as well as equal treatment with respect to the evaluation of the quality of work”. More specific is ILO Convention No. 100 of 1951, of which Article 2 deserves to be highlighted, according to which “each Member State shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.” In reference to the Council of Europe, the reference to Article 4.3 of the European Social Charter of 1961, revised in 1996, which, under the heading “the right to a fair remuneration”, states that “... The contracting parties undertake... to recognise the right of men and women workers to equal pay for work of equal value”.

With regard to European Union legislation, since the Treaty of Rome of 15 March 1957 has incorporated an allusion to non-discrimination in pay, specifically in Article 119, which expressed the principle of equal pay for equal work, in the following terms: “each Member State shall ensure during the first stage and thereafter maintain the application of the principle of equal pay for men and women for the same job”. From there it was renumbered as Article 141 of the consolidated text of the Treaty establishing the European Community, by virtue of which, transitioning to the current Article 157, paragraph 1, of the TFEU, it obliges each Member State to ensure the application of the principle of equal pay for men and women for the same work or for work of

equal value, a principle that is one of the five priorities set out in the Women's Charter, which reaffirms the Commission's commitment to a strong mobilization of all instruments, legislative and non-legislative, to reduce the pay gap between men and women. Along the same lines, Directive 2006/54/EC establishes the principle of equal pay for the same work or for work to which the same value is attributed and the obligation to eliminate direct or indirect discrimination on grounds of sex in all the elements and conditions of pay. The European Commission's Recommendation of 7 March 2014 ²² on strengthening the principle of remuneration between men and women through transparency also has an impact on this matter.

Previously, the Court of Justice had recognized the principle of equal pay for men and women as regulated by Article 119 of the EEC Treaty and that it could be relied on before national courts and tribunals in disputes between individuals (direct effect), ²³ but Directive 75/117/EEC (now repealed) specified that 'in certain respects the material scope of Article 119 contains (contained), in addition, various precepts designed, in essence, to improve the jurisdictional protection of workers who may be harmed by the failure to apply the principle of equal pay established by Article 119' ²⁴. In other words, not only are national legislatures prevented from establishing 'artificial obstacles' to the effectiveness of the principle of equal pay, but it also imposes on employers an obligation of result by virtue of which male and female workers must receive the same remuneration, it being the responsibility of the national courts to ensure compliance with them by making use of all the means available in their domestic law.

However, the Court of Justice of the European Community itself has followed a rather restrictive line that has been progressively extended, but with severe limits when it comes to judging positive action measures in relation to wages, and it may cite, by way of example of the first stage, the consideration as discriminatory of the provisions of the occupational accident insurance scheme that allows women to receive a social benefit for an accident of these characteristics higher than men, in terms of their longer life expectancy, not in vain implies unequal treatment which constitutes discrimination contrary to Community law ²⁵.

However, EU and case law progressively evolved and will continue to do so after the enactment of Directive 2023/970 which reinforces the application

²² OJEU 69/112, 8-3-14.

²³ ECJ 8-4-76, Defrenne C-43/75.

²⁴ ECJ 8-4-76, Defrenne C-43/75.

²⁵ ECJ 3-9-14, X C-318/13.

of the principle of equal pay for men and women for equal work or work of equal value through pay transparency measures and mechanisms for their compliance.

This Directive states that employers must inform job applicants about the starting salary or pay band of the positions offered, either in the vacancy announcement or by any other means, without being able to ask about the remuneration history in current or previous employment relationships and ensuring the use of neutral terms in the selection process (Article 5). The inclusion of transparency at the time of selection is of great importance, as it is an area of special vulnerability.

With regard to the remuneration policy within the production unit, companies will make available to their staff the objective and neutral criteria used to determine wages, remuneration levels and remuneration progression, and States may exempt from this obligation those with a workforce of less than 50 workers (Article 6).

Each worker has the right to request and know within a maximum period of two months for him/herself, through her/his representatives or an equality promotion body, his/her individual remuneration level and the average remuneration levels, disaggregated by sex, for the categories of workers who perform the same work or work of equal value to his own (Article 7).

In addition, any company with one hundred or more workers must prepare a report on the wage gap every three years --one for those with two hundred and fifty or more-- to be implemented progressively according to its size (but in any case before June 7, 2031), an obligation that may be extended by each State to those with a smaller workforce or voluntarily assumed by them (Article 9).

Where this is mandatory, a remuneration assessment shall be carried out in cooperation with the workers' representatives on whether there is a pay gap of at least 5% between men and women in any category, whether the employer has not justified such a difference on objective and neutral grounds and whether, in addition, it has not been remedied within the following six months. This instrument, which will be available to workers, representatives, the Labour Inspectorate and the competent bodies in matters of equality, must contain: <<a) an analysis of the proportion of workers in each category; (b) information on the average remuneration levels of workers and the complementary or variable components for each category; (c) any difference in the average pay levels of workers in each category; (d) the reasons, if any, for such differences in average pay levels, based on objective and gender-neutral criteria and determined jointly by the workers' representatives and the employer; (e) the pro-

portion of workers who have received some increase in their remuneration after their return to work after maternity or paternity leave, parental leave or carers' leave, if such an improvement occurred in the relevant occupational category during the period in which they took the leave; (f) measures to address pay gaps, if they are not justified on the basis of objective and gender-neutral criteria; g) an evaluation of the effectiveness of the measures of the above through joint remuneration evaluations>> (Article 10).

3. Work of equal value

The principle of non-discrimination is predicated not only with respect to the provision of exactly similar services, but, on the contrary, ends up extending to the concept of greater conceptual breadth “tasks of equal value”, linked to the nature of the work actually performed²⁶. The first judgments of the Court of Justice of the European Community dealt with cases in which women and men were in a comparable situation. Suffice it to recall that *Defrenne II* deals with the difference in pay between flight attendants and flight attendants, whose work is identical²⁷ or *Jenkins* concerned a part-time worker in a company producing women's clothing who performed the same duties as men on a full-time basis²⁸, but later he has understood that there is also discrimination when it comes to jobs that are not strictly equal.

In an effort to summarize, it is worth highlighting three cases in which the Court of Justice of the European Community analyzed the concurrent circumstances between non-identical jobs: in the *Cadman* case it concluded that, in principle, rewarding seniority does not constitute indirect discrimination on grounds of sex, even though men tend to have more seniority than women²⁹; In the *Wiener* case, when a question was referred for a preliminary ruling relating to the lower remuneration established for psychological psychotherapists (mostly women) in relation to that established for medical psychotherapists (mostly men) despite the fact that the activity carried out by both was similar, the Court justified the Community legitimacy of the difference in the dissimilar basic training and in the lower mobility (availability for another of the functions) of psychotherapists in relation to psychotherapist psycholo-

²⁶ ECJ 1-7-86, *Rummler* C-237/85.

²⁷ ECJ 8-4-76, *Defrenne II* C-43/75.

²⁸ ECJ 31-3-81, *Jenkins* C-96/80. In the same vein, ECJ 26-2-86, *Roberts* C-151/84; 13-2-96, *Gillespie and others* C-342/93 or 13-12-01, *Moufflin* C-206/00.

²⁹ ECJ 3-10-06, *Cadman* C 17/05.

gists³⁰; in *Kenny and Others*, the Court considered that the interest in maintaining good employment relations was a valid criterion for establishing a pay difference with detrimental effects on the activities carried out mainly by women, since it was a reference that was found in several collective agreements applicable in the same company, whose social partners had carried out joint negotiation strategies that had yielded better results for the masculinized collective³¹. Thus, the European Court of Justice has held that there may be differences in remuneration between workers and workers who perform the same work or work of equal value, provided that such distinctions can be explained by factors that are objectively justified and unrelated to any discrimination on grounds of sex and in accordance with the principle of proportionality³², as is the case, in a paradigmatic example that benefits women in this case, with a social policy aim of improving the professional situation of those who have had to interrupt their career due to maternity justifying differences that affect the retirement pension.

More recently, the Judgment of the Court of Justice of the European Union in the *Tesco Stores* case³³ concludes that the principle of equal pay for male and female workers can be directly invoked, both for <<equal work>> and <<for work of equal value>> between individuals when analysing the differences in pay between workers who sell products in stores or between workers. They do so online, so that if the conditions of remuneration can be attributed to a single source, the work and remuneration of these workers can be compared even if they work in different establishments.

The Judgment of the Court of Justice of the European Union, of 24 February 2022³⁴, has also been forceful which has established the non-conformity with European Union law of Social Security rules that place female workers at a particular disadvantage with respect to male workers and is not justified by objective factors unrelated to any discrimination on grounds of sex, as is the case with the exclusion of domestic workers from unemployment benefits, the correction of which has led to the enactment of Royal Decree Law 16/2022, of 6 September.

As has been seen, determining when two jobs are identical is relatively easy, the task of determining whether two jobs, despite not being the same,

³⁰ ECJ 11-5-99, *Wiener Gebietskrankenkasse* C-309/97.

³¹ ECJ 28-2-13, *Kenny and others* C-427/11.

³² ECJ 31-5-95, *Royal Copenhaguen* C-400/93 o 28-2-13, *Kenny and others* C-427/11. 140. ECJ 17-7-14, *Leone* C-173/13.

³³ ECJ 3-06-2021, *Tesco Store*, C-624/19

³⁴ ECJ C 389/20

deserve the same valuation is not always easy. By virtue of this parameter, the ultimate conclusion to be reached will depend on the comparison of “a set of factors, such as the nature of the work, the training conditions and the work characteristics”, thus avoiding a mere equivalence in the abstract based on the professional classification of individuals³⁵.

The 2014 Commission Recommendation on strengthening the principle of equal pay for women and men through transparency considers that the comparison of the value of work should be constructed using criteria such as qualification, effort and responsibility, as well as the nature of the tasks performed, an idea reiterated in the European Parliament resolution on women’s economic empowerment in the public and private sectors of 2017 which refers to the use of objective criteria such as “educational, professional and training requirements, competences, effort and responsibility, the work carried out and the nature of the tasks in question>>. For its part, Article 4.4 of Directive 2023/970 states that <<shall include skills, effort, responsibility and working conditions, and, if applicable, any other factor that is relevant to the specific position or job. They shall be applied in an objective and gender-neutral manner, in such a way as to exclude any direct or indirect discrimination on grounds of sex. In particular, they will not underestimate relevant interpersonal skills>>.

Finally, if it is proven that a group of women have been disadvantaged in terms of wages in relation to men, it is up to the employer to prove that the remuneration criteria are objectively justified and that they are unrelated to any discrimination. Here the key is to resort to statistical data that must refer to a sufficient number of people and must not be “fortuitous or circumstantial”³⁶.

The Court of Justice of the European Union has recently clarified that although subsistence allowances (monetary amount for accommodation and subsistence expenses) are an element of remuneration, EU law does not preclude a difference in the amount of such allowances depending on whether they are paid to a group of people who are predominantly men or women when these two groups of workers do not perform the same work or work to which the same value is attributed. This is because the airline that pays travel allowances, applying two different collective agreements, the amount is higher for those who fly the aircraft, the majority of whom are men; the other agreement applies to the rest of the crew, the vast majority of whom are women³⁷.

³⁵ ECJ 26-6-01, Brunnhofer C-381/99.

³⁶ ECJ 28-2-13, Kenny and others C-427/11.

³⁷ ECJ 4-10-04, Stavla C-314/23.

4. Worrying exogenous factors. The commitment to transparency

Once the lower female remuneration has been affirmed, specific explanations must be sought, justifying the higher salary of a male worker compared to a female worker in order to prevent the final discriminatory consequence. It is necessary to provide rigorous and conclusive results on the factors that continue to contribute to pay inequality, since this is perhaps the most expressive disadvantage suffered by the female workforce (average salary received), which in most cases is not due to reprehensible distinctions (manifest or latent) in the regulatory or conventional framework of reference. but also to exogenous factors of a wide variety of morphology³⁸; among the most noteworthy: the difficult and late incorporation of women into the world of work, usually being relegated to temporary occupations or with shorter hours; or vertical segregation (low participation in managerial and technical positions) and horizontal segregation (concentration in tasks with limited remuneration, of low productivity and feminized), usually accompanied by interruptions in their professional life for reasons such as motherhood or decisions in favor of caring for the family. In other words, although the reforms carried out in recent years have led to a generalized worsening of working conditions without distinction of gender that has only been slightly alleviated by the 2021 reform, the truth is that women have been suffering to a greater extent from the scourge of precarious employment, especially in the form of lower remuneration, accompanied by partiality and less seniority, due both to the role of caregiver socially attributed to an economic approach of opportunity cost: the family renounces the lowest salary, opting for the woman to work part-time to combine work and care for dependents or to temporarily abandon her job in order to dedicate herself exclusively to such care (of course), hence the accumulation of a shorter time in the company). The joint action of these elements translates into a

³⁸ The document prepared by the European Commission in 2014, entitled “How to combat the pay gap in the EU”, establishes up to six objective determining causes of the pay gap: a) direct or abrupt discrimination in the workplace, with women receiving a lower salary for work of equal value; b) in different jobs and in different sectors markedly female, low wages predominate, together with unpaid work in the home; (c) labour practices and wage systems show that the structure of wages and their components may give rise to different pay conditions; (d) the undervaluation of women’s work and abilities leads to the conclusion that greater physical effort is usually better paid, the predominance of men in activities and sectors often leads to a higher level of remuneration, women’s abilities are generally undervalued and low wages are paid in professions in which they are highly represented; (e) the low presence of women in leadership and high-level positions; (f) certain traditions and gender roles have an impact on wages, as they determine the role to be played in society, so that women in positions of responsibility in masculinized sectors are usually paid more than those who occupy them in strongly feminized sectors; (g) the reconciliation of work and family life leads women to work fewer hours, increasing the wage gap when women have children and work part-time.

notable differential, in a significant wage gap between the workforce of both sexes, both – and above all – in general terms (within the market) and specific (with respect to specific occupations). All this without forgetting, as the 2015 European Parliament Resolution points out, that taking into account how wages are currently increasingly negotiated individually, there is a lack of transparency in salary structures, making it very difficult to verify possible discrimination.

In a socio-labour context where women earn a lower percentage salary than their male colleagues, there is no doubt that the incidence of inflation affects women more from several points of view: firstly, the wage gap is entrenched in those productive sectors that have suffered the greatest wage cuts and in those professional groups with lower incomes. because in the face of a homogeneous reduction, the consequences are very different between a high salary and a low salary and such happens when a supplement is eliminated or its amount reduced. Secondly, wage reductions have affected feminised professions or sectors more, and therefore, women more. Thirdly, the freezing of certain allowances perpetuates the differences in their perception between men and women, notably, seniority, an issue aggravated by the current economic situation as a result of the invasion of Ukraine. Fourthly, the lack of determination in the functions of each post causes an ambiguity in comparison between the remuneration received by colleagues in the same company, which prevents complaints from being made. Fifthly, women's lower salaries also determine a lower level of contributions to Social Security systems, which has an impact on the quality of their benefits compared to those received by men, taking into account the markedly contributory nature of the system. Finally, the presence of women in management positions is very low, especially if we take into account that a third of medium and large companies do not even have a woman at the highest hierarchical levels, given the difficulties of reconciling the professional and family facets.

CHAPTER 5

MATERNITY PROTECTION

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I. REGULATORY MAP OF MATERNITY PROTECTION IN THE EUROPEAN UNION

The most relevant directives that currently refer to maternity protection are Directive 92/85/EEC, of October 19, 1985, relating to applying measures to promote safety and health at work of the pregnant worker, who has given birth or is breastfeeding (Tenth specific Directive on risk prevention in development of the Framework Directive 89/391/EEC) and Directive 2006/54/EC, of July 5, 2006 (Recast Directive on the application of the principle of equal opportunities and equal treatment between men and women in matters of employment and occupation). Directive 92/85/EEC provides a detailed treatment of the rights and guarantees of pregnant women, newly-mothering women, and

breastfeeding women to grant them preventive protection. It also establishes specific rights fundamentally related to leave, protection against dismissal without cause, and maintenance of employment rights. The protection provided to maternity and pregnancy in Directive 2006/54/EC is a general anti-discrimination protection that operates from the express assimilation of discrimination based on pregnancy and maternity to discrimination based on sex (Dir 2006/ 54/EC art.2.2.c). The ECJ already established before the approval of both Directives that discrimination based on pregnancy or maternity constitutes direct discrimination based on sex, which allows it to be linked to the current art. 157 of the TFEU and provide it with the general framework of guarantees established for anti-discrimination protection based on sex.

Discrimination on the grounds of maternity and pregnancy may involve a contravention of both Directive 2006/54/EC and Directive 92/85/EEC. However, Directive 92/85/EEC has a smaller application framework. On the contrary, the assimilation to discrimination based on sex that operates in art.2.2.c of Directive 2006/54/EC, although it makes a general reference to Directive 92/85/EEC to identify the issue to which refers, has a much more extensive scope. To date, the rulings of the ECJ recognizing the existence of discrimination based on pregnancy and maternity based on Directive 2006/54/EC are more numerous than those based on the violation of Directive 92/85 /EEC. However, in recent years the volume of ECJ rulings based on Directive 92/85/EEC has grown.

In addition to Directives 2006/54/EC and 92/85/EEC, other directives establish some type of protection for situations of pregnancy and maternity. This is the case in Directive 2010/41/EU, of July 7, 2010, on the application of the principle of equal treatment between men and women that refers to self-employed activity and Directive 79/7/EEC, of December 19, 2010. 1978, relating to the progressive application of the principle of equal treatment between men and women in matters of Social Security.

1. Directive 92/85/EEC of October 19: maternity protection linked to risk prevention

The main characteristics of Directive 92/85/EEC are the following:

a) Directive 92/85/EEC is a Directive for the prevention of occupational risks that is a development of the Prevention Framework Directive 89/391/EEC. This fact explains at least two of its most characteristic features: on the one hand,

Directive 92/85/EEC does not mention that pejorative treatment in situations of pregnancy and motherhood constitutes discrimination based on sex, even though the ECJ had previously established this on numerous occasions. This does not imply that Directive 92/85/EEC denies this connection but simply that it does not take it into account. The Directive sets up a series of obligations for the employer that do not connect with broad discrimination concepts but that are very concrete and that are strictly delimited in the temporal sphere (only concerning pregnancy, maternity leave, and breastfeeding), objective (only the rights and guarantees expressly mentioned in Directive 92/85/EEC) and subjective (art. 2 of Directive 92/85/EEC defines the concept of pregnant worker, recently giving birth woman and breastfeeding one); on the other hand, although the Council and the European Commission have expressly declared that maternity leave is not comparable to sick leave (Declaration of the Council and the European Commission of 1992¹), it is quite significant that Directive 92/85/EEC has not recognized the right to full remuneration in the event of maternity suspension, change of work or exemption from work due to risk in pregnancy and breastfeeding. On the contrary, Directive 92/85/EEC is limited to recognizing women in these situations with a payment that must be “adequate”, which means that must at least guarantee the receipt of what is provided for in the legislation for the situation of sick leave. In essence, the Directive allows the woman to perceive less than before pregnancy or maternity. This is not very consistent with the guarantee of maintenance of rights to the worker established in Article 11 of Directive 92/85/EEC, but it is explained because its main objective is risk prevention. This nature of Directive 92/85/EEC also explains how other rights are formulated in its text. For example, the right to protection against dismissal (Dir 92/85/CEE art.10) or to maintain the rights inherent to the employment contract (Dir 92/85/CEE art.11) are rights that have great importance in the Directive and which have given rise to an interesting doctrine of the ECJ. However, they have not been interpreted as consequences of the right of non-discrimination but as instrumental tools for the preventive purpose.

b) Directive 92/85/EEC has been the subject of several attempts at reform that have been unsuccessful. Fundamentally, these reforms have attempted to incorporate the aspect of anti-discrimination protection based on sex and to relate its content to that established in ILO Recommendation 191 of 2000 (which complements what is established in ILO Convention 183 on the protection of motherhood of 2000). In 2008, a proposal for a Directive was presented in this

¹ Statement of the Council and the Commission concerning Article 11 (3) of Directive 92/85/EEC, entered in the minutes of the 1608th meeting of the Council (Luxembourg, 19 October 1992)

regard, which was the subject of intense discussion and was finally withdrawn in 2015². Some of the aspects that were the subject of debate in this 2008 proposal were the incorporation of paternity leave (exclusive parental enjoyment leave) into the new Maternity Directive to guarantee the distribution of responsibilities; the extension of maternity leave to 18 weeks (as established by ILO Recommendation 191/2000 art.1) or even up to 20 weeks (as was proposed during the processing of the proposal in the draft of the Parliament's Committee on Women's Rights March 2010); or the guarantee of full remuneration during maternity leave (as established in ILO Recommendation 191/2000 art.2). All these proposals have been abandoned except for the one referring to paternity leave, which has reappeared in Directive 2019/1158/EEC of June 20, 2019, on the reconciliation of family life and professional life of parents and caregivers.

c) Directive 92/85/EEC applies exclusively to pregnant women and women who have given birth or are breastfeeding in the terms set out in the Directive which are related to biological motherhood. The Directive does not apply, therefore, to people who do not have the status of biological mother (for example, in the case of maternity suspensions due to adoption or in the case that the internal regulation recognizes that the father can enjoy part of the maternity leave). The sphere of rights recognized for the care of children to subjects who are not biological mothers exceeds the application framework of Directive 92/85/EEC and falls within the framework of Directive 2019/1158, on the reconciliation of family and professional life. This exclusion from maternity protection to subjects who are not strictly the biological mother has been expressly established by the ECJ by not recognizing maternity leave in the case of surrogate motherhood, not even when the intended mother could have carried breastfeeding of the minor through specific stimulation techniques (ECJ 18-3-14, *C.D. C-167/12*).

d) There is a strict temporal space in which Directive 92/85/EEC applies: on the one hand, the time between the beginning of pregnancy and the end of maternity leave configures the general space in which the rights of the Directive must be applied. It also serves to delimit the time frame in which protection against dismissal without cause is applied; on the other hand, regarding the application of preventive measures, the protection period applies to the workers described in Article 2 of Directive 92/85/EEC: the pregnant worker, the worker who has given birth, and the breastfeeding worker. The concept of a pregnant

² Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. Brussels, 3.10.2008 COM(2008) 637 final

worker is in itself objective. However, the concept of a worker who has given birth and a worker who is breastfeeding does, by art. 2 of Directive 92/85/EEC (in the sense of national laws and/or practices), depend on the meaning attributed to it by each internal regulation. This provision seems to enable internal regulations to establish maximum time limits regarding what can be understood as a worker who has given birth and a worker who is breastfeeding.

2. Directive 2006/54/EEC of 5 July 2006: maternity protection linked to protection against discrimination on grounds of sex

Art.2.2.c of Directive 2006/54/EC establishes the assimilation between discrimination based on pregnancy/maternity and discrimination based on sex as follows: *For the purposes of this Directive, discrimination includes: ... c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EC.* In this way, Directive 2006/54/EC refers to the consolidated doctrine of the ECJ that had long established that discrimination based on pregnancy constitutes direct discrimination based on sex. This declaration made by the ECJ is particularly important because it avoids any justification based, for instance, on business efficiency or economic reasons. It has to be noted that only indirect discrimination can be justified by objective, reasonable, and proportionate reasons, including business or economic reasons. Instead, situations that constitute direct discrimination do not allow any justification other than the *Genuine and Determining Occupational Requirement* (such is the term used in Article 14.2 of Directive 2006/54). The recognition by the ECJ that discrimination due to pregnancy was constitutive of direct discrimination based on sex occurred in 1990, in the seminal ruling handed down in *Dekker* (ECJ 8-11-90, *Dekker C-177/88*). This case was about a pregnant worker who had successfully passed the selection procedure and who was going to be hired imminently until the worker herself reported her pregnancy, at which time the company decided not to proceed to hire her but another candidate, who was a woman as well. The company considered that its refusal to hire the pregnant woman was justified for business reasons given that according to the legislation then applicable, social security would not reimburse the daily benefits that the company would be obliged to pay her during her maternity leave. As a result, the company would be financially unable to employ a replacement for the pregnant woman during her maternity leave and would thus be short-staffed. In this case, the ECJ was faced with the dilemma of classifying this discrimination based on sex in access to employment as direct (in which case the business reasons could

not be admissible) or indirect (in which case the business reasons could justify lack of hiring). The *Dekker* consideration that discrimination due to pregnancy constitutes direct discrimination based on sex and, consequently, cannot be justified for business reasons has given rise to an interesting and resounding doctrine of the ECJ according to which the failure to hire a pregnant woman because of her pregnancy constitutes direct sex discrimination when the contract was permanent (ECJ 14-7-94, *Webb* C-32/93) but also when the contract is temporary and had the same duration as the pregnancy during which the women would not be able to work (ECJ 4-10-01, *Tele Danmark* C-109/00). Other rulings of the ECJ in a similar sense to the rulings handed down in the *Webb* and *Tele Danmark* cases were those handed down in *Habermann* (ECJ 5-5-94, *Habermann* C-421/92) and *Mahlburg* (ECJ 3-2-00, *Mahlburg* C-207/98). The ECJ has also established that the discrimination to which a woman is subjected due to the breastfeeding that she carries out constitutes direct discrimination based on sex (ECJ 19-10-17, *Otero Ramos* C-531/15).

Art.2.2.c of Directive 2006/54/EC not only incorporates the doctrine of the ECJ on the direct discrimination nature of discrimination due to pregnancy but also refers to it as maternity leave, thus configuring a kind of complementarity relationship between the protection provided by both Directives. Thus, there are cases related to pregnancy and maternity that do not fall within the scope of Directive 92/85/EEC, but do fit within the space delimited by anti-discrimination protection based on sex (Dir 2006/54 /CE art.2.2.c and jurisprudence of the ECJ). This is the case of the ruling handed down in *Mayr* (ECJ 26-5-08, *Mayr*, C-506/06), in which the ECJ considered the dismissal without cause that occurred at a time before pregnancy but after an advanced stage of fertility treatment to be discriminatory based on sex. The ECJ expressly stated in its ruling that the case did not fall within the scope of Directive 92/85/EEC because the pregnancy had not yet occurred when the dismissal took place. However, it was interpreted that discrimination based on sex did occur due to links to pregnancy, in the terms established in art.2.2.c. of Directive 2006/54/EC.

Linking anti-discrimination protection based on pregnancy and maternity to anti-discrimination protection based on sex has an additional consequence of notable relevance: the guarantees linked to anti-discrimination protection based on sex must also apply to discrimination based on pregnancy and motherhood. This implies, among other things, that the victim has the right to effective judicial protection (or to judicial action, in a formal and material sense, in the terms established in Dir 2006/54/CE art.17), which must operate modification of the burden of proof (Dir 2006/54/CE art.19), that the legal system must guarantee adequate

reparation to the victim (Dir 2006/54/CE art.18) and that an effective and dissuasive sanction must be applied to the offending subject (Dir 2006/54/CE art.25).

3. **Other directives that configure anti-discrimination protection due to pregnancy and maternity**

About pregnancy, maternity, and, where applicable, breastfeeding, both Directive 92/85/EEC and Directive 2006/54/EC apply exclusively to employment relationships. The ECJ has, however, applied a substantive or material interpretation of the concept of employed worker that allows the inclusion in the scope of both Directives, for example, of women members of the Board of Directors of a company who receive from it remuneration for the services provided and who have a dependency relationship concerning it that is evidenced in the possibility of being dismissed (ECJ 11-11-10, *Danosa* C-232/09). In *Danosa's* Case, the key point was that the woman was a real worker even though she belonged to the Board of Directors of a company, and that was the reason why she was included in the scope of Directive 92/85. In any case, Directive 2010/41/EU, of July 7, 2010, on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, states in its Article 8 the right of self-employed workers to a maternity benefit of at least fourteen weeks during which they will have the right to receive a sufficient amount, meaning the perception of an amount equivalent to what they received previously or what they would have received in the concept of sickness benefits or what is established as family benefits in the applicable legislation. It is a formulation similar to the remuneration that corresponds to maternity leave configured in article 11 of Directive 92/85/EEC for employed workers, although the remuneration that is guaranteed during it for self-employed workers is merely “sufficient” in Directive 2010/41/EU (and not “adequate”, as established by Dir 92/85/EEC).

There are also references to maternity in Directive 79/7/EEC, of December 19, 1978. This Directive establishes the principle of equal treatment between men and women in matters of Social Security, configuring a series of exceptions that are the only ones that may justify differences in treatment between men and women as the ECJ has expressly established in its ruling handed down in *X* (ECJ 3-9-14, *X*, C-318/13). In this regard, Article 4.2 of Directive 79/7/EEC establishes that *The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity*. What must be interpreted by such *protection of women on the grounds of maternity* in Direc-

tive 79/7 has not been the subject of express pronouncement by the ECJ but in other issues, the ECJ has established that only those benefits for the protection of the biological condition of women during pregnancy and childbirth can be considered linked to maternity. Especially interesting was what was established by the ECJ in *Griesmar* (ECJ 29-11-01, *Griesmar* C-366/99). In this case, the ECJ considered that the internal provision that established only for mothers (and not fathers) a specific benefit for access to pensions constituted employment discrimination based on sex given that it was not intended to compensate for maternity but rather for the care of children. In terms of Social Security, Directive 79/7/EC in its Article 7.1 certainly establishes the possibility of exclusively attributing Social Security benefits to women in response to child care, but later on, Article 7.2 warns that these exclusive or preferent benefits for women must be reviewed so that they are progressively eliminated. Putting all of the above together, one could conclude that any Social Security benefit attributed exclusively to women is illegal in EU legislation, given that it could not be linked to the physical fact of motherhood but rather has a compensatory purpose for the dedication given to the care of children. If a Member State does not review the legislation in this regard to eliminate it but instead incorporates new differential measures between men and women in the scope of public pensions, it is failing to comply with the provisions of Article 7.2 of Directive 79/7/EC. This was the reason why the ECJ declared that a maternity supplement established to compensate women for their “demographic contribution” contravened Directive 79/7 (ECJ 12-12-2019, INSS C-450/18).

II. PREVENTION OF RISKS FOR WOMEN DURING PREGNANCY, CHILDBIRTH, AND BREASTFEEDING

Directive 92/85/EEC establishes in its articles 3 to 7 a series of specific rules for protection against occupational risks applicable to pregnant women, and women who have recently given birth or are breastfeeding³. The dynamics of the preventive obligation established in these precepts constitute a replica of the general prevention mechanism established for all types of occupational risks in Framework Directive 89/391/EEC but applied to the specific pregnancy and maternity situation.

³ See at the respect the *Report of the European Commission about the Implementation of council directive 92/85/EEC on the introduction of measures to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding* COM (1999) 100-, and the Explanatory Memorandum to COM(1999)100.

Articles 3 to 7 of Directive 92/85 can be summarized as follows:

a) Art.4 of Directive 92/85/EEC establishes the need for the employer to evaluate these risks, considering those risk factors that may, objectively, cause harm to the women described in Article 2 of the Directive itself and that could occupy those jobs in the future. This implies the need for the evaluation of every one of the company's jobs to take into account the objective risk factors that could entail for a pregnant or breastfeeding worker. This has been expressly established by the ECJ in *Otero Ramos* (ECJ 19-10-17, *Otero Ramos* C-531/15). Likewise, in *González Castro* (ECJ 19-9-18, *González Castro* C-41/17), the ECJ established that the risk evaluation must take into account the individual situation of the breastfeeding female worker.

b) Article 5 of Directive 92/85/EEC establishes that, in case of risk, the female worker has the right to adapt her working conditions and/or working time, to change to a position compatible with pregnancy, breastfeeding, or recent maternity, or even to be exempt from working when the previous measure is not *technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds*. This formulation highlights the staggered nature with which the preventive obligations are configured: the transition from adaptation to the change and, where appropriate, from this to the exemption of working occurs exclusively when the previous measure is not technically and/or objectively possible or could not reasonably be required for duly justified reasons.

c) Directive 92/85/EEC makes a non-exhaustive list, in two annexes, of the risk factors likely to cause harm to pregnant or breastfeeding women. Article 6 establishes an absolute prohibition of exposure to certain risk factors concerning these annexes. To determine its specific scope, the Directive itself establishes in Article 3.1 that the Commission, in consultation with the Member States and assisted by the Advisory Committee on Safety, Hygiene and Health Protection at Work, would draw up guidelines for the evaluation of chemical, physical and biological agents, as well as industrial procedures considered dangerous for the health or safety of female workers who are pregnant, have recently given birth or are breastfeeding. The guidelines were approved in 2000⁴.

It should be noted that both the annexes to Directive 92/85/EEC and the Guidelines are not exhaustive and cannot foresee the specific situations that

⁴ Communication from the Commission on the Guidelines on the assessment of the chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of pregnant workers and workers who have recently given birth or are breastfeeding (Council Directive 92/85/EEC). Brussels, 20.11.2000 COM(2000) 466 final/2

each pregnancy or breastfeeding presents, which will have to be specifically addressed in each risk evaluation.

d) Directive 92/85/EEC establishes in Article 7 a specific provision in the case of night work: if there is harm to the pregnant worker or who has recently given birth, which can be conditioned by the Member State to the corresponding medical certification, she has the right to transfer to a day position or, when transfer is not technically and/or objectively possible or cannot reasonably be required for duly justified reasons, to exemption from the obligation to work.

e) The preventive rights set out in Directive 92/85/EEC must be effective, which means that Member States are obliged to guarantee not only the formal transposition of the Directive but also that materially it is effective. Under the heading “Defense of rights”, Article 12 of Directive 92/85/EEC recognizes the right of the worker who considers the rights recognized in the Directive to have been violated to file a judicial claim. Article 12 of Directive 92/85 is similar to Article 17.1 of Directive 2006/54/EC, which also recognizes the right to legal action of the victim of discrimination based on sex. In both precepts, the right to judicial action implies, on the one hand, the right to go to Court and, on the other, the right to obtain adequate satisfaction from them, for which the laws must proceed to eliminate the obstacles that could exist for the effectiveness of the rights established in the Directive. This right is of great relevance in the case of preventive obligations because it requires internal legislators to develop appropriate mechanisms so that the female worker at risk does not have to be subject to it until the moment it is judicially decided whether the evaluation has adequately occurred, whether the employer has adequately fulfilled its previous obligations of adaptation and change of position and, consequently, whether or not the exemption from working is appropriate. It must also be taken into account that, in the case of risk prevention due to pregnancy, maternity, or breastfeeding, the modification of the burden of proof must also operate since it is a case of discrimination based on sex and the guarantees configured in the Directive 2006/54/EC and particularly in its art. 19 which establishes the modification of the burden of proof fully applies. This means that, in disputes about the existence or not of risk for pregnancy or breastfeeding, the existence of risk must be presumed based on the mere presentation of evidence (ECJ 19-10-17, *Otero Ramos* C-531/15). The evidence does not necessarily have to consist of a medical report or certificate, but may also derive from facts that allow the existence of discrimination due to lack of adequate protection during breastfeeding to be presumed (ECJ 19-9-18, *González Castro* C-41/17).

A question of particular interest arises concerning the duration of breastfeeding protection that Member States must provide. Directive 92/85/EEC does not establish a duration that depends on the mother's will, nor does it establish a minimum duration. The duration of preventive protection for breastfeeding in the Directive is, therefore, up to the determination established by the Member States. This implies that the duration of protection may be limited in time and may not cover the entire period in which the mother would like to breastfeed.

III. MATERNITY LEAVE

Besides the permits that must exist for the application of prevention regulations due to the impossibility of adaptation or change of position, Directive 92/82 states other two permits: maternity leave (Article 8) and time off, without loss of pay, to attend ante-natal examinations (art.9). Directive 92/85/EEC does not establish the obligation for Member States to establish breastfeeding permits. Breastfeeding only constitutes obligations in this Directive from the point of view of risk prevention (evaluation, adaptation, change of position, and exemption from the obligation to work following the provisions of Dir 92/85/EEC Articles 5 to 7).

Directive 92/85/EEC establishes the right to leave without loss of pay to attend prenatal check-ups (Dir 92/85/EEC art.9) if these take place during working hours. It must be understood, therefore, that there is no possibility of any reduction or adjustment, either present or future, that implies any loss in terms of remuneration and that had its origin in the permission for prenatal check-ups.

Article 8 of Directive 92/85/EEC establishes the right of female workers to a minimum paid leave of 14 weeks for maternity reasons which can be freely distributed by Member States before or after childbirth. The remuneration of it must be, at least, that provided for in cases of illness. Two weeks of paid leave are mandatory for the female worker. It is a very basic protection that is surpassed by the provisions of ILO Convention 183 (adopted on June 15, 2000), whose article 4.4 establishes the obligation to recognize six postpartum mandatory weeks of permit. It is also surpassed by what is established in ILO Recommendation 191 (adopted on June 15, 2000) which recommends ensuring all previous income and advises a minimum duration of maternity leave of 18 weeks. It has to be noted that maternity leave has to be recognized as a

continuous permit so the possibility of splitting it could contravene the provisions of Article 8 of Directive 92/85/EEC.

The permissions configured in Directive 92/85/EEC are women's rights. Nothing is established in the Directive about the possibility of them being taken by men. However, any regulatory provision that expands the scope (objective, subjective, or material) of what is established in Directive 92/85/EEC, for instance, allowing fathers to accede to maternity leave as well, would fall within the powers of the Member States and would even serve to enhance the co-responsibility between men and women which is an objective sought by the Directive 2019/1158 of 20 June 2019 on work-life balance for parents and careers. The Directive 2019/1158 establishes an interesting relation between maternity leave and parental leave in Art. 20 when it says that to comply with the paid parental leave obligation *Member States may take into account any period of, and payment or allowance concerning, family-related time off work, in particular maternity leave, paternity leave, parental leave and carers' leave, available at national level which is above the minimum standards of the Directives*. Article 20 of Directive 2019/1152 is a "runway" clause that allows the part of maternity leave in a State that exceeds the 14 weeks of maternity leave established in Directive 92/85 to be considered the remunerated parental leave established in Directive 2019/1158. However, this provision does not mean that maternity and parental leave have the same nature. Maternity leave is a female right and, consequently, can legally be limited to women but parental leave must always be a neutral right. This has a consequence of no small importance. It is against EU law any parental leave that is exclusive or preferential for women given that such situation would be discriminatory against women themselves by perpetuating care roles. This was established by the ECJ in *Roca Álvarez* (ECJ 30-9-10, *Roca Álvarez* C-104/09) and *Maistrellis* (ECJ 16-7-15, *Maistrellis* C-222/14).

One interesting issue arises when the maternity leave recognized by a State is much longer than the 14 weeks established in Directive 92/84/EEC. The duration of maternity leave established in Directive 92/85/EEC is a minimum that can be improved for the benefit of the worker, giving rise to a leave that, due to its duration, could lose direct connection with childbirth. In these cases, the question that had to be solved is if part of the maternity leave becomes, in reality, a parental leave. In the 1980s the ECJ stated that the duration of maternity leave enjoyed exclusively by the mother could be freely determined by internal regulations, even exceeding the duration that was reasonably necessary for recovery after childbirth without losing its nature of maternity leave. Thus, in the *Hofmann* case (ECJ 12-7-84, *Hofmann* C-184/83) the ECJ

established that maternity leave *could* legitimately be configured exclusively for the mother regardless of its duration to promote the “special relationship between mother and child after birth.” This reference to the special relationship between mother and child did not seem very consistent with the objective of co-responsibility, since it seemed to allow the States to create care permits only for mothers that would not be against EU legislation as long as they were called “maternity leave”. *Hoffmann* was confirmed in other sentences of the ECJ (for example, ECJ 19-9-13, *Betriu Montull* C-5/12). However, the *Hoffmann* doctrine was clarified by the ECJ itself almost forty years later. In the *Syndicat CFTC* case (ECJ 18-11-18, *Syndicat CFTC*, C-463/19) the ECJ established that extensions of maternity leave that had no connection with the biological situation of pregnancy or motherhood could not be limited exclusively to the mother. The ECJ did not expressly say that the *Hoffmann* doctrine had been repealed, but rather established that the “special relationship of the mother with the child” could justify an extension of maternity leave exclusively for the mother, but only if there was also a connection with the biological situation of the pregnancy or childbirth.

What has been stated regarding the legitimate female exclusivity in the enjoyment of maternity leave also applies in the case of breastfeeding leave. Although breastfeeding leave is not provided for on a mandatory basis in Directive 92/85/EEC, if it were established by a Member State, it would fall within the framework of the Directive and could consequently be attributed exclusively to women. However, if a possible breastfeeding leave does not have as its objective natural breastfeeding but rather has a more extensive purpose related to the care of the child, it will not be breastfeeding properly but rather parental leave. In this case, an exclusive or preferential attribution to women would not be admissible. This was precisely the assumption that gave rise to the STJEU ruling in the *Roca Álvarez* case (ECJ 30-9-10, *Roca Álvarez* C-104/09) concerning the Spanish breastfeeding permit. This ruling forced a change in the regulation of the Spanish breastfeeding leave (which, according to the ECJ ruling, was not a breastfeeding leave but a parental leave) that occurred through Law 3/2012, of July 6. The regulatory change meant equal access to breastfeeding permission for fathers and mothers.

A question of particular interest arises about maternity leave in the case of surrogacy, when the intended mother (the one who did not bear the child) asks for maternity leave. In such a case, it could be asked whether Directive 92/85 also applies or not to the intended mother. This issue was resolved by the

ECJ in two rulings that denied the intended mother access to the maternity leave established in Directive 92/85/EEC:

1) In the *C.D.* Case (ECJ 18-3-14, *C.D.* C-167/12) the ECJ considered that the failure to recognize the right to maternity leave for the intended mother did not go against Directive 92/85/EEC because it did not apply to the mother who had given birth (as required by the Directive). Nor did it imply contravention of Directive 2006/54/EC because there are not only intentional mothers but also intentional fathers, so the situation is not related to sex discrimination. The ruling handed down in the *C.D.* Case is of particular interest because the intended mother had managed to breastfeed through stimulation techniques the child that she had not gestated. However, not even this link to breastfeeding was considered relevant to apply Directive 92/85/EEC or Directive 2006/54/EC. The ECJ is aware of its desire to completely leave out of anti-discrimination protection situations linked to surrogacy which, as is known, involve dilemmas that are difficult to make compatible with effective equality between men and women.

2) The ECJ reached the same conclusion in the *Z* case (ECJ 18-3-14, *Z*, C- 363/12). This ruling reiterated the arguments of the ruling handed down in the *C.D.* regarding the fact that there was no contravention of Directive 2006/54/EC. Nor did it consider that the denial of maternity leave to the intended mother was in contradiction with the provisions of Directive 2000/78/EC given that the protection provided in this Directive refers to a disability that has employment repercussions and sterility of the intended mother that would have triggered surrogacy does not have any employment dimension. This interpretation of the ECJ does not, however, prevent Member States from recognizing leave for intended parents, which involves an extension of maternity leave or which is of any other nature.

IV. PROTECTION AGAINST DISMISSAL WITHOUT CAUSE

Art.10 of Directive 92/85/EEC establishes protection against dismissal that extends until the end of maternity leave and is formulated as follows: *Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent.* Some of the issues that

protection against dismissal set out in Article 10 of Directive 92/85/EEC raises are the following:

a) The first issue has to do with the possible extension of this protection against dismissal beyond the duration of maternity leave. This matter becomes relevant, for example, in the case of dismissals due to lack of attendance at work, when the cause was long-lasting illnesses caused by childbirth or pregnancy. Before Directive 92/85/EEC, the ECJ established that dismissal due to lack of attendance once the maternity leave has expired does not necessarily have to be considered a discriminatory dismissal even if the lack of attendance was caused by a pathology generated during pregnancy. The ECJ thus established that Member States can configure, through the duration of maternity leave, what they consider to be a reasonable time to link a certain pathology to pregnancy or childbirth (ECJ 8-11-90, *Handels* C-179/88). After this ruling, Article 10 of Directive 92/85/EEC expressly specified the temporal space of protection against dismissal, referring specifically to the space of time between the beginning of pregnancy and the end of maternity leave, as configured by each Member state. However, this time frame is not as strict as it may seem because it allows for a certain extension beyond the end of the maternity leave when the dismissal would have begun to be prepared during the maternity leave even if it had been notified at a later time. This was precisely the case in the *Paquay* Case (ECJ 11-10-07, *Paquay* C-460/06). It does not seem, however, that the extension operated in this ruling allows an unlimited extension of protection for dismissal beyond the end of maternity leave: rather it seems that the ECJ maintains the linking to maternity leave the protection against dismissal without cause but simply gives relevance to the preparatory acts of the dismissal. The *Paquay* case is often given as an example of a ECJ ruling in which not only the formal transposition of the Directive is analyzed, but also its effectiveness.

b) Another interesting issue is the possible allegation of ignorance of the pregnancy on the part of the employer who dismisses a pregnant woman. The underlying matter to be resolved is whether Directive 92/85/EEC establishes automatic protection for the situation of pregnancy, regardless of the knowledge that the employer may have. Article 2 of Directive 92/85/EEC establishes that any pregnant worker who communicates her state to the employer will be considered a pregnant worker for the Directive. The communication of the state of pregnancy to the employer seems to be the key element in this Article. But Article 10 of the Directive, which specifically establishes protection against dismissal without cause, refers its application to the temporal

space delimited by the beginning of pregnancy (without any specific reference to the communication of the pregnancy) and the end of maternity leave. Even though the two Articles seem to give different interpretations Article 2 of the Directive gives a general approach, but Article 10 establishes the time frame for the concrete situation of protection against dismissal. This interpretation is consistent with the preventive purpose expressed in the preamble of the Directive, which justifies the protection provided against dismissal without cause so that the threat of job loss does not affect the progress of the pregnancy. The ECJ has not ruled to date on the appropriate interpretation. In any case, whether Article 10 of Directive 92/85/EEC is applicable or not to cases of lack of knowledge of the pregnancy on the part of the employer, it does not seem appropriate to exclude from anti-discrimination protection pregnant women who had not communicated their status to the employer and were dismissed because, even if they were not included in the scope of Directive 92/85/EEC, they probably would be included in the scope of Directive 2006/54/EC which establishes generic assimilation between discrimination for pregnancy/maternity and discrimination based on sex. The fact of pregnancy, notified or not, regardless of the allegations of ignorance on the part of the employer, constitutes an indication of discrimination, which transfers the burden of proof to the employer regarding the justification of the termination, even during the trial period.

c) The issue of the extension of temporary contracts (or their possible integration into the protection provided against dismissal) is also of notable interest. In principle, the unjustified failure to extend the temporary contract due to pregnancy or maternity does not fall within the scope of Directive 92/85/EEC because it is not strictly a dismissal, but it falls within the scope of the Anti-Discrimination Directive (the current Directive 2006/54/EC) and may constitute discriminatory conduct. This was established by the ECJ in *Jiménez Melgar* (ECJ 4-10-01, *Jiménez Melgar* C-438/99).

d) On the other hand, it must be taken into account that the concealment of the pregnancy situation during the selection process by the worker, even when the situation was incompatible with the development of the work activity and required a change of job, cannot be considered cause for disciplinary dismissal due to violation of contractual good faith. The worker does not have the obligation to warn the employer before being hired that she is pregnant, not even when the employment contract is temporary and the worker cannot carry it out because she is pregnant. This has been expressly established by the ECJ in the *Tele Danmark* case (ECJ 4-10-01, *Tele Danmark* C-109/00).

e) The issue of the possible justification of the dismissal included in the scope of Art. 10 of Directive 92/85/EEC is also relevant because it connects with the application of the causes of dismissal due to a business crisis. Art. 10 of Directive 92/85/EEC establishes that the only causes that may justify the dismissal of pregnant women or those on maternity leave are “exceptional cases not connected with their condition”. In the *Porrás Guisado* case (ECJ 22-2-18, *Porrás Guisado* C-103/16) the ECJ established that the Spanish State adequately complies with the provisions of article 10 of Directive 92/85/EEC when it admits as justification for the dismissal of a pregnant worker due to the concurrence of generally established economic, technical, organizational or production causes. However, he warned that the Spanish legislation with this system does not sufficiently prohibit the dismissal of pregnant workers nor does it have adequate preventive capacity. It also established that the communication of the dismissal to the worker must include the objective criteria that have been followed for the designation of the workers affected by the dismissal.

f) Article 18 of Directive 2006/54 establishes that Member States must enforce the anti-discrimination principles of the Directive through an adequate system of compensation. Expressly Article 18 states the following: *Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered.* This provision of Directive 2006/54 also applies in the case of discrimination due to pregnancy or maternity, including the case of discriminatory dismissal for these reasons. This probably means that Member States must establish compensation mechanisms for cases of discriminatory dismissal due to pregnancy or maternity that adequately compensate for the specific harm caused by these situations. Therefore, it would not be enough if the member states did not ensure, in the event of discriminatory dismissal due to pregnancy or maternity, additional compensation to those established by law in cases of termination of an ordinary contract or even ordinary dismissal without cause.

g) The protection against dismissal of pregnant women established in article 10 of Directive 92/85 must be interpreted jointly with article 12 of the same directive, which establishes the right of women to be able to defend themselves judicially if they consider that the rights recognized by the directive have been violated. This implies that States must guarantee that procedural rules do not hinder the judicial claims of workers included in the scope of the Directive. In the *Haus Jacobus* case, the Court established that it is against

the directive that the rules of prescription for claiming against dismissal are configured so strictly that they make it difficult for women who know of their pregnancy after the dismissal has occurred to file a judicial claim (ECJ 27-6-24, *Haus Jacobus*, C-284/23).

V. THE RIGHT TO MAINTAIN THE RIGHTS INHERENT TO THE EMPLOYMENT CONTRACT

Article 11 of Directive 92/85/EEC establishes that, when the preventive measures contemplated in articles 5 to 7 (adaptation, change, or exemption from work because of risk to pregnancy or maternity) are applied, the worker will be entitled to the rights inherent in the employment contract, including the maintenance of “adequate” remuneration and/or social security benefits. Member States are, therefore, free to determine the nature of this compensation, which may be salary or social security benefits. During maternity leave, the worker will also have the right to maintain the rights inherent to her contract, including the right to adequate remuneration and/or social security benefits, understood as one that guarantees income equivalent, at least, to what the worker would receive in case of suspension of the contract due to illness. It is noted, therefore, that the remuneration guarantee for the case of adaptation, change, or exemption of work for preventive reasons must be similar but not necessarily identical to the compensation established for maternity leave: in both situations, the need for compensation must be “adequate”, but only for maternity leave it is established that it must be at least equivalent to what is established for sick leave. In both cases, however, the right to remuneration and/or social security benefit may be conditioned by national legislation to the fulfillment of certain requirements, including a specific prior period of work, provided that this period does not exceed 12 months.

There is also a reference to the maintenance of rights inherent to the employment contract in article 15 of Directive 2006/54/EC, which establishes the right of the worker to return to the same or similar job after her return due to maternity and to benefit from any improvement to which she may have been entitled during her absence for this reason. The principle of intangibility of rights for the exercise of rights linked to motherhood is thus established. However, this right of art.15 of Directive 2006/54/EC is not as absolute as it may seem. This is because Directive 92/85/EEC considerably limits its scope in terms of remuneration by not establishing the right to maintain her previous remuneration, but only access to adequate remuneration in the terms described above.

Concerning remuneration rights, during the 1990s the position of the ECJ was somewhat dilettante and took time to be consolidated with sufficient clarity. *Gillespie's* case (ECJ 13-2-96, *Gillespie* and others C-342/93) constituted a particularly important point of reference by establishing that salary increases during maternity leave should be reflected in the female worker's remuneration. However, in subsequent years the ECJ qualified this interpretation until it ended up establishing that, both during maternity leave and during the eventual exemption from work due to its incompatibility with the situation of pregnancy or breastfeeding, the female worker only had the right to an "adequate" compensation. The dilemma that arose between the remuneration limitation of Art. 11 of Directive 92/85/EEC and the discriminatory nature based on sex of any job loss as a consequence of pregnancy or maternity, was resolved by the ECJ in favor of the first. Thus, in *Parviainen* (ECJ 1-7-10, *Parviainen* C-471/08) the ECJ established that, in cases of change of position due to incompatibility between work and the situation of pregnancy, it did not constitute discriminatory treatment based on sex the fact that the worker lost, by carrying out another different job, a certain loss of income because the new job did not have a certain complementary salary that existed in the old one. Likewise, in the *Gassmayr* case (ECJ 1-7-10, *Gassmayr* C-194/08) the ECJ admitted that there could be differences between the remuneration received before the maternity benefit and that corresponding to it, since the right to the same remuneration not currently included in Directive 92/85/EEC. In the *Ornano* case (ECJ 14-7-16, *Ornano* C-335/15) the ECJ also considered that the loss of remuneration suffered by a judge for not receiving a certain remuneration concept during maternity leave did not imply a contravention of Directive 92/85/EEC nor to anti-discrimination regulations based on sex. The ruling handed down in *Ornano* is particularly relevant because in it the ECJ has denied that the pay loss constitutes pay discrimination based on sex. In the previous cases (*Parviainen* and *Gassmayr*) the ECJ ruled only on Directive 92/85/EEC, the literal terms of which were difficult to ignore. However, in *Ornano* the ECJ definitively eliminated the possible connection of remuneration loss with discrimination based on sex.

When the ECJ faced the issue of maintaining the labour rights of pregnant workers or workers on maternity leave when those did not have a remunerative dimension, its position was strongly in favor of maintaining them. Thus, if the vacation coincides with the period of maternity suspension, the ECJ established the right to enjoy it cumulatively (ECJ 18-3-04, *Merino Gómez* C-342/01). Likewise, the company's refusal to reduce the duration of parental leave for the care of children to be able to replace it with maternity leave corresponding to a later child has also been considered contrary to EU law (ECJ 20-9-07, *Kiiski* C- 116/06).

The same interpretation favorable to the female worker has been maintained in the case of seniority rights. In this regard, the ECJ has interpreted that, if the day of starting the job had to be delayed because the worker was on maternity leave, her seniority cannot be traced back to this later moment but rather to the moment in which she was unable to do so effectively because she was on maternity leave (ECJ 16-2-06, *Sarkatzis Herrero* C-294/04). Similarly, in the *Rosselle* case (ECJ 21-515, *Rosselle* C-65/14) the ECJ established that, in the case of transition from civil servant relation to a labour contract, the worker should be recognized for the time contributed as a civil servant to enable her the access to maternity benefit as a worker. Likewise, in *Lewen* (ECJ 21-10-99, *Lewen*, C-333/97), the ECJ considered that an extraordinary payment for Christmas did not fall within the framework of Directive 92/85/EEC but was contrary to the Anti-discrimination directive based on sex (Directive 2006/54) if the time spent in maternity leave was not taken into account to generate the right to the aforementioned extraordinary payment. In *Napoli* (ECJ 6-3-14, *Napoli*, C-595 / 12) the ECJ also ruled in favor of the worker when she was denied her right to access a training course for promotion because she was on maternity leave.

CHAPTER 6

EQUALITY AND NON-DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION, GENDER IDENTITY AND GENDER EXPRESSION IN EUROPEAN UNION LAW

GEMMA FABREGAT MONFORT

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I. INTRODUCTION

The legal framework of equality and protection against discrimination is characterised by its open, dynamic and adaptive nature to the evolution of a constantly changing reality from a historical, social, educational, linguistic,

cultural, etc. perspective, which in turn shapes unique conditions, states or constituent causes of discrimination and which intrinsically generates divergences between contemporaneity and the legal framework.

European Union law is no exception, and although it has always been open-minded in guaranteeing non-discrimination, in the issue that affects us here, the protection of the LGBTI collective or, in other words, protection against discrimination on grounds of sexual orientation, sexual identity, gender expression and other sexual characteristics, the framework of protection is limited exclusively to discrimination on grounds of “sex” and “sexual orientation”, as a cause, in its regulatory framework, although with a certain dose of openness to the doctrine of the Court of Justice of the European Union (ECJ) which, always innovative and guarantor, remains permeable to changes, accepting to interpret conditions or states of difficult legal fit in the configuration of what could be identified as the traditional EU anti-discrimination legal framework.

This study examines in depth precisely the above, i.e. European regulatory framework and the evolution of the case law of the ECJ on LGBTI employment discrimination or, what amounts to the same, on grounds of sexual orientation and other conditions linked to gender identity, gender expression and sexual characteristics, in order to define what is the real scope of the current protection conferred by EU law.¹

II. EUROPEAN UNION LEGISLATIVE FRAMEWORK: ORIGINAL AND SECONDARY LAW

1. Original Law

Articles 2 and 3 of the Treaty on European Union establish non-discrimination as one of the EU’s core values. Furthermore, Article 19 of the Treaty on the Functioning of the European Union empowers the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, but without explicitly

¹ Although the undersigned, as could not be otherwise, assumes the authorship of the chapter, the germ of this study is to be thanked to CANO GALÁN, Y., «Igualdad y no discriminación por razón de género, orientación sexual e identidad sexual en el derecho de la Unión Europea», in CASAS BAAMONDE, M.E, GARCÍA-PERROTE ESCARTÍN, I., GIL ALBURQUERQUE, R., GÓMEZ GARCÍA-BERNAL, A. Y SEMPERE NAVARRO, A.V. (eds.), *Derecho Social de la Unión Europea*. Editores Boletín Oficial del Estado, BOE, Agencia Estatal Boletín Oficial del Estado.), Vol. 1, 2023, ISBN 978-84-340-2919-4, pp.457-495.

referring to sexual identity, gender expression or sexual characteristics as a condition to be considered in anti-discrimination matters.

Nor does the Charter of Fundamental Rights of the European Union explicitly mentions the above conditions as grounds for discrimination, although it does prohibit discrimination in general, any discrimination, it says, and in particular discrimination based on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. Repeating the absence of reference to other sexual conditions or sexual nature of the Treaty.

2. Secondary legislation

The Directives, as secondary legislation, as far as labour law is concerned, focus on sex and sexual orientation as the only causes or grounds of discrimination, following in the wake of the original law and therefore without mentioning other sexual and gender conditions as a cause of discrimination.²

Although sex as a cause of discrimination should be left out of this study, as another chapter of this work deals exclusively with it, it is important to mention, at least, that the protection of sex as a cause of discrimination is Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU; Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures; and Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.³

² As an exception, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, does cite gender identity or gender expression as a ground for discrimination.

³ In fact, the Directives concerning equality between women and men and the prohibition of discrimination on grounds of sex are as follows:

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

And it is important to cite them, despite the fact that sex as a cause of discrimination is dealt with in this work in another chapter, because this duality in the normative treatment of discrimination that concerns us here, which is conditioned exclusively to the concept of sex and sexual orientation as a cause, determines that any discrimination motivated by transsexuality, sex identity and gender expression, within the European Union, has been considered by the ECJ, for the purposes of conferring protection, as discrimination on the grounds of sex.

Thus, in the well-known case of the ECJ 30-4-1996, *P/S and Cornwall County Council* C-13/94, it is said that “transsexual” persons are born male or female regardless of the feeling of belonging to a different “sex”, so that, if the discrimination occurs precisely because of the change of sex, it is closely re-

Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC.

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter “Racial Equality Directive”), which prohibits discrimination on grounds of racial or ethnic origin in a wide range of areas, such as employment, social protection and social advantages, education and publicly available goods and services, including housing.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave and repealing Directive 96/34/EC.

Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting victims, and replacing Council Framework Decision 2002/629/JHA.

Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order.

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA.

Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on reconciling the work and family life of parents and carers and repealing Council Directive 2010/18/EU.

Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on a better gender balance among directors of listed companies and related measures.

Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 reinforcing the application of the principle of equal pay for equal work or work of equal value for men and women through pay transparency measures and enforcement mechanisms.

lated not only to the “sex” that is shown from birth, but to the new one to which one belongs after undergoing the corresponding surgical or hormonal treatments.

In the same sense, but after the adoption of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, the ECJ, 27-4-06, *Richards* C-423/04, applies Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security to a case in which a question was raised by the United Kingdom as to whether to refuse a “transsexual” person equal treatment in the field of social security, on the progressive implementation of the principle of equal treatment for men and women in matters of social security, to a case in which a question was raised by Great Britain as to whether refusing a “transsexual” person who changes from “male sex” to “female sex” the recognition of a retirement pension at the age of 60 - the age at which women are entitled to it - constitutes discrimination on grounds of sex. The ECJ concludes that the scope of application of the Directive cannot be reduced solely to discrimination arising from membership of one sex or the other, and must also be applied to discrimination occurring as a result of the change of sex of the person concerned, and therefore considers the refusal to grant the pension at the age at which he or she would have been entitled to it had he or she been considered a woman - the “sex” that is acquired after the corresponding transformation - to be discriminatory.

For its part, the ECJ decision dated 07-1-04, *K.B.* C-117/01, deals with the protection of discrimination on the grounds of transsexuality also from the point of view of anti-discrimination legislation on the grounds of “sex”. The judgement refers to a case in which a person who lived with a person born a woman who had changed her “sex” and with whom she had not been able to marry precisely because of this circumstance, was informed that in the event of her death she would not be able to receive a widow’s pension as she was not a surviving spouse. In the light of the above, the question was raised for a preliminary ruling as to whether the exclusion of a woman’s (male transsexual) partner constitutes discrimination on grounds of sex. The ECJ is not as clear as in the previous case, and concludes that the requirement of marriage for heterosexual couples is not contrary to EU law and such a requirement cannot in itself be regarded as discriminatory on grounds of sex (...) since the fact that the requirement of marriage for heterosexual couples does not in itself constitute discrimination on grounds of sex (...) is not contrary to EU law) since the fact that the applicant is a man or a woman is irrelevant for the purposes of

granting the survivor's pension, even if it does consider that the unequal treatment although it does not directly affect the enjoyment of a right protected by Community law, affects one of its premises, hence leaving it to the national courts (in this case the British court) to verify whether the premises on which the refusal of the widow's pension is based could be discriminatory.

The same Council Directive 79/7/EEC of 19 December 1978 underpins the protection afforded by the ECJ in *MB v Secretary of State for Work and Pensions* (C-451/16), 26 June 2018, in which the ECJ addressed discrimination in access to a state retirement pension for people who have changed gender. The applicant was a trans woman whose application for a state pension was rejected in the UK because her gender had not been legally recognised. UK law required annulment of the previous marriage for such recognition, delaying her retirement.

The ECJ ruled that the UK rules amounted to direct discrimination based on sex, as a cisgender person would not have faced the same barrier to accessing the pension. It found that making access to the pension conditional on the marital status of the transgender person infringed the principle of equal treatment, as it established an additional requirement that did not apply to cisgender persons. The Court emphasised that the right to recognition of gender identity could not be made subject to the dissolution of a marriage and that the UK rules in question placed transsexual people at an unjustified disadvantage, in breach of Directive 79/7/EEC.

This ruling is very important because, even though it uses sex as a ground for discrimination, it recognises the protection of transsexuality even if the administrative procedure for the change of sex has not been carried out.

It is also a guarantor from the point of view of sex, although not from the Directive referred to, because it does not have to do with employment, but with the recognition of identity, the STJU 4 October 2024, C-4/23, *Mirin Case*, in which a citizen with dual British and Romanian nationality legally changed his name and gender in the United Kingdom. However, when he tried to update his birth certificate in Romania, the authorities refused to recognise these changes. The Court found that this refusal infringed the right to free movement and residence of EU citizens, protected by Articles 20 and 21 TFEU. Furthermore, it found that requiring a new procedure in the country of origin is not justified and represents an unnecessary administrative barrier.

The protection is evident without prejudice to the nuances that may be made to some of the previous judgments and despite the fact that the treatment of transsexuality, from the legal perspective of equality on grounds of sex, is far from being a peaceful issue. However, the fact remains that under the cur-

rent EU regulatory framework, the transsexuality to sex discrimination seems to be the “least bad” option. And certainly, at least, it seems a better option than identifying transsexuality with that “*any other condition*” to which, for its part, Resolution No. PS-00070-2023 of the Spanish Data Protection Agency, 26 January 2024, redirects sexual orientation and gender identity from the perspective of European Union law.

Be that as it may, the truth is that regarding the anti-discrimination protection of transsexuality, gender identity or gender expression, and its protection, there is no optimal solution from the strict interpretation of European law. In fact, although the protection of discrimination on grounds of sex seems to be designed to prevent it from occurring between women and men, and transsexuality does not always *fit in* easily there, it is also true that the rest of the relevant grounds are not expressly mentioned in any other legislation and do not always have to do with sexual orientation, which is a ground for protection in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

III. A SPECIAL REGULATORY REFERENCE: DIRECTIVE 2000/78/EC

Council Directive 2000/78/EC of 27 November 2000 provides a general framework for equal treatment in employment and occupation and for combating discrimination in employment and occupation on the grounds of religion, belief, disability, age or sexual orientation, seeking to ensure that the principle of equal treatment is applied in the Member States by eliminating all forms of direct or indirect discrimination in the employment context.

It applies to all persons, in both the public and private sectors, in relation to: conditions for access to employment (selection criteria and the conditions for recruitment and promotion); vocational training (access to all types and levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience); employment and working conditions: including conditions of dismissal and remuneration; and membership and participation in organisations, i.e. membership and participation in an organisation of workers or employers, or in any organisation whose members carry on a particular profession.

Differences of treatment on grounds of nationality; provisions and conditions relating to the entry and residence of third-country nationals and stateless persons; and payments of any kind made by public or assimilated schemes, including public social security or social protection schemes.

Directive 2000/78/EC imposes obligations on Member States with a view to ensuring the full effectiveness of the principle of equal treatment in the field of employment and occupation.

Firstly, States must ensure that all forms of discrimination, whether direct or indirect, based on the grounds expressly set out in the Directive are prohibited. This prohibition is at the heart of the European Union's equality framework.

It also establishes a reversal of the burden of proof in judicial or administrative proceedings relating to discrimination. Where a claimant provides *prima facie* evidence of unequal treatment, it is for the defendant to prove that there has been no breach of the principle of equal treatment. This procedural rule is intended to prevent the victim of discrimination from facing disproportionate evidentiary obstacles that limit his or her access to justice.

In parallel, the Directive imposes an obligation to take measures to protect workers against retaliation for making claims or taking legal action in defence of equal treatment. Protection against dismissal or other forms of unfavourable treatment is essential to ensure a working environment in which fundamental rights can be exercised without fear of adverse consequences.

Social dialogue is also encouraged as a tool to promote equality in the workplace. In this sense, the participation of the social partners in the monitoring of business practices, the negotiation of collective agreements, and the drafting of codes of conduct and research on anti-discrimination measures is encouraged.

In addition, the Directive provides for the possibility for States to adopt positive action measures aimed at preventing or compensating for structural disadvantages linked to the protected grounds. These measures are not exceptions to equal treatment, but instruments to ensure substantive equality and to correct persistent factual inequalities in the labour market.

Finally, there is an obligation to ensure the dissemination and knowledge of the provisions adopted under the Directive, especially in the workplace, in order to ensure their effective implementation and to raise awareness among employers and workers of the prohibition of discrimination.

The fulfilment of these obligations strengthens the legal framework for the protection of workers in the European Union, consolidating effective mechanisms for the promotion of equality and inclusion in the workplace. However, it should be noted that these important mandates for the member states are foreseen or established in relation to the LGBTI collective only with respect to sexual orientation, not with respect to any of the other causes related to sexual characteristics that can generate discrimination, such as sexual identity, gender expression or sexual characteristics that, due to their sexual characteristics, can generate discrimination, gender expression or sexual character-

istics which, for the time being, in the case law of the ECJ, continue to be protected under the “*umbrella*” of the concept of sex and, therefore, can be brought back to the regulatory framework mentioned above and outside of Directive 2000/78/EC, which only refers, as far as we are concerned here, to the concept of “sexual orientation”.

This is important. Because the member states can, in domestic law, regulate by improving the mandates required by Directive 2000/78/EC and give treatment that is more in line with the reality of the LGBTI collective. But, in reality, and in transposition of Directive 2000/78/EC with regard to the LGBTI collective, they are only concerned with sexual orientation as a cause of discrimination, not with regard to the other causes which, in any case, would be included in the protection of discrimination on grounds of sex.

This is neither the time nor the place for a detailed dissertation on the long-term legal consequences of this duality in the treatment of equality and protection from discrimination of the LGBTI collective. The effect on the real and effective equality of women and men in the face of the possible distorted use of certain guaranteeing measures by other groups whose discrimination has per se different characteristics could lead to a *totum revolutum* of doubtful benefit for some and great risk for all. However, this is the normative framework currently available at European level, and in which the most recent rulings of the ECJ, which has always, and increasingly so, guaranteed the rights of diversity in the terms relevant here, continue to be framed.

IV. CONCEPTUAL CLARIFICATIONS IN THE LABOUR SPHERE

At this point, the differentiation between “sex”, “sexual orientation”, “gender identity” and “gender expression” is fundamental to understanding the complexity that the ECJ’s interpretation of anti-discrimination rules in the field of employment generates in a normative bifurcation.

1. **Discrimination on the grounds of “sex”, “gender” and “sexual orientation”**

The concept of “sex” is the most established legal category in anti-discrimination law and the existing regulatory framework referred to above is a good example of this.

Sex is associated with the biological differentiation between men and women, based on primary sexual characteristics (internal and external genital organs, genetic make-up and hormonal structure) and secondary sexual characteristics (physical traits that develop with sexual maturation). In this sense, normative protection covers situations of discrimination directly related to the biological fact of being a man or a woman, such as discrimination based on pregnancy or maternity.

Unlike “sex”, the concept of “gender” lacks a uniform legal definition in EU law, despite its legal and social recognition. By way of example, in the Spanish sphere, and prior to the current legal definition, Constitutional Court Ruling 67/2022 of 2 June, which defined gender as the “social identity of a person, based on socio-cultural constructions that determine roles, personality traits, attitudes and behavior attributed differentially to men and women”, may serve as an example. It is therefore a dynamic concept linked to historical, social, cultural and educational factors.

Given that, as mentioned above, EU law does not expressly prohibit discrimination on the basis of gender, and given that gender identification responds to subjective and social elements, its regulatory protection presents greater difficulties. This is further complicated by the introduction of “gender identity” and “gender expression”, the conceptual and legal boundaries of which, as noted above, are not clearly defined in EU-level law.

The term “sexual orientation” has not been expressly defined in EU law either, despite its express inclusion, as mentioned above, in Directive 2000/78/EC on equal treatment in employment and occupation. The express reference does not entail a specific normative definition, although the concept has been developed at the international level, where it is defined as the feeling of emotional, affective and sexual attraction towards persons of the same or different sex or gender.

Based on this conceptualisation, it has been considered that “sexual orientation” should be understood as a category distinct from both “sex” and “gender”, insofar as it is not linked to the biological fact of sex or the feeling of belonging to a certain gender but is related to the affective and sexual attraction towards other people, regardless of their gender identity.⁴

⁴ CANO GALÁN, refers that the following seem to lead to this conclusion: 1) European Parliament Resolution 4-2-14, on the EU roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, (2013/2183/INI); 2) The provisions of the Parliamentary Assembly of the Council of Europe on discrimination on grounds of sexual orientation or gender identity; or 3) Recommendation CM/Rec (2010) 5 of the Council of Europe to combat discrimination on grounds of sexual orientation or gender identity, adopted by the Committee of Ministers of the Council of Europe on 31-3-

2. Collectives covered by “Sexual Orientation”

In accordance with the above and from a legal perspective, and for the purposes of illustration only, if gender orientation is the feeling of emotional, affective and sexual attraction towards persons of the same or different sex or gender, the following categories would fall within the protection of discrimination on the basis of “sexual orientation”: (a) homosexuals, whose affective and sexual orientation is directed towards individuals of the same sex; (b) bisexuals, who experience attraction towards both sexes; (c) heterosexuals, whose sexual orientation is directed towards individuals of the opposite sex; (d) asexuals, who do not experience sexual attraction; (e) pansexuals or queer, whose orientation is not determined exclusively by the sex or gender of the person to whom they are attracted.

The concept of “sexual orientation”, in any case, is constantly evolving, which makes it foreseeable that the enumeration of categories will change over time as social sensitivities and research on gender and sexuality progress or not.

3. “Sexual or Gender Identity”, “Gender Expression”, “Transsexuality”: New Legal Categories of Protection?

The emergence of new terms related to “sex”, “gender” and “sexual orientation”, which have begun to be elevated to the status of autonomous conditions of protection against discrimination, such as gender expression and identity and transsexuality, creates interpretative challenges in the field of EU law, which, as stated above, only expressly refers in law to the prohibition of discrimination on the grounds of “sex” or “sexual orientation”.

Doctrinally, it is understood that “gender expression” implies an external and visible element, while “sexual or gender identity” responds to an internal feeling of belonging to a certain sex or gender, not necessarily identifiable with the one biologically assigned at birth.

In this sense, gender or sex expression is considered to be all outward manifestations of a person’s gender or sex identity, including aspects such as clothing, body language, tone of voice, gestures and other socially codified forms of presentation. This is a particularly relevant concept in anti-discrimi-

2010. It also advocates this conclusion (Discrimination on grounds of transsexuality...”, cit.; and, by the same author, Equality and non-discrimination, cit).

nation law, as gender expression is a visible element and therefore likely to generate discriminatory behavior.

At the opposite extreme to gender expression is gender identity or sexual identity, which is an internal and subjective phenomenon, linked to a person's self-perception of themselves as belonging to a particular gender, regardless of the biological sex assigned to them at birth.

In this sense, gender identity may or may not coincide with registered sex, and its recognition in legal terms has been the object of important normative and jurisprudential advances in some member states, although not so much, as has been emphasised, in the European regulatory framework itself.

In this sense, and in accordance with the aforementioned definition, "sexual identity" is linked to the "sex" that one has from birth and its conformity or not with it", which seems to refer, indirectly, to the protection that the Community legal system should grant to "trans" or "transsexual" persons⁵. But, as has been doctrinally pointed out, other components should also be considered that would link the concept of identity with "gender", and not with sex, especially in the states prior to undergoing surgical interventions or hormonal treatments for sex change, since the person feels that they belong to a "sex" other than the one with which they were born.

And there may even be a link to "sexual orientation", in that sexual attraction is projected onto people of a different "sex" or "gender".

According to this conceptualisation, the concept would include⁶:

a) **Transsexuals.** While there is no definition of "transsexual" in EU law, the concept was addressed in the above-mentioned ECJ 30-4-96, P/S and Cornwall County Council C-13/94, which protects transsexuality discrimination as sex discrimination by identifying "transsexuals" as those persons who, while physically belonging to one sex, have the feeling of belonging to another, often seek to achieve a more coherent and less equivocal identity through medical treatment and surgical interventions aimed at adapting their physical characteristics to their psychology.

⁵ The ECJ of 30 April 1996 (C-13/94), case P/S and Cornwall County Council, addressed the definition of "transsexuality", identifying the term as one in which "persons who, while physically belonging to one sex, have the feeling of belonging to another, often seek to achieve a more coherent and less equivocal identity through medical treatment and surgical interventions aimed at adapting their physical characteristics to their psychology".

⁶ The European Parliament resolution of 4 February 2014 on the EU roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (2013/2183/INI) only includes "lesbian, gay, bisexual, transgender and intersex" persons among the groups against whom discrimination is condemned.

b) **Transgender.** According to the definition of “transsexual” given by the doctrine of the ECJ⁷, there are two elements that could identify “transsexual” persons: 1) The personal perception of belonging to a sex other than the one they were born with, which would lead them to adopt their attire and behaviour; and 2) The surgical intervention to adapt their physical appearance to their personal perception of belonging to a certain sex. With regard to the first element, the socially used term is “transvestite”, although the group considers this term to be pejorative, hence the term “transgender” is more widely accepted, while the second element corresponds to the term “transsexual”, which is used by the community.

c) **Intersex.** Intersex”, also considered in common parlance as “hermaphrodites”, could also be included in the collective identified by their “gender identity”. According to the RAE, “hermaphrodite” is someone who “has both sexes”, and said of a person, “who has testicles and ovaries, which gives them the appearance of having both sexes”. Their “sexual orientation” can be asexual, heterosexual, bisexual or homosexual, so they cannot be included in the group identified by their “sexual orientation”, since the identifying element is not the emotional, affective and sexual attraction they feel, but their own biological nature and the awareness of belonging to a certain gender.

If these people were discriminated against per se, as mentioned above, they would fall outside the protection of Directive 2000/78/EC. It is a different matter when in the same person there is multiple discrimination given the link between gender expression and “sexual orientation”, since the sexual attraction of the former is projected onto persons of a different “sex” or “gender”, thus obtaining protection similar to that of the judgments that follow.

V. JURISPRUDENCE OF THE ECJ ON LGBTI LABOUR PROTECTION. SEXUAL ORIENTATION AS A SINGULAR CAUSE OF PROTECTION

The case law of the Court of Justice of the European Union (ECJ) has played a key role in the interpretation of Directive 2000/78/EC in relation to the protection of LGBTI people. ECJ decisions have consistently addressed sexual orientation discrimination, setting precedents in the application of the principle of equal treatment in employment and social security.

⁷ Especially ECJ dated 30 April 1996 (C-13/94), case P/S and Cornwall County Council.

1. The Maruko case (C-267/06): recognition of the widow's pension for same-sex partners

The first occasion on which the Court of Justice of the European Union (ECJ) ruled on the application of Directive 2000/78/EC on discrimination on grounds of sexual orientation was in the judgment of 1 April 2008, Case C-267/06, Maruko. The dispute arose from the refusal to grant a widow's pension to Mr Maruko, who had been in a stable union with a person of the same sex who was affiliated to the Vddb social security institution. The reason for the refusal was that the statutes of the Vddb did not provide for entitlement to a survivor's pension for members of registered partnerships.

The Vddb operated under a sectoral labour standard with the aim of complementing the social security benefits established in national legislation. Membership of and contributions to the scheme were compulsory for workers and employers in the sector, and it was financed exclusively by private contributions, with no public funding.

The ECJ's analysis is based on the interpretation of Articles 3(1)(c) and 3(3) of Directive 2000/78/EC, in response to the questions referred for a preliminary ruling, among which were: 1) whether the Vddb could be considered a public social security scheme for the purposes of Article 3.3 of the Directive; (2) whether the survivor's pension in question could be qualified as remuneration within the meaning of Article 3(1)(c) of the Directive; (3) whether the exclusion of members of registered partnerships from access to that benefit constituted an act of discrimination based on sexual orientation.

The ECJ ruled by granting protection by considering, firstly, that the supplementary pension scheme managed by the Vddb does fall within the scope of application of the Directive, as it is a complementary mechanism to Social Security, without the public nature of the organisation or the compulsory affiliation to the scheme undermining this conclusion. Secondly, the widow's benefit at issue could be regarded as pay within the meaning of Article 3(1)(c) of the Directive, since it 'arose from the employment relationship of Mr Maruko's registered partner'. It follows, thirdly, and logically, that the refusal to grant the survivor's pension to registered partners, when the national legislation places same-sex couples on the same footing as married couples as regards that benefit, constitutes direct discrimination on grounds of sexual orientation.

Thus, in Case C-267/06 (Maruko), the ECJ recognised that the refusal to grant a widow's or widower's pension to a same-sex couple, when it was granted to married heterosexual couples, constituted direct discrimination on the grounds of sexual orientation.

The judgment was highly relevant, because for the first time the ECJ concluded that if a benefit derived from an occupational pension scheme is considered “remuneration” within the meaning of Article 3(1) of Directive 2000/78/EC, it cannot be subject to discrimination on grounds of sexual orientation. Therefore, the refusal of the pension as remuneration was in breach of the principle of equal treatment.

2. The Römer case (C-147/08): equalisation of pension benefits

Shortly afterwards, the ECJ ruled again on this issue in Case C-147/08, *Römer*, extending the analysis developed in the *Maruko* case and consolidating the prohibition of any unequal treatment in employment benefits based on sexual orientation.

In this case, the applicant, a municipal official in Hamburg, challenged the calculation of his retirement pension, requesting that it be put on an equal footing with that of heterosexual married couples, on the grounds that his same-sex partner enjoyed legal recognition analogous to marriage under German law.

Mr Römer, who was dissatisfied with the amount of his pension, sought its recalculation on the ground that he had cohabited uninterruptedly with his same-sex partner, with whom he had entered into a registered partnership under German law. The applicable legislation, in particular the *Erstes Ruhegeldgesetz der Freien und Hansestadt Hamburg* (Law of the Land of Hamburg on supplementary retirement and survivors’ pensions for employees of the *Freie und Hansestadt Hamburg*), provided for different calculation formulae for ‘married beneficiaries not living permanently apart’ and for ‘beneficiaries entitled to family allowances or other equivalent benefits’.

Faced with the administration’s refusal to recalculate his pension in accordance with these criteria, Mr Römer brought an action, claiming that such a refusal constituted an act of discrimination on grounds of sexual orientation, contrary to Directive 2000/78/EC.

The ECJ examined whether or not certain supplementary retirement pensions are excluded from the scope of Directive 2000/78/EC - Article 3(3) and recital 22 - because they are payments made by public schemes.

The ECJ concluded that it is that the supplementary retirement pension paid by a public scheme constitutes “remuneration” within the meaning of Article 157 TFEU and is therefore not excluded from its scope. Consequently, such benefits cannot benefit from the derogation provided for in Article 3(3) of

Directive 2000/78/EC and must therefore be subject to the principle of equal treatment and non-discrimination, which includes the prohibition of any distinction based on sexual orientation.

It follows from this reasoning that denying a higher pension to same-sex couples, while heterosexual married couples enjoy such a right, constitutes direct discrimination on the basis of sexual orientation in the field of employment.

3. The Hay case (C-267/12): employment benefits and marital status

In the Hay case (C-267/12) the ECJ strengthened protection against sexual orientation discrimination in the field of employment. In this case, the applicant, Mr Hay, worked for a private entity in France and applied for leave and benefits which the company granted to employees who got married. However, he was denied those rights on the grounds that his civil union with his same-sex partner was not legally equivalent to marriage in French law at the time.

The dispute raised the question of whether this refusal constituted direct or indirect discrimination on grounds of sexual orientation in the light of Directive 2000/78/EC.

The ECJ found that the French legislation at the time differentiated access to certain employment rights on the basis of the marital status of workers, which disproportionately affected same-sex couples who, in practice, could not access benefits reserved exclusively for marriage. The Court therefore concluded that the company's refusal to grant Mr. Hay the benefits associated with marriage constituted direct discrimination on the basis of sexual orientation, since same-sex couples did not have access to the institution of marriage and were therefore treated unequally in relation to their heterosexual partners.

4. The Asociația ACCEPT (C-81/12) and Rete Lenford (C-507/18) cases: protection against homophobia in access to employment

Protection extends to prior or preliminary acts with ECJ Cases C-81/12, Asociația ACCEPT (2013) and C-507/18 (Rete Lenford).

In the first of these, ECJ C-81/12, Asociația Accept v Consiliul (2013), the ECJ found that public statements by a football club manager expressing his refusal to employ homosexual players could constitute discrimination in access to employment, even if there was no recruitment process in progress. The Court underlined that such statements could create a deterrent effect, prevent-

ing homosexual people from applying for employment. Furthermore, it established that freedom of expression is not an absolute right and may be limited when its manifestations affect the principle of equality in employment.

At the time when the manager, who had decision-making powers in the club's recruitment policy, made statements which gave rise to the complaint, there was no selection process in progress. Even so, the ECJ found that they in themselves created a deterrent effect limiting access to employment for homosexual persons and should be considered as discrimination in access to employment covered by Directive 78/2000 on grounds of sexual orientation, thus reinforcing the protection against homophobia in the work environment by concluding that discriminatory statements can be sanctioned even if there is no identifiable victim.

This is without prejudice, moreover, to the fact that it is not contrary to the Directive for an LGBTI rights organisation to be able to act in defence of those affected, even without a specific victim being identified.

This is confirmed in Case 507/18 (*Rete Lenford*). In this case, as in the previous case, homophobic comments were made by an employer.

In this case, a lawyer stated on a radio program that he would never hire or use the services of gay lawyers in his firm. Although the lawyer who made the statements did not formally have direct jurisdiction over recruitment, nor was there an open recruitment process, extending the expansive guardianship of the *Asociata Accept* case, the ECJ found that they could be identified with an exclusionary company policy, creating a deterrent effect which in itself constituted discrimination in access to employment prohibited by Directive 78/2000.

5. The Case Relating to Trans Identity (C-356/21): protection of self-employed persons

The progression in protection goes a step further with Case C-356/21 (*Case Relating to Trans Identity*), not so much because of the discriminatory condition or cause, which was the plaintiff's homosexuality, but because of the type of legal relationship that linked him to the company.

Between 2010 and 2017, a freelancer produced audiovisual montages, advertisements or trailers for the self-promotional broadcasts of TP, a company operating a national public television channel in Poland. That collaboration was based on a series of short-term service contracts concluded consecutively by that worker with TP in the context of his self-employed economic activity.

In December 2017, that freelancer and his partner posted a Christmas music video on Youtube in order to promote tolerance towards same-sex couples. Shortly after the publication of that video, that worker's shifts of service were unilaterally cancelled by TP and no new service contract was subsequently concluded with him.

Considering himself to be the victim of direct discrimination based on his sexual orientation, that worker brought an action for compensation before the District Court of the City of Warsaw (Poland). First, that court asks whether the situation at issue in the main proceedings falls within the scope of the Directive on equal treatment in employment and occupation. Second, the national court wishes to know whether that directive precludes national legislation which, on the basis of the freedom of choice of the other contracting party, excludes from the protection against discrimination to be conferred under that directive a refusal, based on a person's sexual orientation, to conclude or renew a contract with a self-employed person.

In view of both the wording and the purpose of the Directive, the ECJ states that the concept of conditions for taking up employment, self-employment and occupation, which defines the professional activities falling within the scope of the Directive, provided that they do not consist merely of the supply of goods or services to one or more recipients, which requires that they be real and that they be exercised within the framework of a legal relationship characterised by a certain degree of stability.

Similarly, as regards the concept of employment and working conditions, including dismissal and remuneration within the meaning of the Directive, the ECJ states that this concept must also be interpreted broadly, including the conditions applicable to all forms of employed and self-employed activity, irrespective of the legal form in which that activity is exercised.

Moreover, as regards the concept of 'dismissal', the Court accepts that a person who has been self-employed may also be forced by his employer to cease that activity and thus find himself in a situation of vulnerability comparable to that of an employee who has been dismissed.

On the basis of the foregoing, the Court concludes, without prejudice to the assessment of the national court, that the decision not to renew the contract on account of the sexual orientation of the contractor falls within the scope of the directive.

As can be seen, although constantly evolving, the case law of the ECJ has been instrumental in consolidating a robust legal framework against sexual orientation discrimination from an employment law perspective. Indeed, while for some time it was argued that benefits were outside the protection of Direc-

tive 2000/78/EC, the above rulings demonstrate the inappropriateness of making conclusive statements, as whether or not they are protected depends on when one considers that one is dealing with a “payment” excluded by Article 3(3) and when one is dealing with “remuneration” falling within the scope of Article 3(1)(c).⁸

From that first recognition of the right to widows’ and widowers’ pensions for same-sex couples (*Maruko, Römer*), to protection against discriminatory statements in access to employment (*Asociația ACCEPT, Rete Lenford*), the Court has set precedents that reinforce the principle of equality and the prohibition of discrimination on grounds of sexual orientation. Furthermore, with case C-356/21, the ECJ has extended protection to self-employed workers, consolidating an evolving interpretation of the principle of non-discrimination in EU employment law.

VI. CONCLUSION

The above shows the progress that has been made and consolidated in EU law in guaranteeing equality and protection against LGBTI discrimination in the field of employment. Particularly in relation to sexual orientation through Directive 2000/78/EC and the jurisprudence of the ECJ.

However, the evolution of social reality calls for a clarification of the normative framework to explicitly reference the protection of gender identity and gender expression as specific protected categories.

The jurisprudence of the ECJ has assumed an expansive tendency towards the progressive inclusion of these realities within the scope of labour protection, but given the existence of duality of regulations, a regulatory review and legislative harmonisation at EU level is surely required to guarantee uniform treatment in the protection of all LGBTI discrimination from a labour law perspective.

What has been analysed in the preceding pages shows the great work of the ECJ, but it also reveals the distortion that the existence of a double channel of regulatory protection generates by breaking up a group.

⁸ Although it may be dysfunctional to protect the rest of the group through the concept of sex, the regulatory bifurcation means that in the first case it is necessary to look at the specific case to determine whether the benefit is a payment or remuneration and, depending on what is defined, it will or will not be covered by the application of Directive 78/2000/EC, whereas sexual identity and gender expression will always be covered by benefits under Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

Without touching on issues connected with the alterations that the above may generate in measures to guarantee equality between women and men, which is not the subject of this chapter, it should be pointed out as an obvious example of the existing regulatory anomaly that, beyond the fact that it is dysfunctional to protect the identity or expression of sex and gender through the concept of sex, the regulatory bifurcation means that the protection is different. For example, in the case of the protection of sexual orientation in matters of social security, the ECJ must look at the specific case to determine whether the benefit is a payment or remuneration and, depending on what is defined, it will or will not be covered by the application of Directive 78/2000/EC. On the other hand, in the case of sexual identity and gender expression, regardless of how forced it is to protect them as “sex”, the fact is that protection will always be available in the event of discrimination in benefits in application of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

Against this backdrop of differing protection on the one hand, and disruptions on the other, it is imperative to move towards greater legislative harmonisation in the field of equality and non-discrimination on grounds of sexual orientation and gender identity and expression. Ensuring that the case law advances of the ECJ, which are many and relevant, are reflected in a unitary, solid, coherent and binding regulatory framework at European level and in all Member States.

A more inclusive legislative action would make it possible to clarify the protection of the rights of the entire LGBTI community, ensuring them uniform, homogeneous and more effective labour protection throughout the European Union.

CHAPTER 7

COUNCIL DIRECTIVE 2000/43/EC OF 29 JUNE 2000 IMPLEMENTING THE PRINCIPLE OF EQUAL TREATMENT BETWEEN PERSONS IRRESPECTIVE OF RACIAL OR ETHNIC ORIGIN

MARÍA EMILIA CASAS BAAMONDE

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I. COUNCIL DIRECTIVE 2000/43/EC OF 29 JUNE 2000 IMPLEMENTING THE PRINCIPLE OF EQUAL TREATMENT BETWEEN PERSONS IRRESPECTIVE OF RACIAL OR ETHNIC ORIGIN

The principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, common to the Member States, together with the principle of respect for the fundamental rights guaranteed by the European Convention of Human Rights and Fundamental Freedoms (ECHR) and

by the constitutional traditions of the Member States, as general principles of Community law (Article 6(3) TEU), including the right to equal treatment and protection against discrimination, were the basis for the adoption by the Council of Directive 2000/43/EC. It was specifically based on Article 13 of the “Treaty establishing the European Economic Community” (EEC Treaty), as amended by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (the “Treaty of Amsterdam”), in force since 1 May 1999, which gave the Council the power to take appropriate action to combat discrimination on grounds of, *inter alia*, racial or ethnic origin.

Directive 2000/43, in its opening remarks, explains the importance of combating racism and xenophobia in order to ensure socially integrated labour markets and the development of democratic and tolerant societies (recitals 8 and 12). It also warns of the dangers of discrimination based on racial or ethnic origin for the achievement of the Union’s objectives, in particular the attainment of a high level of employment and social protection, economic and social cohesion and solidarity, and for its own configuration as an area of freedom, security, and justice (recital 9).

A few months later, the Council approved Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, “in order to combat discrimination on grounds of religion or belief, disability, age or sexual orientation [...], with a view to ensuring that the principle of equal treatment is applied in the Member States” (Article 1). With the same basis in Article 13 of the EEC Treaty, their obvious differences in the grounds for discrimination to whose elimination their respective regulations are addressed to – the broader one of Directive 2000/43, not limited to the field of employment and occupation, but extended to different areas of social life – do not prevent this second framework Directive from sharing a good part of the anti-discrimination regulation of Directive 2000/43, as well as some of its preliminary considerations. Nor have both been inspired by and taken advantage of the conceptual and technical apparatus provided by the Directives on the implementation of the principle of equal treatment between men and women, approved in the 1970s of the last century and, in particular, by Council Directive 76/207/EEC of 9 February 1976, amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, later consolidated, with other repealed Directives, in Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, and in its interpretation by the ECJ. The common objective of the Directives in question is to combat discrimination on various “odious” grounds, which in

social practice can and often do act together, and their aim is to ensure equal treatment of persons in all Member States.

However, discrimination on grounds of race or ethnicity occupies a unique position in the order of prohibited discriminations under EU law – which is explained by the “gap” in protection between Directive 2000/43 and Directive 2000/78 – due to the legal rights protected by the prohibited grounds of discrimination. The doctrine specializing in Directive 2000/43 has not failed to recognize that its approval represented an undeniable advance in anti-discrimination law in many Member States, but has also denounced the weakness of its “formal” regulation in pursuing social phenomena as serious as racism and segregationism, as well as its outdated approach, focused on non-discrimination and alien to a broad vision of equality, oriented towards results and distribution.

Both the specific Directive 2000/43 and the general framework Directive 2000/78 have not forgotten to expressly refer to the objective, which the Union must pursue in all its actions, of eliminating inequalities between men and women and promoting their equality (Articles 2 and 3(2) EEC Treaty), “especially considering that women are often victims of multiple discrimination” (recitals 3 and 14).

Directive 2000/43 entered into force on 19 July 2000, the day of its publication in the Official Journal of the European Communities (Article 18), and requested Member States to which it is addressed to comply with their obligations in their respective internal legal systems by 19 July 2003 (“at the latest”), either by adopting the necessary laws, regulations, and administrative provisions or by implementing them by the social partners at their joint request, “as regards provisions falling within the scope of collective agreements” (Article 16).

In order to comply with the Directive, States were required to repeal any legal, regulatory, or administrative provisions contrary to the principle of equal treatment on racial or ethnic grounds, and to declare, or make possible the declaration of, null and void or to amend all provisions contrary to the principle of equal treatment on equal grounds in individual contracts, collective agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, rules governing independent professions, and trade union and employers’ associations (Article 14). States are required to publicize the measures adopted in implementation of the Directive so that the persons concerned are aware of their rights (Article 10) and to inform the Commission by 19 July 2005 at the latest, and every five years so that the Commission may draw up a report on the application of the Directive to the European Parliament and the Council (Article 17).

The latest of the joint Commission reports on the application of the Racial Equality Directive and Framework Directive 2000/78/EC, of 19 March

2021, highlighted the difficulties and challenges of racial discrimination in Europe, a practice that, despite the low level of complaints and the scarcity of preliminary questions raised by state courts to the ECJ, remains widespread.

Over the course of more than two decades, the ECJ has issued only a dozen judgments and one decision interpreting Directive 2000/43, and a few other judgments in which the Directive is invoked secondarily. The number of complaints to the ECtHR, which can be used by individuals and legal entities, is much higher, which is evidence of the existence of racial discrimination reported by victims and specialist bodies. The analysis of the ECJ's case law is the subject of this work, essential to understand the application of the Directive, intended to play an effective and efficient role in the regulation and social integration of ethnic minorities in the countries of the Union, and in particular the Roma community, an objective of growing importance in the face of the large migratory processes in which, for various reasons, we are immersed in the European Union, who are faced with racist and xenophobic behavior fueled by terrorism, social and economic crises, insecurity, unemployment, increasing social inequalities, and the proliferation and success of far-right populist political parties, which advocate closing their countries' borders to the entry of immigrants, refugees, and displaced persons.

II. THE LEGAL BASIS OF DIRECTIVE 2000/43 AND ITS RELATIONSHIP WITH THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (CFREU)

1. **The Right to Non-Discrimination on the Grounds of Race or Ethnicity as a General Principle of European Union Law and Its Implementation by Directive 2000/43; Effectiveness of the Directive on the Implementation of the General Principle of Non-Discrimination in Relations Between Individuals**

Article 13 of the TEC, as amended by the Amsterdam Treaty, incorporated a general principle of anti-discrimination on the basis of specific grounds such as sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. This was achieved by deferring its effectiveness to the adoption by the Council, unanimously on a proposal from the Commission and after consulting the European Parliament, of "appropriate measures to combat" discrimination "within the limits of the powers conferred on the Community." The Treaty of Nice amending the Treaty on European Union, the Treaties es-

tablishing the European Communities and certain related (the “Treaty of Nice”) further amended Article 13 of the EEC Treaty by adding paragraph 2 to avoid the need for unanimity when the Council adopted incentive policies by means of the co-decision procedure, excluding any harmonisation of the legal and regulatory provisions of the States. In such cases, the Council would decide in accordance with the qualified majority procedure.

The current Article 19 TFEU essentially reiterates in its paragraph 1 the provisions of Article 13 EEC Treaty, Amsterdam version, and in its paragraph 2 reflects the procedural changes introduced by the Treaty of Lisbon: “[...] the European Parliament and the Council may, acting in accordance with the ordinary legislative procedure, may adopt the basic principles for Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.”

Directive 2000/43 was the first legal act adopted by the Council on the basis of Article 13 EEC Treaty, with considerable speed, ahead of the adoption of Framework Directive 2000/78 due to the development of populist movements in the Union and the situation in Austria caused by the significant growth in support in the 1999 elections for Jörg Haider’s Freedom Party, a nationalist, far-right, and anti-European political party. The text adopted was supported by a greater political will on the part of the States for its adoption, linked to the strengthening of democracy and the acceptance of human, social, and cultural diversity as a wealth, and not as a threat. It was, however, a minimal agreement by the Council against racial discrimination, far from the initial position of the Commission and the amendment proposals of the European Parliament. In exchange, Directive 2000/43 leaves room for more favourable or more protective state provisions for equal treatment and against discrimination based on racial or ethnic origin (Articles. 6(1) and 8(2)), behaving, in this sense, as if it were a social policy directive.

The ECJ, Grand Chamber, judgment of 19 January 10, *Küçükdeveci*, C-555/07, EU:C:2010:21 reiterated the judgment *Mangold* (ECJ, Grand Chamber, judgment of 22 November -05, C-144/04, EU:C:2005:709), on the principle of non-discrimination as a general principle of EU law (paragraph 21). It added that article 21(1) of the CFREU, which has the same legal value as the Treaties, prohibits all discrimination on the grounds it indicates. It held that in order for this principle, specified in the case – discrimination on grounds of age – by Directive 2000/78, to be effective, it was necessary for the main disputed case, a dispute between private parties, to be within the scope of application of EU law, which also determines the jurisdiction of the ECJ. Regarding the effectiveness of the general principle of equality, which the an-

ti-discrimination directives specify, in disputes between individuals, the ECJ reaffirmed that a directive cannot, on its own, create obligations for individuals and cannot be invoked against them; directives do not have direct horizontal effect. However, since the principle of non-discrimination is a general principle of EU law, national judges must, within the scope of their jurisdiction, guarantee the legal protection granted to individuals by EU law in disputes between private parties and its full effectiveness, leaving without application any provisions of national legislation contrary to this general principle, if a consistent interpretation is not possible, without the need to refer the question to the ECJ for a preliminary ruling (paragraphs 46-56). The principle of primacy of EU law protects the general principle of non-discrimination (ECJ judgment of 19 June 14, *Specht and Others*, C501/12 to C506/12, C540/12 and C541/12, EU:C:2014:2005 paragraph 89).

The ECJ, Grand Chamber, judgment of 16 July 15, *CHEZ Razpredelenie Bulgaria*, C83/14, EU:C:2015:480, paragraph. 58, and the ECJ judgment of 15 November 18, *Maniero*, C457/17, EU:C:2018:912, paragraph 36, applied the case-law on Directive 2000/78 to Directive 2000/43. They concluded as follows:

1. Directive 2000/43 does not in itself establish the principle of equal treatment of persons regardless of their racial or ethnic origin, a general principle of Union law which finds its source in various international instruments on fundamental rights and in the constitutional traditions common to the Member States (Article 6(3) TEU), but rather aims to establish a framework for combating discrimination on grounds of racial or ethnic origin.

2. In order for the principle of non-discrimination on grounds of racial or ethnic origin, as specified in Directive 2000/43, to apply as a general principle of Union law, the allegedly discriminatory legislation must fall within the scope of that law.

With regard to Directive 2000/43, the ECJ has openly declared itself incompetent to answer the question referred for a preliminary ruling by a Hungarian court on the interpretation of the principle of non-discrimination, as a fundamental principle of Community law (Article 6(3) TEU; Directive 2000/43, and Articles. 10, 11 and 12 CFREU), in conjunction with the provision of the Hungarian Criminal Code prohibiting, under penalty of criminal penalties, the public display of symbols of totalitarianism, in particular a five-pointed red star. The court held that the Hungarian legislation applied in the main proceedings did not fall within the scope of Community law and that the dispute did not contain any connection with any of the situations covered by the provisions of the Treaties (Order of ECJECJ 6 October 05, *Vajnai*, C328/04, EU:C:2005:596, paragraph 14).

3. In disputes between individuals, in which Directive 2000/43 has no direct effect, national courts are required to interpret domestic legislation in accordance with Directive 2000/43 (Articles 11, 14(b) and 16), and obviously not only those intended to transpose the Directive, but any legislation falling within its scope. In cases where this is not possible, they must exempt individuals from the protection of the Directive, leaving the national provisions that are contrary to it unapplied, without the need to request a preliminary ruling from the ECJ.

2. **The CFREU and Directive 2000/43: The Right to Non-Discrimination as a Fundamental Right of European Union Law**

The prohibition of all discrimination has been incorporated into Article 21(1) of the CFREU (Strasbourg, 12 December 2007). Article 21(1) of the Charter prohibits all discrimination, in particular, discrimination based on “sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”.

Article 21(1) of the Charter is of broader scope than that of Article 19(1) TFEU. However, the Charter “does not create any new powers or tasks for the Community or the Union, and does not modify the powers and tasks defined by the Treaties” (Article 51(2) and Article 6(1)(2) TEU), here by Article 19 TFEU. Union law must be interpreted, in the light of the Charter, within the limits of the powers conferred on the Union, in accordance with the settled case-law of the Court of Justice.

The official explanations of the Presidium, which accompany the Charter and must be “duly taken into account” in its interpretation by the judicial authorities of the Union and the Member States (Article 6(1)(3) TEU; Article 52(7) CFREU), reject any kind of contradiction or incompatibility between Article 21(1) and Article 19(1) TFEU, the purpose of which is to confer powers on the Union to adopt legislative acts, including the harmonisation of the laws and regulations of the Member States, in order to combat certain forms of discrimination, exhaustively listed, in the fields of action of the Member States and in relations between individuals. Article 21(1) of the Charter does not confer on the Union the power to adopt laws to combat forms of discrimination in the Member States or in the private sphere. Its sole purpose is to prohibit discrimination by the Union institutions and bodies in the exercise of their powers and by the Member States when implementing Union law.

Marking a difference with the matter it resolves, the judgment of the ECJ, Grand Chamber, 15 January 14, *Association de médiation sociale*, C-176/12, EU:C:2014:2, categorically states, with support from the judgment of the ECJ *Küçükdeveci*, that the prohibition of discrimination – on grounds of age – recognised by Article 21(1) of the Charter is sufficient in itself to confer on individuals a subjective right that can be invoked as such (paragraphs 45 and 47–51). Which, going beyond the language contained in the judgment of the ECJ, Grand Chamber, 19 April 2016, *Dansk Industri*, C441/14 (paragraph 21 et seq.), EU:C:2016:278 was reiterated by the judgment of the ECJ, Grand Chamber, 17 April 18, *Egenberger*, C414/16, EU:C:2018:257: the prohibition of any discrimination established in Article 21(1) of the Charter is mandatory as a general principle of Union law and “is sufficient in itself to confer on individuals a right that may be invoked as such in a dispute between them in an area governed by Union law [...]” (paragraph 76).

The Charter sets out, in its Article 21(1), the principle of non-discrimination on the grounds of race, colour, ethnic or social origin, genetic features, language and membership of a national minority, which is embodied in Directive 2000/43 by establishing the legal framework for combating discrimination on grounds of racial or ethnic origin (Article 1), which is the concrete expression, in its scope of application, of that general imperative principle of Union law, proclaimed by the CFREU. This has been expressly recognised, specifically for Directive 2000/43, by the ECJ in its judgment 12 May 11, *RunevičVardyn and Wardyn*, C391/09, EU:C:2011:291, paragraph 43: “Directive 2000/43 [...] is merely an expression”, in the material areas covered by it, “of the principle of equality, which is one of the general principles of European Union law, as recognised in Article 21 of the Charter of Fundamental Rights of the European Union”. This was reiterated by the ECJ *CHEZ Razpredelenie Bulgaria*, paras. 42, 58 and 72, referring to the analogy with Directive 2000/78 and the ECJ in *Felber* (judgment 21 January 15, C529/13, EU:C:2014:2041, paragraphs. 15 and 16), in judgement of 15 November 2018, *Maniero* C-457/17, EU:C:2018:912, para. 36, 15 April 2021, *Braathens Regional Aviation*, C-30/19, EU:C:2021:269, paragraph. 30, and 10 June 2021, *Land Oberösterreich*, C-94/20, EU:C:2021:477, para. 63.

Given the interpretation of the ECJ on the direct effectiveness in relations between individuals of the principle of non-discrimination on the basis of age and religion or belief established by Article 21(1) of the Charter, it is clear that this same horizontal direct effectiveness must be proclaimed on the principle of non-discrimination on the basis of racial or ethnic origin, which is sufficient in itself to grant individuals a subjective right that can be invoked as such. Although there is no express decision of the ECJ stating this, it can be deduced

by analogy with the effectiveness of the principle/fundamental subjective right of non-discrimination on other grounds, and from the ECJ judgments cited.

Furthermore, Articles 7 and 15 of the Directive, which are intended to ensure effective and efficient legal protection of the right to equal treatment of persons irrespective of racial or ethnic origin, give concrete form to the right to effective judicial protection guaranteed by Article 47 of the Charter, “which is sufficient in itself and does not need to be elaborated by other rules of Union or national law in order to confer on individuals a subjective right which may be invoked as such” (ECJ judgments, *Braathens Regional Aviation*, C-30/19, EU:C:2021:269, para. 57, and *Egenberger*, C-414/16, EU:C:2021:269 paras. 76-78).

The case law of the ECJ has clarified the concept of the application of Union law by States in relation to their obligation to observe the fundamental rights of the Charter, including by their national constitutional courts in their role of interpreting and applying the fundamental rights of their Constitutions. “The applicability of Union law implies the applicability of the fundamental rights guaranteed by the Charter”, even in cases where State laws have not been adopted to transpose Union law, if those laws fulfil obligations imposed on States by the Treaties, stated the judgment of the ECJ, Grand Chamber, 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, para. 21, at great length: only in situations where the action of States “is not wholly determined by Union law, national authorities and courts remain empowered to apply national standards of protection of fundamental rights” (paragraph 29), as long as such application does not affect the level of protection provided for by the Charter, as interpreted by the ECJ, or the primacy, unity and effectiveness of Union law, with constitutional courts being obliged, where appropriate, to refer the relevant question to the ECJ for a preliminary ruling in accordance with Article 267 TFEU - which they do not usually use or use only very sparingly. If the situation is not determined by Union law, the Charter and its rights do not apply to the States.

Article 53 of the Charter states that none of its provisions may be interpreted as limiting or prejudicing the fundamental rights recognized by international law, the ECHR and the Constitutions of States. However, the judgment of the ECJ, Grand Chamber, 26 February -2013, *Melloni*, C 399/11, EU:C:2013:107, considered, regarding the right to effective judicial protection under Article 47 of the Charter, that this is so provided that the application by the States of their Constitutions “does not affect the level of protection provided for by the Charter, as interpreted by the Court of Justice, nor the primacy, unity and effectiveness of Union law” (para. 60), as absolute values.

In short, the existence of a European canon on a particular fundamental right established by the ECJ, when States apply Union Law, which fully regu-

lates the matter in question, identifies a content that does not act as a premise, presupposition or minimum part of the full content of that right in national Constitutions, but as its full constitutional content.

In the case of the fundamental right to equal treatment and non-discrimination based on racial or ethnic origin, it must be specified, after this interpretation of the fundamental rights of the Charter by the ECJ, what are the margins of freedom, legal effectiveness and efficiency of the provisions that are more favourable to the protection of the principle of equal treatment than those provided for in the Directive (Articles 6(1) and 8(2), which the State laws of transposition have decided to incorporate in a free and legitimate determination of legislative policy authorised by Union law. The key issue is again the extension of the concept of “application of Union law” in Article 51(1) of the Charter. The consideration that in the normative space of greater favour, the States would not apply Union law, but their own law, would lead to placing this more favourable regulation outside the level of protection provided by Article 21(1) of the Charter to the fundamental right of non-discrimination based on racial or ethnic origin.

3. Directive 2000/43 and the ECHR

The European Union recognises the fundamental rights guaranteed by the ECHR and by the constitutional traditions of the Member States as general principles of its law, respect for which is guaranteed by the ECJ, in accordance with settled case-law, as set out in Article 6.3 TEU. Obviously, this provision does not regulate the relationship between the ECHR – and its Protocols – and the legal systems of the Member States, nor does it oblige the national court, in the event of a conflict between a rule of national law and the ECHR, to apply directly the provisions of that Convention and not to apply the rule of national law that is incompatible with it (ECJ, Grand Chamber, 24 April 12, *Kamberaj*, C571/10, EU:C:2012:233 paragraphs. 60-63).

The Charter has provided that, insofar as the rights it recognises correspond to rights guaranteed by the ECHR, their meaning and scope are to be the same as those conferred on them by that Convention. The Charter does not prevent Union law from granting more extensive protection (Articles 52(3) and 53), nor does it require that the ECHR be a canon of validity of Union law, until it is ratified. The ECJ states that “although the fundamental rights recognised by the ECHR form part of Union law as general principles – in accordance with Article 6(3) TEU – and Article 52(3) of the Charter requires that the rights contained therein which correspond to rights guaranteed by the ECHR be given the same meaning and scope as that Convention,

the latter does not constitute, since the Union has not acceded to it, a legal instrument formally integrated into the legal order of the Union.”

The ECJ has also stated that “to the extent that the Charter contains rights that correspond to rights guaranteed by the ECHR, Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in it and the corresponding rights guaranteed by the ECHR, without affecting the autonomy of Union law and of the Court of Justice of the European Union”, and therefore, for the purposes of interpreting the Charter, the ECHR must be taken into account as a minimum level of protection. According to the explanations relating to Article 52(3) of the Charter, the provision is intended to ensure the necessary consistency between the Charter and the ECHR, “without affecting the autonomy of Union law and the Court of Justice of the European Union.” The ECJ has thus left the door open to its autonomous interpretation or weighing.

Concerning Article 21(1) of the Charter, the Praesidium’s explanations state that it is “inspired” by Article 13 EEC Treaty, later replaced by Article 19 TFEU, but also by Article 14 ECHR and by Article 11 of the Convention for the Protection of Human Rights and Dignity of the Human Person with regard to the Application of Biology and Medicine, done in Oviedo on 4 April 1997. And that, in so far as it coincides with Article 14 ECHR, it must be applied in accordance with the latter.

Article 14 ECHR also envisages a general or open prohibition of discrimination: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”; which is, however, limited by its application to “the rights and freedoms recognized in this Convention.”

Article 1 of Protocol No. 12 to the ECHR, done in Rome on 4 November 2000, corrected this limitation and extended the general prohibition of discrimination to the “enjoyment of all rights granted by law” (Article 1(1) ECHR). Its Explanatory Memorandum extends the scope of operation of the general prohibition of discrimination beyond the ECHR to include national laws.

The application of Article 21(1) of the Charter in accordance with Article 14 ECHR, there being a material coincidence between both provisions, has led the ECJ to take into account the decisions of the ECtHR, fulfilling the interpretative mandate of Article 52(3) of the Charter, without prejudice to its possible greater protection. Thus, the ECJ judgment ECJof 16 July 2015 *CHEZ Razpredelenie Bulgaria*, C83/14, EU:C:2015:480 supports the consideration of Roma origin as an ethnic origin in the judgments of the ECtHR, Grand Chamber,

Nachova and Others v. Bulgaria, of 6 July 05, and, Grand Chamber, Sejdić and Finci v. BosniaHerzegovina, of 22 December09.

III. THE PURPOSE OF DIRECTIVE 2000/43

1. Object and Purpose

According to Article 1, the purpose of Directive 2000/43 is to establish a framework for combating discrimination on grounds of race or ethnic origin, in order to ensure that the principle of equal treatment, a fundamental principle of EU law enshrined in Articles 20 and 21 of the Charter, is applied in the Member States. This principle requires that similar situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (ECJ judgments 22 May 14, Glatzel, C356/12, ECLI:EU:C:2014:350 paragraph. 43; 21 December 16, Vervloet and Others, C76/15, paragraph. 74; 9 March 17, Milkova, C406/15, paragraph. 55).

2. The Concepts of Racial Origin and Ethnic Origin

The Directive does not define the concepts of racial origin and ethnic origin. In its negative delimitation, it states that the “European Union rejects theories which attempt to determine the existence of separate human races,” so that the use of the term “racial origin” “does not imply an acceptance of such theories” (recital 6); theories that, in addition to opposing modern anthropology, favor segregationism and racial and ethnic discrimination and reached a paroxysmal level of cruelty with Nazi barbarism against which the Universal Declaration of Human Rights was raised in 1948.

For its positive definition, the Directive refers, in its recitals 2 and 3, to fundamental rights as guaranteed by the ECHR and as resulting from the constitutional traditions common to the Member States, and, in particular, to the right to equality before the law and to the right of everyone to be protected against discrimination, a universal right proclaimed in international standards, including the United Nations International Convention on the Elimination of All Forms of Racial Discrimination of 1965, which is an appropriate instrument for the interpretation of the Directive. As early as 1950, UNESCO had recommended replacing the concept of race, of dubious scientific validity, with that of ethnicity, more focused on cultural and social differences, which explains the diversity of peoples

within the unity of the human race. While the notion of race is rooted in the idea of biologically classifying human beings into subspecies on the basis of morphological characteristics such as skin color or facial features, the notion of ethnicity is rooted in the concept of a people, a human community defined by similar social characteristics, relating in particular to nationality, tribal affiliation, religion, language, or cultural and traditional origins and backgrounds. Under Article 21(1) of the Charter, “ethnic origins” are equated with “social origins.”

In order to arrive at these conceptual definitions, the ECJ draws on the case law of the ECtHR, following the indication of the official explanations on Article 21(1) of the Charter, which determine the application of this provision in accordance with Article 14 ECHR, insofar as it coincides with the latter.

Based on the judgments of the ECtHR *Nachova and Others v. Bulgaria*, of 6 July 05, and *Sejdić and Finci v. BosniaHerzegovina*, 22 December 09, judgment of 16 July 15, *CHEZ Razpredelenie Bulgaria*, C83/14, EU:C:2015:480, ECJ defines the concept of ethnic origin on the basis of ethnicity as a societal group identified “in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds”.

It concludes that this concept applies to the Roma community: Roma origin may be classified as ethnic origin (para. 46). Remember that discrimination based on ethnic origin is considered a form of racial discrimination by Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (para. 73), and by the ECtHR, which insists that discrimination based on a person’s ethnic origin constitutes a form of racial discrimination, and consequently produces a virtual assimilation of the concepts of racial origin and ethnic origin and of racial and ethnic discrimination. Doctrinal thought also gives greater prominence to the concept of ethnicity, thanks to the philosophical evolution of the notion of physical race and its replacement by that of historical nation and, ultimately, by that of culture.

The ECJ judgment 6 July 17, *Jyske Finans*, C668/15, EU:C:2017:278 will be based on the judgment *CHEZ* and on the fact that the concept of “ethnic origin” comes from the “idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and background” (paragraph 17). Analyzing this jurisprudential definition, the *Jyske Finans* judgment observes that a person’s country of birth does not appear on this list of criteria, but points out that this list is not exhaustive, using the phrase “in particular,” so it does not exclude that the country of birth may appear, although it would only be one of the specific factors that would allow the conclusion that a person belongs to an ethnic group, without being in any way a decisive criterion for such membership (paragraph 18).

The *Jyske Finans* judgment provides the definition of ethnic origin with the necessary plurality of criteria for its identification, so that it cannot be determined with the support of a single criterion, but must be based on a set of circumstances, some of an objective nature and others of a subjective nature, and without the country of birth being able to replace, in a general and absolute way, all the criteria of the jurisprudential formulation. From which it deduces: first, that the country of birth cannot serve as a basis by itself to establish a general presumption of belonging to a particular ethnic group – there is no direct or inseparable link between these two concepts; – and, second, that it is not possible to have a correspondence between each sovereign State and a single ethnic origin (paragraphs. 19-21). The main proceedings concerned the practice of a Danish credit institution specializing in financing the purchase of cars, imposed by anti-money laundering legislation, of requiring applicants for a loan for the purchase of a car whose driving license shows a country of birth that is not a Member State of the European Union or EFTA, to provide an additional identification requirement, consisting of the provision of a copy of their passport or residence permit. The difference in treatment accorded to the applicant in the main proceedings, born in BosniaHerzegovina but of Danish nationality, was imposed without distinction on all persons born outside the territory of a Member State of the Union or of EFTA, without a direct link to ethnic origin.

Furthermore, it is clear that neither the Directive, nor Article 13 EEC Treaty, nor Article 19 TFEU cover discrimination based on socio-professional category or place of work (ECJ judgment 7July11, *Agafitei and Others*, C-310/10, EU:C:2011:467).

3. The Exclusion of Nationality; and Status of Third-Country Nationals Who Are Long-Term Residents

According to its Article 3(2), the Directive “does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.” The International Convention on the Elimination of All Forms of Racial Discrimination formulates the exclusion with greater technical correctness, providing that none of its clauses affect the legal provisions of States on nationality, citizenship or naturalization, but “provided that such provisions do not discriminate against any particular nationality” (Article 1(3)).

Discrimination on the basis of nationality of workers of Member States with regard to employment, remuneration and other working conditions is prohibited by Article 45(2) of the TFEU and by Regulation No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance.

Differences in treatment between foreigners who are granted the status of third-country nationals who are long-term residents in the European Union – regulated by Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, do not fall within the scope of Directive 2000/43: refusal to grant housing assistance to an Albanian national who is a long-term resident in the autonomous province of Bolzano, Italy, due to exhaustion of the budget allocated to third-country nationals as a result of a method of calculating the funds that is favourable to Community nationals and unfavourable to long-term resident third-country nationals; refusal to a Turkish national who is a long-term resident in the Land of Oberösterreich, Upper Austria, of the housing benefit he was receiving because the new legal regulation requires long-term resident third-country nationals, from 1 January 2018, to prove, in the manner prescribed by law, basic knowledge of the German language, a requirement not applicable to nationals of States of the Union or the EEA (ECJ judgment of 24 April 2012 *Kamberaj*, C571/10, EU:C:2012:233 paragraphs 48-50 and 65; and ECJ judgment of 10 June 2011 *Land Oberösterreich*, C-94/20, EU:C:2021:477 paragraphs 50-53). Directive 2000/43 does not protect against differences in treatment on grounds of nationality, nor does it project its effects onto the provisions on aliens governing the entry and residence of third-country nationals and stateless persons in the territory of the States.

However, Directive 2003/109/EC establishes, in its Article 11(1)(d) and (f), a principle of equal treatment of long-term residents with Community nationals, aimed at the social integration of the former, both with regard to social security benefits, social assistance and social protection in accordance with national legislation, and, among other conditions and rights, access to goods and services and the supply of goods and services available to the public, as well as procedures for accessing housing. Article 11(4) provides that States “may limit equal treatment in respect of social assistance and social protection to core benefits,” not social security as defined in national legislation.

The ECJ judgment *Kamberaj*, after recalling that the concept of “core benefits” in Article 11(4) of Directive 2003/109 is not defined by Union law, nor does it refer to the laws of the States, stated that it follows from recital 13 of that Directive that “the concept of core benefits covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-

term care. The modalities for granting such benefits are to be determined, in accordance with that recital, by national law.” Although this list is not exhaustive and does not exclude housing aid and the application of the principle of equal treatment to it (paragraphs. 84, 85). The ECJ then considered that the limitation of the meaning and scope of these “basic benefits” must be made in the light of the objective of the Directive on the social integration of third-country nationals legally and permanently resident in the States of the Union, such as social assistance or social protection benefits granted by national, regional or local public authorities, which contribute to people meeting basic needs such “as food, accommodation and health (paragraphs 90, 91). This is consistent with Article 34(3) CFREU, which states, in order to combat social exclusion and poverty, the Union, and thus the Member States when they are implementing European Union law, “recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by European Union law and national laws and practices” (paragraphs. 80, 92). The Court held that Article 11(1)(d) of Directive 2003/109 precludes national or regional legislation which, in relation to the distribution of funds for the granting of housing assistance, provides for different treatment for a third-country national enjoying long-term resident status than for nationals residing in the same province or region, provided that the assistance in question is a basic benefit falling within one of the three categories referred to in that provision, a nature which appears to be that of housing assistance; and that paragraph 4 of that Article 11 is not applicable, which, as an exception to the principle of equal treatment, must be invoked formally, which the Italian Republic had not done, and must be interpreted strictly, which is for the national court in question to verify (paras. 86, 88, 93 and judgment 3).

The ECJ in its judgment of 10 June 2021 *Land Oberösterreich*, C 94/20, EU:C:2021:477 ECJ went a step further and stated that Article 11(1)(d) of Directive 2003/109 precludes legislation of a Member State which makes the grant of housing benefit to long-term residents of third countries subject to the requirement that they prove that they have a basic knowledge of the language of that Member State, if that benefit constitutes a “basic benefit,” even if that State has made use of the option to apply the exception provided for in Article 11(4) of the Directive 2003/109, a matter which is for the referring court to determine. If, on the other hand, the court in question considers that housing benefit does not constitute a “basic benefit” within the meaning of the aforementioned provision of Directive 2003/109, but the States nevertheless decide to grant long-term resident third-country nationals a “non-basic” benefit falling within the scope of social assistance or social protection and to make use

of the option to limit the principle of equal treatment of long-term resident third-country nationals with nationals of Member States of the Union, the conditions for granting housing benefit laid down by the laws of the States do not fall within the scope of that directive (paras. 46-49).

As regards the application of Article 21 CFREU, which requires the State to implement EU law and of which the judgment of the ECJ Land Oberösterreich states that “Directive 2000/43 gives specific expression in the substantive fields that it covers” (paragraph. 63), the Charter only applies if the housing allowance under Austrian legislation is a “core benefit” within the meaning of Article 11(4) of Directive 2003/109. However, even if it is a “core benefit,” the Austrian regulation, which requires foreigners residing in EU countries for a long time to have knowledge of the German language, does not preclude Article 21 CFREU, since this regulation does not result in a disadvantage for persons of a particular ethnic origin (paragraphs. 61-64).

IV. PROHIBITED DISCRIMINATION ON THE GROUNDS OF RACIAL OR ETHNIC ORIGIN OF THE VICTIM AND OTHER PERSONS, AND ITS FORMS. EXCEPTIONS

“The principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin” (Article 2(1) Directive 2000/43).

1. **The Subjective Scope of Application Extends to All Persons Against Discrimination Based on Racial or Ethnic Origin**

Given the object and nature of the rights protected by the Directive, its subjective scope of application cannot be limited restrictively. Recital 16 of the Directive states that protection against discrimination based on racial or ethnic origin should benefit “all” persons, including legal persons discriminated against on the grounds of the racial or ethnic origin of their members. Consequently, its Article 3.1 provides that this Directive shall apply “to all persons, as regards both the public and private sectors, including public bodies.”

On the basis of the Directive, Article 13 EEC Treaty, Article 19.1 TFEU, and Article 21(1) CFREU, the ECJ has concluded that the principle of equal treatment and the prohibition of discrimination sanctioned by the Directive does not apply only to a category of persons determined by “their” race or

ethnicity, but to all persons discriminated against on the grounds of racial or ethnic origin (Article 1).

Despite its different language versions, the Directive prohibits “discrimination based on racial or ethnic origin” (Article 2(1)), and is therefore applicable to persons who, although not belonging to the discriminated ethnic group, nevertheless suffer less favourable treatment, a particular disadvantage, or harassment, on account of their affiliation or association with other persons of a certain racial or ethnic origin. This has been categorically affirmed by the ECJ judgment of 16 July 15, *CHEZ Razpredelenie Bulgaria*, C83/14, EU:C:2015:480, ECJ *CHEZ*, C83/14, paragraph 56, taking into account the context, the general scheme, and the purpose and practical effect of the Directive, referring, by analogy, to the judgment of the ECJ, Grand Chamber, 17 July 08, *Coleman*, C303/06, EU:C:2008:415 paragraphs. 38 and 50, on discrimination based on association on the basis of disability.

2. Direct Discrimination: Its Causes; Without Identifiable Victim; Multiple Discrimination of Women; Parodies

2.1 DIRECT DISCRIMINATION

Article 2(2)(a) of the Directive defines direct discrimination as a situation where, on the grounds of racial or ethnic origin – not on the grounds of “his” racial or ethnic origin – “one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.”

Direct discrimination takes the form of a less favourable or adverse result due to racial or ethnic origin, and without possible justification - except when the difference in treatment is based on an essential and determining professional requirement of Article 4 of the Directive - and regardless of whether the person causing it has a racist or xenophobic attitude or not. Discrimination, despite its offensive and stigmatizing nature, does not require any intention, but it does not exclude it either, and therefore does not rule out racist and xenophobic motivations.

Acts of racist violence are obviously discriminatory conduct, which could, in certain circumstances, constitute “degrading treatment” within the meaning of Article 3 ECHR, in breach of this provision either alone or in conjunction with Article 14 ECHR itself. It is the obligation of the State authorities to investigate the possible link between the racist motivation and the act of violence in

order to reaffirm society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the authorities' ability to protect them from the threat of racist violence (ECtHR judgments of 6 July 2005, *Nachova and others v. Bulgaria*, §160; 11 March 2014, *Abdu v. Bulgaria*, §29, 31, 53).

Less favourable treatment resulting from direct discrimination is any detriment and does not necessarily have to involve detriment to the rights or legitimate interests of the person who suffers it, which constitutes a limitation incompatible with the Directive and would lower its level of protection (ECJ judgment of 16 July 15, *CHEZ Razpredelenie Bulgaria*, C83/14, ECLI:EU:C:2015:480, paras. 65-69).

The decision by the captain of a Swedish airline to subject a passenger of Chilean origin, resident in Stockholm, to an additional security check because he was associated with an Arab person, placed that passenger at a disadvantage and receiving less favourable treatment than other passengers in a comparable situation. This behaviour led the Swedish Ombudsman on Discrimination to take legal action, seeking compensation for direct discrimination caused to the passenger by the airline, in accordance with Swedish anti-discrimination legislation, with the dispute over discriminatory treatment falling within the scope of the Directive (ECJ judgment, *Braathens Regional Aviation*, C-30/19, paragraphs. 18-20, 31).

2.2 THE CAUSES OF DISCRIMINATION: THE RACIAL OR ETHNIC ORIGIN OF THE VICTIM, DISCRIMINATION BY ASSOCIATION

The ECJ has categorically considered that “it is sufficient” that ethnic origin “has determined the decision to establish the least favourable treatment for there to be direct discrimination.” In the case which gave rise to its judgment of 16 July 15, *CHEZ Razpredelenie Bulgaria*, C83/14, EU:C:2015:480,, all the electricity meters in a district of a town in Bulgaria, inhabited mainly by people of Roma origin, were installed on overhead electricity poles at a height of six to seven metres, while in districts not inhabited mainly by people of that ethnic group the meters were located at a height of less than two metres. The applicant in the main proceedings, of non-Roma but Bulgarian ethnicity, ran, as a sole trader, a grocery store located in the district, and complained of discrimination, since she could not observe her electricity meter to monitor her consumption and ensure the accuracy of the bills issued to her by the electricity company, which in her opinion were excessive in amount.

In these circumstances, the ECJ declared that the concept of “discrimination based on racial or ethnic origin” (Articles 1 and 2(1) of the Directive) is

applicable “irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure” (para. 60). “Discrimination by association” or “affiliation” is also supported by the ECtHR case law (Judgment of 28 March 17, *Škorjanec v. Croatia*).

The judgment in *CHEZ* also states:

1. The fact that the neighbourhood was also inhabited by persons who were not of Roma origin could not exclude the possibility that this practice of the Bulgarian electricity company had been established precisely because of the Roma origin of the majority of its inhabitants.

2. The unfavourable nature of the treatment resulting from this practice for the inhabitants, mostly of Roma origin, of the neighbourhood concerned was undeniable, given the difficulty or impossibility of the persons concerned examining their electricity meter in order to monitor their consumption, and the offensive and stigmatising nature of this practice.

3. As regards whether the condition relating to the existence of a “comparable situation” (Article 2(2)a) of the Directive), “it must be held that, in principle, all final consumers of electricity who are supplied by the same distributor within an urban area must, irrespective of the district in which they reside, be regarded as being, in relation to that distributor, in a comparable situation so far as concerns the making available of an electricity meter intended to measure their consumption and to enable them to monitor changes in their consumption” (paragraphs 75, 86-90).

In any event, in order to establish the existence of direct discrimination on the basis of racial or ethnic origin, it must be proven that the decision of the electricity company had been established and maintained for reasons linked to the common ethnic origin of the majority of the inhabitants of the affected neighbourhood, which is for the referring court to assess, taking into account all the relevant circumstances of the case and the rules on the reversal of the burden of proof in Article 8(1) of the Directive (paragraphs 76, 91).

2.3 DIRECT DISCRIMINATION WITHOUT AN IDENTIFIABLE VICTIM

In its judgment of 10 July 08, *Feryn*, C-54/07, EU:C:2008:397 the ECJ stated that the absence of an identifiable complainant who claims to have been a victim of discrimination does not prevent direct discrimination within the meaning of the Directive.

The Directive does not apply solely to cases where a job candidate who has not been hired and considers themselves a victim of direct discrimination has taken legal action against the employer. Direct discrimination in recruitment occurs when a company, through one of its directors, publicly declares that it will not hire workers of a certain ethnic or racial origin to meet the wishes of its clients. This can obviously discourage certain candidates from applying and therefore make it more difficult for them to enter the labour market.

In such cases, the complaint of discrimination may be made by a person or body that has been granted, among its powers by the national legislation implementing the Directive, more favourable than the minimum regulation of its Article 7(2), the power to submit complaints of discrimination without having to act on behalf of a specific complainant, or in the absence of an identifiable complainant. It is the exclusive competence of the national judge to determine whether its legislation allows such a possibility.

In the *Feryn* judgment, C-54/07, the action against the employer had been brought by the Centre for Equal Opportunities and the Fight against Racism of Belgium, a body responsible for promoting equal treatment which the States must designate in compliance with Article 13 of the Directive. The Belgian legislator had recognized that this body had standing to file complaints about discrimination, without the need for a prior complaint from the person allegedly discriminated against or for their authorization (paragraphs 14, 23-28).

2.4 MULTIPLE DISCRIMINATION BASED ON GENDER, AGE, AND ETHNIC ORIGIN

As a manifestation of the multiple discriminations affecting women and about which the Directive warns in its recital 14, the ECJ judgment of 19 April 12, *Meister*, C-415/10, EU:C:2012:217, ruled on a case of triple direct discrimination on the grounds of sex, age, and ethnic origin of a woman who sought to be recruited in Germany for a job, meeting the required professional qualifications, and saw her application rejected by the company without being interviewed or receiving any explanation for that rejection.

Ms. Meister, a 45-year-old Russian-born graduate with a Russian degree in computer engineering recognized by Germany, applied for a job in a German company for an “experienced software developer” through a public announcement. The company rejected her application by letter without conducting a selection interview with the applicant. Shortly afterward, the company posted a second advertisement on the Internet, with content similar to the first, to which Ms. Meister responded by reapplying. She was again rejected by the

company, without an interview invitation or any information being provided on the reasons for the rejection, so there was no indication that the company had considered Ms. Meister's level of qualifications to be unsuitable for the recruitment process. Ms. Meister filed a claim for discrimination on the grounds of her sex, age, and ethnic origin, alleging that she plausibly met the conditions for employment, and requesting payment of compensation by the company for discrimination in employment, as well as knowledge of the file of the selected candidate, which is essential to prove their qualifications.

The ECJ concludes that the refusal of the defendant company to provide information on the non-employment of the applicant, without an interview or any explanation, is a fact that establishes the presumption of discrimination, direct or indirect, which the defendant company must disprove, proving the objective justification for the non-employment of the applicant, unrelated to any discrimination. The lack of information cannot be erected as an insurmountable obstacle that renders the protection of the Directive against discrimination useless (Article 8 (1)).

2.5 PARODIES AND DISCRIMINATORY MESSAGES

In the main proceedings which gave rise to the judgment of the ECJ, Grand Chamber, 3 September 14, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, the applicants in the main proceedings, the copyright holders, complained about the discriminatory message conveyed by the drawing which was the subject of the contested parody. The ECJ did not address the issue, which was not raised in the request for a preliminary ruling, and merely referred to the argument of the applicants in the main proceedings that, by replacing the characters who collected the coins in the original work with people in burkas or people of colour, the contested drawing conveyed a discriminatory message within the meaning of Directive 2000/43, which led to the protected original work being associated with that message, and the copyright holders therefore had a legitimate interest in preventing this (Articles 2 and 3 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society). This was to be taken into account by the Belgian referring court when striking the right balance between, on the one hand, the interests and rights of the heirs of the author of the original drawing contained in the *Suske en Wiske* comics and, on the other, the freedom of expression of the user of a protected work, Mr. Deckmyn, a member of a far-right, populist, nationalist Flemish political party, who invokes the parody exception provided for in Article 5(3)(k) of Directive 2001/29 (paragraphs 29-32).

3. Indirect Discrimination; Its Strict Objective Justification

Indirect discrimination occurs “where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary” [Article 2(2)b) Directive 2000/43].

In indirect discrimination, the Directive refers to persons of a particular racial or ethnic origin at a particular disadvantage compared to other persons. The ECJ will reiterate its extensive interpretation of victims of racial or ethnic discrimination who, despite not having the particular racial or ethnic origin that motivates it, are discriminated against by association with that origin.

Regarding the definition of indirect discrimination in Directive 2000/43, specialist doctrine has highlighted that it would be sufficient to assess it by demonstrating that the provision, criterion or practice “would put” the affected persons at a “particular disadvantage”, without the need to demonstrate that they have suffered actual discrimination - potential discrimination would be sufficient - or to provide statistical evidence of such discrimination, which differs from the definition of indirect discrimination on the grounds of sex adopted by the repealed Directive 97/80 and developed by the ECJ, which requires the presentation of statistical evidence demonstrating the actual differential impact.

In the case law of the ECJ, indirect discrimination is identified with a situation of “particular disadvantage” on the grounds of a specific racial or ethnic origin as a result of the neutral measure in question (judgments, of 16 July 2015, *CHEZ Razpredelenie Bulgaria* C-83/14, EU:C:2015:480 para. 100; *Jyske Finans*, C 668/15, , EU:C:2017:278, paragraphs 27-31; of 15 November 2018, *Maniero* C-457/17, EU:C:2018:912 C-457/17, paragraphs 47-48; and judgement of 18 May 2006 *Land Oberösterreich* C-94/20,, ECLI:EU:C:2006:330 paragraphs 55-57). Indirect discrimination is a collective discrimination with an adverse impact which, like direct discrimination, does not require the existence of a discriminatory, racist or xenophobic intention on the part of the person causing it, although it does not exclude such intention.

As in the case of “less favorable treatment”, which defines direct discrimination, the “particular disadvantage” to which indirect discrimination may place people need not consist solely of a provision, criterion or conduct that prejudices their rights or legitimate interests. “Particular disadvantage” does not require a special degree of severity and inequality either (judgment in ECJ judgment of 16 July 15, *CHEZ Razpredelenie Bulgaria*, C83/14, EU:C:2015:480, paragraphs 68-99, 103); it does require that it affects or is likely to affect in a specific and determined way

persons of a particular racial or ethnic origin, or by association with that origin, in relation to other persons, which was not appreciated by the ECJ in its judgments of 6 April 2017, *Jyske Finans* C-668/15, EU:C:2017:278 paragraphs. 31-32, of 15 November 2018, *Maniero* C-457/17, EU:C:2018:912 paragraphs. 48-52, and 10 June 2021 *Land Oberösterreich* C 94/20, EU:C:2021:477, paragraph. 55.

The *Maniero* judgment, in which the ECJ addressed the practice of a German foundation of awarding grants for research projects and legal studies abroad to those who had passed the first state legal examination in Germany, recognized that it was “not disputed” that the group favoured by the foundation included people who met that requirement, while the group of people who did not meet it was disadvantaged (paragraph 49). As in the *Jyske Finans* case, where the disputed practice was based on a criterion not directly or indirectly linked to the ethnic origin of the people, the *Maniero* judgment had nothing to do with the fact that this disadvantage affected people belonging to or related to a specific ethnic group.

In the *Land Oberösterreich* judgment, Austrian legislation, which made the granting of housing benefit to third-country nationals legally resident in EU states, including long-term residents, subject to proof of basic knowledge of the language of that Member State, was applied indiscriminately to all third-country nationals, who must enjoy equal treatment with nationals (Article 11 Directive 2003/109), and not to those of a specific ethnic origin. As a result, not only did the Austrian legislation not constitute indirect discrimination based on ethnic origin, as prohibited by Directive 2000/43, since it did not cause a particular disadvantage for persons of a particular ethnic origin (paragraph 63), but, following the *Kamberaj* judgment, C 571/10 (paragraph 50), such a difference in treatment does not fall within the scope of Directive 2000/43 (paragraphs 53-57, 60). The doctrine has rightly criticized these decisions for their limited application of Directive 2000/43 to third-country nationals who are long-term residents of the Union. The Austrian court did not fail to raise, as an element of comparison for the judgment of equality with third-country nationals, who are not required by law to have knowledge of the German language in order to access housing subsidy in the State of Upper Austria.

The prohibition of discrimination on the grounds of ethnic origin in Article 21 CFREU does not apply where the State fails to apply Union law by making use of the option to rely on the exception to the principle of equal treatment with Community nationals provided for in Article 11(4) of Directive 2003/109, because the housing benefit does not constitute a “core benefit” within the meaning of Article 11(1)d) thereof. If the housing benefit constitutes a “core benefit”, Article 21 of the Charter applies, but does not preclude legislation which does not cause a particular disadvantage for persons of a particular ethnic origin.

Returning to the *CHEZ* case, C-83/14, if the Bulgarian court were to reject the evidence of direct discrimination based on ethnic origin, it would then have to analyse whether the disadvantage predominantly affecting persons of Roma ethnicity concealed indirect discrimination on the basis of that origin, given the offensive and stigmatizing nature of the contested measure and the objective difficulty it caused them in accessing their electricity meters in order to monitor their electricity consumption (paragraphs 105-108).

Prohibited indirect discrimination does not occur if the unequal provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, which must be verified by the State court. However, in cases of differences in treatment based on racial or ethnic origin, the concept of objective justification must be interpreted strictly (*CHEZ*, C-83/14, paragraph 112, in accordance with the case-law rendered by the ECtHR). The fight against fraud and crime are legitimate objectives accepted by EU law (ECJ, Grand Chamber, 6 March 07, *Placanica and Others*, C-338/04, C-359/04 and C-360/04, EU:C:2007:133 paragraphs. 46-55).

In the main proceedings in the *CHEZ* judgment, the electricity company had claimed that the measure in question had been put in place to combat the numerous damages, manipulations of electricity meters and illegal connections occurring in the affected area and to prevent fraud and abuse. The ECJ held that the disputed practice of raising the positioning of meters could only be objectively justified by the desire to ensure the security of the electricity transmission network and to monitor its consumption appropriately, without exceeding the limits of what is appropriate and necessary to achieve those legitimate objectives and provided that the inconvenience caused to users was not disproportionate. The measure would not be proportionate to the legitimate aims pursued if other appropriate and less restrictive means of achieving them were possible or, failing that, if the practice in question disproportionately undermined the legitimate interest of the end-users of electricity living in the affected neighbourhood, who are mainly of Roma origin, in having access to the supply in conditions that were not offensive or stigmatizing and in being able to regularly monitor their electricity consumption. All of this was a matter for the Bulgarian court to verify (paragraphs 113, 128).

4. Harassment

Harassment is or causes discrimination, without the need for a judgment of equality, since it consists of behaviour that is not desired by the person who suffers it, in relation to “their” racial or ethnic origin, “with the purpose or effect of

violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”. “In this context”, Article 2(3) of the Directive allows for its definition by the laws and practices of the States.

By analogy, it is necessary to cite here again the judgment of the ECJ Coleman, C-303/06, which states that the prohibition of harassment established by Directive 2000/78, in the same terms as Directive 2000/43, is not limited exclusively to those persons affected by the protected personal condition but includes harassment by association or affiliation.

When harassment is based on discrimination, it is a discriminatory act - moral harassment is not discriminatory - and is equivalent, for the purposes of protecting the principle of equal treatment, to any form of discrimination prohibited by the Directive and by state laws. It may occur through an order or instruction to harass or commit an act of racist intolerance.

Any order to discriminate against persons on the grounds of “their” racial or ethnic origin, or association with such persons, is discrimination within the meaning of Article 2(4) of the Directive.

5. Exceptions: Genuine and Determining Occupational Requirements

Exception to the provisions of its Article 2, 1 and 2, Article 4 of the Directive authorizes States to provide “that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination, where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate”.

However, recital 18 of the Directive logically warns that only in “very limited circumstances, a difference of treatment may be justified where a characteristic related to racial or ethnic origin constitutes a genuine and determining occupational requirement”, and requests that these circumstances appear “in the information provided by the Member States to the Commission”.

In reality, the genuine and determining occupational requirement operates differently in indirect and direct discrimination. In indirect discrimination, following the model of sex discrimination, the difference can be justified objectively according to the strictest test. Direct discrimination only admits an exception by making express reference to the “genuine and determining occupational requirement” (“occupational requirements” in Directive 2000/78, Article 4), an objectively more limited exception.

According to the settled case-law of the ECJ, a genuine and determining occupational requirement is not the ground on which the difference in treatment is based, but a characteristic related to that ground (Grand Chamber, judgment of 13 September 11, *Prigge and Others*, C-447/09, EU:C:2011:573 paragraph 66). This genuine and determining occupational requirement can only be due to “the nature of the specific professional activities or the context in which they are carried out”, it must be objective, and “cannot cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the client” (Grand Chamber, judgment 14 March 17, *Bougnaoui and ADDH*, C-188/15, EU:C:2017:204 paragraph. 40, by analogy; judgment of 10 July 08, *Feryn*, C-54/07, EU:C:2008:397).

V. THE MATERIAL SCOPE OF DIRECTIVE 2000/43/EC: NON-EXHAUSTIVE LIST OF SUBJECTS AND NON-RESTRICTIVE APPLICATION

Article 3(1) of the Directive lists the material areas in which, “within the limits of the powers conferred” on the Union, the prohibition of discrimination on grounds of ethnic or racial origin applies. The ECJ has considered that, taking into account the nature of the rights protected by the Directive and the fact that it is the expression, in the area of discrimination on grounds of racial or ethnic origin, of the principle of equality, a general principle of Union law recognized as a fundamental right by Article 21 CFREU, the material scope of the Directive cannot be defined restrictively (judgments *RunevičVardyn and Wardyn*, C391/09, EU:C:2011:291 paragraph 43; *CHEZ*, C83/14, EU:C:2015:480, paragraph 42; *Maniero* C-457/17, ECLI:EU:C:2018:912, paragraph 36).

The first matters referred to in Article 3(1) of the Directive correspond to the field of “employment and occupation,” in which the various competences of the Union on “social policy” are recognized in the TFEU, and are the same, with some minor variation in wording, as those listed in Article 3.1 of Directive 2000/78 and Article 14(1) of Directive 2006/54. They are in turn inspired by ILO Convention No. 111 of 1958, on discrimination in respect of employment and occupation.

Furthermore, Directive 2000/43 sets out other material areas of protection of persons against discrimination on grounds of racial or ethnic origin to ensure the development of democratic and tolerant societies (recital 12), with the aim, stated in its recital 16, “to protect all natural persons against discrimination on grounds of racial or ethnic origin” in order to fulfill the objective of

“ensuring a common high level of protection against discrimination in all the Member States,” which announces its recital 28.

The list of material areas of application provided for in Article 3(1) of the Directive is not exhaustive, as States may expand it by adopting provisions more favourable to the protection of the principle of equal treatment (Article 6(1)).

Among such material areas, the following have decisions by the ECJ:

a) “Conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion”

The provision covers access to employment, to any employment, public or private, as an employee or self-employed person, and to professional activities, the selection criteria, and the conditions of recruitment and professional promotion, in any sector of activity and level of professional classification. The Directive does not specify, unlike Directives 2000/78 and 2006/54, the inclusion of promotion in professional classification systems, but this promotion may be included in the generic reference to the “recruitment conditions [...] including promotion,” which cannot be interpreted restrictively.

The Directive applies, in short, to access to employment, i.e., to persons seeking access to employment, including the selection criteria and conditions of employment for that employment (judgment *Meister*, C415/10, EU:C:2012:217 paragraph 33); not to those who do not seek employment but only the formal status of candidate for the sole purpose of claiming compensation, and who seek to avail themselves unduly and abusively of the protection of Union law (judgment of 28 July 2016, *Kratzer*, C423/15, EU:C:2016:604 paras. 43-44, by analogy).

A recruitment policy may be discriminatory on the basis of an employer’s public statements that it will not employ workers of a particular ethnic or racial origin (judgment of 10 July 2008 *Feryn*, C54/07, EU:C:2008:397).

b) “Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience”

The rule, with identical wording in the symmetrical precept of Directive 2000/78 and in Article 14(1)(b) of Directive 2006/54, includes the conditions of access to vocational guidance and training, at any level, its updating and the obtaining of experience through work experience, separately from the conditions of access to employment, since they are materially different, regardless of whether the training conditions really function as conditions of employability, of access to employment.

It is a controversial question whether vocational training includes, in EU law, university education which qualifies for the exercise of a profession. The answer must be positive (judgment 2 February 1988, *Blaizot/Université de Liège and Others*, C24/86, EU:C:1988:43), since letter (g) of this same provision refers to education.

The Directive does not define the concept of “employment and working conditions” -nor do Directives 2000/78 and 2006/54, which, however, does not detract from its precision, the ECJ having stated, since its well-known judgment 19 November 1991, *Francovich and Bonifaci*, C6/90 and C9/90, ECLI:EU:C:1991:428, that the fact that a Directive does not define the labour law concepts it uses does not have the effect that it cannot be applied by national judges if they describe a minimum legal (c) “Employment and working conditions, including dismissals and pay” protection (paragraphs 13 et seq.).

The Directive expressly states that working conditions include those relating to dismissal and remuneration. This is also stated in Directive 2000/78 in its corresponding Article 3(1)(c), while in Directive 2006/54, Article 1(2)(b), working conditions include remuneration, which the Directive itself defines in its Article 2(1)(e), in accordance with Article 141(2) of the EEC Treaty (Article 157(2) of the TFEU), as “the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer.” Similarly, in Directive 2006/54, the prohibition of discrimination on grounds of sex in working conditions covers the conditions of dismissal and remuneration (Article 14(1)(c)). There is extensive and well-known case law of the ECJ on the principle of equal pay between men and women (Article 157 TFEU), applicable by analogy to the principle of equal treatment of persons regardless of their racial or ethnic origin.

The prohibited discrimination affects both the constituent elements of the remuneration and the level or amount of those elements (judgment 15-4-08, *Impact*, C-268/06, EU:C:2008:223, paragraph 130, by analogy). It extends to all benefits, contributions and pensions from private or occupational social security schemes, which, regardless of the specific formula for their arrangement, depend on the employment relationship between the worker and the employer and constitute a direct or indirect payment to the worker, even after the employment relationship has ended, which is the case of survivors’ pensions intended for the worker’s heirs; the same applies to pension schemes for public officials paid in respect of their employment with a public employer, which are perfectly comparable to those paid by a private employer to its employees, even if such schemes form part of a general compulsory scheme (judgment 28 September 1994, *Beune*, C7/93, EU:C:1994:350; 12 September

2002, *Niemi*, C351/00, EU:C:2002:480). All social benefits, whether in cash or in kind, from an employer are remuneration for the purposes of EU law.

The conditions for dismissal are those specific to the dismissal regimes of the States in light of the objective of the Directive, which is protection against discriminatory dismissal, which in turn guarantees the right to work based on the protected characteristic, the racial or ethnic origin of the persons. The laws of the States on dismissal cannot lead to the application of the principle of non-discrimination on grounds of racial or ethnic origin being undermined.

e) “Social protection, including social security and healthcare”

This provision of the Directive, which separates it from the material regulation of Directive 2000/78 and brings it closer to that of the International Convention on the Elimination of All Forms of Racial Discrimination, does not contain an express reference to the law of States to determine its meaning and scope.

Primary law recognizes the power of Member States to define the fundamental principles of their social security system (Article 153(4) TFEU) and its organization and scope. The regulations on the coordination of social security systems in the areas of freedom of movement and residence within the territory of the Member States of citizens of the Union (Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems and the related Regulation (EC) no 987/2009 of the European Parliament and of the Council of 16 September 2009, consolidated texts, applicable to the EEA and Switzerland), which do not replace national systems with a single European system, mean that it is for the national courts to derive those concepts from the laws of the Member States on social protection, social security and healthcare, without this meaning that the Member States may undermine the effectiveness of the directive (judgment of 24 April 2012, *Kamberaj*, C571/10, paragraph 78, EU:C:2012:233 by analogy).

g) “Education”

The Union has the power to carry out actions to support, coordinate or supplement the actions of States in the field of education [Article 6(e) TFEU]. In defining and implementing its policies and activities, it must take into account the requirements of a high level of education (Article 9 TFEU) and must contribute to the development of quality education by encouraging cooperation between States and, if necessary, supporting and complementing their action, while fully respecting their responsibilities with regard to the content of teaching and the organization of the education system, as well as their cultural and linguistic diversity (Article 165 TFEU).

The organization of educational systems is a matter for States. In the International Convention on the Elimination of All Forms of Racial Discrimination,

States undertake to take immediate and effective measures, particularly in the fields of teaching, education, culture and information, to combat prejudices leading to racial discrimination (Article 7). The ECtHR has stressed the importance of education, its organization without discrimination on the grounds of racial or ethnic origin, and of the means to facilitate access to it, particularly for boys and girls, in order to correct inequalities faced by persons belonging to ethnic minorities (judgment ECtHR, Grand Chamber, 13 November 07, *D.H. and Others v. Czech Republic*, “Ostrava”, &175; 30 March 2023, *Szolcsan v. Hungary*).

The ECJ has responded positively to the request for a preliminary ruling submitted by the German Bundesgerichtshof on whether the granting by a registered association – a private foundation – of scholarships intended to promote research projects or studies abroad falls within the concept of “education” in Article 3(1)(g) of the Directive (judgment *Maniero*, C457/17, EU:C:2018:912, para. 44).

Since Directive 2000/43 does not define the concept of “education” for its own purposes, the ECJ understands that the determination of its meaning and scope must be carried out in accordance with its usual meaning in everyday language, taking into account the context in which it is used and the objectives pursued by the regulations in which it is inserted. An essential element of education is access to it and the financial aid to make it effective, since there can be no education without the possibility of accessing it without discrimination. A restrictive interpretation of the concept of education would not be in line with the purposes of the Directive. Therefore, the costs of participation in a research project or educational program, and scholarships intended to eliminate all or part of the economic obstacles to the participation of potential candidates, must be included in education, “in so far as the availability of the financial resources necessary to ensure such participation is likely to determine who is able to access that project or program”; this is, “where there is a sufficiently close link between those payments and participation in a research project or a specific educational program covered by that concept” (judgment of 15 November 18, *Maniero*, C457/17, EU:C:2018:912, paras. 38-39).

Contrary to the arguments adopted by the ECJ in its judgment in *RunevičVardyn and Wardyn*, the ECJ does not consider, as regards the material scope of the concept of education, that the deletion, during the procedure for drafting Directive 2000/43, of the express reference to “grants and scholarships, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity,” which appeared in the Commission’s initial proposal on Article 3.1.g) thereof, reveals “unequivocally” the intention “of the

EU legislature to restrict the scope of that provision” (judgment of 15 November 18, *Maniero*, C457/17, ECLI:EU:C:2018:912, paragraphs. 4243).

h) “Access to and supply of goods and services which are available to the public, including housing”

The concept of “services” in the latter point h) of Article 3.1 of the Directive, despite its non-restrictive interpretation, does not include national legislation relating to the transcription of surnames and first names in documents proving the civil status of persons.

In its judgment in *RunevičVardyn and Wardyn*, C391/09, the ECJ bases its assessment on the fact that the Council, when approving the Directive, did not wish to accept the European Parliament’s proposed amendment, which called for the inclusion in the list of activities enumerated in Article 3.1 of the Directive of “the exercise by any public body, including police, immigration, criminal and civil justice authorities, of its functions.” The ECJ therefore concludes that a national regulation, such as that of Lithuania, which provides that the names and surnames of persons (marriage of a Lithuanian national belonging to the Polish minority with a Polish national, resident in Belgium) may only be transcribed in the documents of that State proving civil status in accordance with the spelling rules of the national official language, and not of the Polish one - nor the surname of the Polish husband who is adopted by the Lithuanian woman together with her maiden name and bears the common child – “relate to a situation which does not come within the scope of Directive 2000/43” (parasgraphs 46, 48). A different issue is whether such Lithuanian national legislation could entail discrimination or restrictions on the freedom of movement and residence of Union citizens within the territory of the States on grounds of nationality (Articles 18 and 21 TFEU), a question that is for the Romanian court requesting the preliminary ruling to analyze (paras. 63-94).

This point h) covers the supply of electricity. The provision to end-users of individual electricity meters, intended to enable those concerned to measure, observe and regulate their energy consumption, falls within the competence of the Union (Articles 114 and 19 TFEU). That being so, this provision of the Directive must be interpreted as also covering the installation at the end-user’s home of an electricity meter, which constitutes an accessory inseparably linked to the supply of electricity, the installation being, like the supply of electricity itself, subject to compliance with the prohibition of discrimination on grounds of racial or ethnic origin and the principle of equal treatment of persons (judgment *CHEZ*, C83/14, paragraph 43).

Article 3.1.h) of the Directive also covers access to a service available to the public, such as the access to flights in Sweden of a passenger of Chilean

origin, resident in Stockholm, who was subjected to an additional security check by decision of the captain of the Braathens airline aircraft, as he was associated with an Arab person, which gave rise to a dispute regarding the airline's discriminatory behaviour on grounds related to the passenger's physical appearance and ethnic origin (judgment of 15 April 2021, *Braathens Regional Aviation*, C-30/19, EU:C:2021:269, paragraph 31).

Applying the rights to protection of the home and respect for private and family life recognized under Article 8 ECHR - and, with equal content, Article 7 CFREU - the ECtHR has declared its violation by the interference of orders from public authorities, not based on the needs of a democratic society and disproportionate, of forced evictions of Roma families from land where they had resided illegally for several years under a regime of *de facto* tolerance, without guarantees for their rehousing in acceptable conditions (judgments 24 April 2012, *Yordanova and Others v. Bulgaria*, &144; 18 September 2012, *Buckland v. the United Kingdom*, &70; 11 October 2016, *Bagdonavicius and Others v. Russia*, &107).

VI. POSITIVE ACTION

The purpose of positive action is to ensure the necessary effectiveness of the right to equality, aiming to guarantee full equality in the social reality of people regardless of their racial or ethnic origin. Following the usual formulation of Union law, Article 5 of the Directive states that "the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin." These national measures must be proportionate to their purpose, temporary in that they prevent or compensate for disadvantages as long as they exist and persist, and must be adopted within the material scope of protection of the Directive.

Although certain States that favour equal social integration of ethnic minorities are reluctant to adopt such measures in light of their differential protection (assimilationist integration models and systems or policies of multiculturalism), the International Convention on the Elimination of All Forms of Racial Discrimination refers twice to the need for States to adopt such special and specific measures in various spheres of social life. Such measures shall not be considered as racial or ethnic discrimination, provided that they do not lead to the maintenance of separate and distinct rights for different ethnic groups and that they do not remain in force after the objectives for which they were adopted have been achieved (Articles 1.4 and 2.2).

In Europe, Roma are the largest ethnic minority, severely affected by Covid-19, which has accentuated their inequality and lack of protection. The Commission published a reinforced and reformed strategic framework for Roma (2020-2030) on 7 October 2020 and prepared the work leading to the new Council Recommendation of 12 March 2021 on equality, inclusion, and participation of Roma 2021/C 93/01.

The ECtHR has found it necessary to safeguard the interests of minorities, to prevent their segregation, to remedy their diminished opportunities, and to preserve cultural diversity in the face of certain social disadvantages faced by ethnic minorities, which it understands to be not prohibited by Article 14 ECHR. In its judgment of 13 November 07, *D.H. and Others v. Czech Republic*, it states that “the vulnerable position of Roma requires that special consideration be given to their different needs and lifestyles in general regulatory frameworks and in decisions on particular cases, especially with regard to the right to education of minors” (§181-182; judgment, Grand Chamber, 18 January 01, *Chapman v. the United Kingdom*, §46). Roma constitute a specific type of disadvantaged and vulnerable minority (judgment *D.H. and Others v. Czech Republic*, §182). The ECtHR considers that, in certain circumstances, the failure to provide such differentiated treatment to correct a factual inequality may even amount to a violation of Article 14 ECHR, if the failure to adopt the differentiated treatment lacks an objective and reasonable justification (judgment, *D.H. and Others v. Czech Republic*, §175).

The ECJ, in its judgment judgment of 16 July 15, *CHEZ Razpredelenie Bulgaria*, C83/14, EU:C:2015:480,, recalled the power of States to adopt positive action measures to prevent or compensate for disadvantages linked to Roma ethnic origin, but they were not relevant to the case (paragraph 76).

VII. DEFENDING RIGHTS: THE FUNDAMENTAL RIGHT TO EFFECTIVE JUDICIAL PROTECTION WITHOUT AN IDENTIFIED VICTIM

Article 7(1) of the Directive requires States to ensure that judicial and administrative procedures, “including where they deem it appropriate conciliation procedures,” public and private, “to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended,” precisely to demand compliance with the obligations established by it. The ECJ has stated that the cited provision “reaffirms” the right to effective

judicial protection, as proclaimed by Article 47 of the CFREU, a fundamental subjective right that can be invoked in itself in proceedings between private parties (judgment of 15 April 2021, *Braathens Regional Aviation*, C-30/19, ECLI:EU:C:2021:269 paragraph 33).

Given the insufficient effectiveness of the model for defending rights based on individual litigation, Article 7(2) of the Directive calls on States to recognize the standing of associations, organizations, or other legal persons which, under domestic law, have a legitimate interest in ensuring compliance with the Directive, to initiate, on behalf of or in support of the applicant, and with his authorization, any appropriate judicial or administrative procedure to enforce compliance with the obligations of the Directive. Article 7(2) of the Directive also constitutes “a specification” of the right to effective judicial protection, guaranteed by Article 47 CFREU (judgment of 15 April 2021, *Braathens Regional Aviation*, C-30/19, EU:C:2021:269, paragraph 34-35).

Article 7(2) does not preclude States from recognizing, in their more favorable national legislation, the right of such associations or organizations, or of the bodies responsible for promoting equal treatment and non-discrimination on grounds of race or ethnic origin designated by the Member States pursuant to Article 13 of the Directive, to initiate such judicial or administrative proceedings, without the need to act on behalf of a specific complainant, or in the absence of an identifiable complainant (judgment of 10 July 08, *Feryn*, C-54/07, EU:C:2008:397, paragraph 27), thereby broadening the possibilities for combating racial or ethnic discrimination.

The Directive does not, in principle, require States to create remedies before their national courts other than those existing in their laws to guarantee that individuals can defend their rights under Union law. However, in accordance with the principle of primacy of this law, it is for the national courts, in the context of a dispute between individuals and in accordance with their jurisdiction, to guarantee them the legal protection afforded by the subjective right to effective judicial protection provided for by Article 47 CFREU, which may be invoked as such, leaving inapplicable, if necessary, any contrary provision of national legislation (judgment *Braathens Regional Aviation*, C-30/19, paragraphs 38, 55, 57-59).

If there is an identified victim of discrimination, it is his or her responsibility to authorize the active procedural legitimation, as coadjutant or principal, of other subjects, authorization that protects his or her fundamental right to privacy.

VIII. DISTRIBUTION OF THE BURDEN OF PROOF

Pursuant to Article 8.1 of the Directive, Member States' rules must ensure that it is up to the respondent to prove before a court or other competent body that there has been no breach of the principle of equal treatment, once the person who considers himself or herself harmed by the non-application of the right to equal treatment alleges facts that allow the existence of direct or indirect discrimination to be presumed. States are not obliged to apply this allocation of the burden of proof to proceedings in which the investigation of the facts is the responsibility of judicial or other competent bodies, or to criminal proceedings, and may also adopt rules on evidence that are more favorable to the applicant (Articles 8.5, 3, 2), which in general confirms Article 6.1 of the Directive (judgment *Asociația Accept*, C81/12, ¶38, by analogy).

The reversal of the burden of proof, based on the evidence of indications of discrimination, is required by the effective application of the principle of equal treatment (recital 21 of the Directive). Obviously, discrimination may not arise from indications, but from direct evidence.

The ECJ's case-law has already established that the determination of the facts, from which a presumption of direct or indirect discrimination may arise, is a matter for the national courts or other competent bodies, in accordance with national laws or practices, which may provide that indirect discrimination be established by any means of proof, including statistical evidence, as set out in recital 15 of the Directive; statistics whose probative value has been cautiously recognized by the ECtHR (judgment 13-11-07, *D.H. and Others v. Czech Republic*, ¶180, 188, 191).

The General Data Protection Regulation (Regulation EU/679/2016 of the European Parliament and of the Council of 27 April 2016) prohibits the processing of personal data revealing a person's racial or ethnic origin. The prohibition does not apply if the data subject has given his or her explicit consent and, in the absence of such consent, when the processing of such data is necessary for the establishment, exercise, or defense of legal claims, or when courts exercise their judicial function, or when it is necessary and proportionate in order to establish suitable and specific measures to protect the interests and fundamental rights of the data subject [Articles 9.1. and 2.a), f), g)].

The Directive does not preclude the application of the above distribution of the burden of proof to proceedings and procedures initiated by associations or organizations that have a legitimate interest in promoting them on behalf of the plaintiff or in his support, and with his authorization; or to those in which there is no identified or identifiable victim, but which the legal systems of the States have made possible, in exercising their power to approve provisions

more favorable than those provided for in the Directive (Articles 8.2, 6.1), legitimizing certain organizations and associations on the basis of a legitimate interest, in application of the Feryn doctrine.

According to this doctrine, public statements by an employer expressing its intention not to hire workers of a particular racial or ethnic origin may be sufficient to constitute a *prima facie* case of discrimination, which the employer would have to raise by means of counter-evidence to dispel the appearance of discrimination; the counter-evidence would have to show that, in reality, the company's hiring practice did not correspond to those public statements by the employer and was based on elements unrelated to any discrimination, and the national courts would have to verify both the accreditation of the presumption of discrimination and the sufficiency of the counter-evidence (C54/07, ¶¶31-34). Complementing the Feryn case-law, the judgment *Asociația Accept* stated that the same public statements about a discriminatory (homophobic, in this case) recruitment policy are facts which allow the existence of discrimination to be presumed, even if they are not made by a person who has the legal capacity to bind or represent the company (a professional football club) in matters of recruitment, if the declarant presents himself and is perceived in the media and in society as the main executive of that club (C81/12, 53).

In the judgment *Meister*, the ECJ reasons that Articles 8(1) of Directive 2000/43, 10(1) of Directive 2000/78, and 19(1) of Directive 2006/54 “not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process.” However, they do not exclude the effect, which is relevant in the context of proving discrimination, that a total denial of access to information by the defendant may prevent the applicant from proving the facts which allow the existence of discrimination to be presumed and shift the burden of proof of non-discrimination to the defendant (paragraph 46-47).

Significant factors in the *Meister* case were that the company “refused Ms. Meister any access to the information that she seeks to have disclosed” and that, on the contrary, it had never denied the adequacy between Ms. Meister's level of qualification and that required for the specific job offered in the public recruitment advertisement, despite which the company did not invite her, twice, to the selection process (paragraph 44-45).

In short, the courts must ensure that the defendant's refusal to provide information cannot prevent the objectives of Directive 2000/43 from being achieved (judgment of 16 July 15, *CHEZ Razpredelenie Bulgaria*, C83/14, ECLI:EU:C:2015:480,,).

IX. REGIME OF RESPONSIBILITIES, COMPENSATION, AND SANCTIONS

Article 15 of the Directive assigns to States the responsibility of determining the regime of sanctions applicable to infringements of the national rules adopted for its implementation. It specifies that such sanctions “may comprise the payment of compensation to the victim” and “must be effective, proportionate, and dissuasive.”

The choice of specific sanctions to be applied in the event of such infringements is left to the States. However, they must consist of measures that are sufficiently effective to achieve the objective of the Directive and must be capable of being effectively invoked before national courts and administrative bodies. This can be done either directly by the discriminated person or by an association, organization, or legal person with a legitimate interest in ensuring compliance with the provisions of the Directive, on behalf of or in support of the complainant and with his or her authorization, or exclusively on behalf of its own legitimate interest if there is no discriminated victim (Article 7.2). This is linked to the right to effective judicial protection (ECJ judgment of 10 July 08, *Feryn*, C-54/07, ECLI:EU:C:2008:397, paragraphs. 37-38; judgment *Braathens Regional Aviation*, C-30/19, paras. 37, 46-47). The insufficiency of compensation or penalties has a negative impact on the exercise of legal action, discouraging it.

Symbolic sanctions are not enough, nor are light sanctions, since discrimination is always a very serious breach of the principle of equal treatment. The system of sanctions established by the law of the States to transpose Article 15 of the Directive may include the payment of compensation to the victims, which is clearly dissuasive, real, effective, and proportional to the harm suffered by the discrimination, including in the form of punitive damages. The financial compensation must be adequate, meaning it must allow for full compensation for the harm actually suffered as a result of the discrimination (judgment *Braathens Regional Aviation*, C-30/19, para. 39). Administrative penalties must be capable of discouraging non-compliance with the national rules implementing the Directive. They must ensure effective and efficient legal protection of the rights recognized, in parallel with the measures adopted to implement Article 7 thereof (judgment of 22 April 97, *Draehmpaehl v. Urania Immobilienservice*, C-180/95, EU:C:1997:208, paragraphs 24, 39-40, by analogy; judgments *Feryn* and *Braathens Regional Aviation*). The severity of the penalties must be appropriate to the seriousness of the infringements, in accordance with the principle of pro-

portionality, ensuring that they have a truly deterrent effect (judgment *Braathens Regional Aviation*, C-30/19, paragraph 39).

A national rule which, in the event of a defendant's failure to pay the compensation claimed by the party bringing proceedings on behalf of the injured party, allows the defendant not to acknowledge the discrimination he has caused, and even to dispute it in order to avoid reputational damage, with the consequence that the applicant cannot obtain a ruling from the court on the existence of such discrimination, "infringes the requirements imposed by Articles 7 and 15 of Directive 2000/43, read in the light of Article 47 of the Charter". Such a solution neither compensates for the non-material damage caused to the discriminated party nor discourages discriminatory behaviour by those who, through the mere financial compensation requested, obtain a more advantageous result (judgment *Braathens Regional Aviation*, C-30/19, paragraphs. 44-45, 48-49).

The payment of compensation, even if it satisfies the plaintiff's claim, does not guarantee the subjective right to effective judicial protection (Article 47 CDFEU) of the person seeking a finding of a violation of his or her right to equal treatment based on racial or ethnic origin, particularly when the main interest of that person is not economic but is directed at repairing the non-material harm suffered by proving the facts alleged against the defendant and their legal qualification as discriminatory. Pursuant to the principle of primacy of EU law, a national court may not apply a national procedural rule which, merely because the defendant has agreed to it, prevents it from finding discrimination; in such a case, it must disapply the national rules (judgment *Braathens Regional Aviation*, C-30/19, paragraphs 47, 56-59).

The ECJ has held that effective, proportionate, and dissuasive sanctions are also applicable in cases of discrimination without an identifiable victim. In such cases, the fact that the sanction is not essentially financial does not necessarily mean that it is merely symbolic in nature. Sanctions may consist of the publicity of the declaration of discrimination by the competent court or administrative body, paid for by the defendant, of an order to the employer to cease the declared discriminatory practice, accompanied by a periodic penalty payment, or of the additional award of compensation to the body that initiated the procedure, according to national legislation (ECJ judgment of 10 July 08, *Feryn*, C-54/07, EU:C:2008:397, paragraphs 38-40); although in a civil liability action it may be difficult to prove the existence of harm to such an association within the meaning of the rules of application of national law (ECJ judgment of 25 April 2013. *Asociația Accept*, C81/12, EU:C:2013:275 paragraph 69).

The legal regime governing the limitation period for offenses and penalties must also be adapted to their effectiveness (ECJ judgment of 25 April 2013, *Asociația Accept*, C81/12, EU:C:2013:275, paragraph 72-73).

X. BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 13 of the Directive orders States to designate “a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at the national level with the defense of human rights or the safeguard of individuals’ rights”. These bodies must have, among their powers, the following: to provide independent assistance to victims of discrimination in the processing of their claims, without prejudice to the right to judicial protection of victims and associations, organizations, or other legal persons (Article 7(2); to carry out independent studies on discrimination; to publish independent reports and to make recommendations on any issue related to such discrimination.

If those bodies are not of a judicial nature within the meaning of Article 267 TFEU, but rather administrative, they cannot refer to the ECJ questions for a preliminary ruling on the validity or interpretation of Union law in relation to national legal systems, nor does the ECJ have jurisdiction to resolve them (ECJ judgment of 31 January 2013, *Belov*, C394/11, EU:C:2013:48).

XI. THE IMMEDIATE FUTURE

According to the ECJ, a preliminary ruling on the interpretation of the Racial Equality Directive and an action brought by the Commission against the Slovak Republic for failure to comply with Articles 2(1), 2(2)(b) and 3(1)(g) are pending.

The question for a preliminary ruling is referred by the Østre Landsret, Denmark - C-417/23, *Slagelse Almennyttige Boligselskab, Afdeling Schackeborgvænge* - concerning the interpretation of the expression “ethnic origin” in Article 2.2.a) and b) of the Directive as meaning that such an expression, in the circumstances of the case - where, under the Danish Law on social housing, the percentage of social family housing in “transformation areas” must be reduced and, for classification as a transformation area, more than 50% of the residents in a housing area must be “immigrants and their descendants from

non-Western countries” - covers a group of persons defined as “immigrants and their descendants from non-Western countries” and whether, if applicable, such a regime constitutes direct or indirect discrimination. The Opinion of Advocate General Ćapeta delivered on 13 February 2025, EU:C:2025:98, proposed that the ECJ interpret as direct discrimination, within the meaning of Article 2(2)(a) of Directive 2000/43, the use by Danish law of the concept of “*immigrants and their descendants from non-Western countries*” for the categorisation of a neighbourhood in which the number of public housing units is to be reduced.

In its application, C-799/23, the Commission seeks acknowledgement by the ECJ declaring that, by disproportionately placing Roma children in special schools or special classes for children with intellectual or other disabilities, where they are taught a limited curriculum, and by segregating Roma children in separate schools or separate classes in mainstream schools, the Slovak Republic has systematically and persistently failed to fulfill its obligations under the abovementioned provisions of Directive 2000/43.

Directive 2000/43 is also invoked in the preliminary ruling question C-747/22, *KH*, raised by the Tribunale ordinario di Bergamo, Italy, on the interpretation of Articles 29 and 26 of Directive 2011/95 for the purposes of establishing whether oppose provisions of a Member State under which anti-poverty and employment and social support benefits may only be granted to persons who, in addition to having resided in that State continuously for at least two years at the time of requesting said benefit, have accumulated ten years of residence in said State...

For its part, the Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC, has deleted Chapter III of Directive 2000/43/EC. References to the bodies for the promotion of equal treatment referred to in that chapter shall be construed as references to the equality bodies referred to in Article 2(1) of the new Directive. This modification shall apply from 19 June 2026, the deadline for the transposition of the new Directive by the Member States (Articles 23, 25 and 24).

CHAPTER 8

PROHIBITION OF DISCRIMINATION ON GROUNDS OF RELIGION OR BELIEF

ROMÁN GIL ALBURQUERQUE

INDEX: I. Applicable regulations. II. Definitions of religion or belief in EU legislation at EU. III. Protection of freedom of religion and belief. Positive and negative aspects. IV. Prohibition of discrimination on grounds of religion in the employment relationship. Judicial doctrine. 1. Prohibition of direct or indirect discrimination on the grounds of religion or belief in the workplace. 2. Remedies and enforceability. Reasonable accommodation. V. The relationship between the protection of human rights and the Directive 2000/78/EC. Bibliography.

I. APPLICABLE LAW

The EU's regulation of the institution of freedom of religion and belief is inseparable from the historical process that culminated (and was re-founded) in the milestone of the Universal Declaration of Human Rights of 1948. As with the very birth of the European confederal political project (but which is federal from a juridic perspective), the great wars of the 20th century were the final catalyst for the need, accepted as evident by the vast majority of states, to recognise common and inalienable rights for all human beings, including the right to freedom of religion and belief. Specifically, EU legislation will recognise and reproduce (and also develop, to some extent) the international legislation to which its own

member states had previously subscribed and will incorporate this new international legal institutionalisation into its own. The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR), was adopted in 1950 by the member governments of the Council of Europe, seeking a closer union between them, to which the protection and development of human rights - with express mention in its preamble of the Universal Declaration of Human Rights - and fundamental freedoms would contribute, as these are “the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend”. This now specifically European legislation will be interpreted by the European Court of Human Rights (ECtHR, constituted in 1953 and renewed in 1998) whose doctrine has the interpretative value of general principles for the case law of the ECJ (and other bodies applying the law in the Union). Given the scarcity of pronouncements by the ECJ (only eight) regarding the right to freedom of religion and opinion, it will be appropriate to consider, as a possible additional relevant criterion, that of the ECtHR, and we will therefore also refer to it. Since the proclamation of the Charter of Fundamental Rights of the EU, for the first time in 2000, reformed in 2007 and proclaimed again in its current version together with the Treaty of Lisbon, the Union has – fully in force in all EU states, with the exception of Poland - a specific legal instrument protecting rights such as the ones we are dealing with, being also of great relevance, in the field of equal treatment in employment and occupation, the Council Directive 2000/78/EC, on equal treatment in employment and occupation.

I will now refer to the legislation relevant in the EU regulation the right to freedom of religion and opinion, both the more specifically European legislation and the international legislation applicable by reference:

1.1. Treaty on the Functioning of the European Union (consolidated version OJEU 2010/C 083/01- hereinafter TFEU): Art.10 (the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation); Art.19(1) (possibility of taking action against discrimination on the grounds of religion or belief).

Without prejudice to the EU’s respect for the status recognised by the Member States for churches and religious associations or communities, as well as philosophical and non-confessional organisations, recognising their specific identity and contribution, and maintaining an open, transparent and regular dialogue with them (art. 17).

1.2. Charter of Fundamental Rights of the European Union (consolidated version OJEU 2012/C 326/02 - hereinafter CFR), with the same le-

gal value as the founding treaties (TEU 6(1)). Article 10 recognises the right of everyone to freedom of thought, conscience and religion, which includes the freedom to change religion or belief and the freedom to manifest religion or belief, either individually or in community with others and in public or private, in worship, teaching, practice and observance. Article 21 prohibits discrimination on grounds of religion or belief; Article 22 declares that the Union respects cultural, religious and linguistic diversity.

1.3. Directive 2000/78/EC (hereinafter referred to as the 'Framework Directive' because it is a general directive to combat discrimination on the grounds, *inter alia*, of religion), Recital 1 of which states that it is in line with Article 6 TEU and with fundamental rights as guaranteed by the ECHR and the constitutional traditions common to the Member States, as general principles of Community law. Furthermore, Recital 4 expressly refers to protection against discrimination as a universal right recognised in the Universal Declaration of Human Rights, the UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, as well as in the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Article 1 of this Directive recognises as its purpose the establishment of a general framework for combating discrimination, *inter alia*, on grounds of religion or belief, with a view to ensuring that the principle of equal treatment is applied in the Member States.

1.4. European Convention for the Protection of Human Rights and Fundamental Freedoms – known as European Convention on Human Rights, ECHR, 1950, developed and amended by various additional protocols. The fundamental rights guaranteed by the ECHR form part of EU law as general principles, in accordance with Art. 6 (3) TEU. Therefore, the interpretation of the ECtHR may be relevant for the ECJ (and therefore we will refer to its doctrine, especially insofar as there is no specific ECJ doctrine on the issue in question), but it is not binding in an absolute or general way. Article 9 of the ECHR recognises freedom of thought, conscience and religion, a right which includes freedom to change one's religion or belief, and freedom to manifest one's religion or belief, either individually or in community with others and in public or private, in worship, teaching, practice and observance. Freedom to manifest one's religion or belief may be subject to no restrictions other than those which are prescribed by law and which are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Comple-

menting this, Article 14 establishes the prohibition of discrimination in the enjoyment and effectiveness of human rights and fundamental freedoms, without any distinction being made, *inter alia*, on grounds of religion, political or other opinion.

1.5. European Social Charter (Council of Europe) 1961-1996, declaring in its 4th paragraph of its Preamble that the enjoyment of social rights should be secured without discrimination on grounds, *inter alia*, of religion or political opinion. The preamble of the TEU confirms its adherence to fundamental social rights as defined in the European Social Charter and in the 1989 Community Charter of the Fundamental Social Rights of Workers. The latter refers, in its opening recitals, to the desirability of combating discrimination based on “opinions and beliefs”.

1.6. UN Universal Declaration of Human Rights (1948), Article 18 of which declares the right of everyone to freedom of thought, conscience and religion, including freedom to change her religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

1.7. Article 18 of the UN International Covenant on Civil and Political Rights (1966), expressly referred to in Directive 2000/78/EC, recognises the right of everyone to freedom of thought, conscience and religion, including freedom to have or to adopt a religion or belief of his choice, and freedom, either alone or in community with others and in public or private, to manifest her religion or belief in worship, observance, practice and teaching. It prohibits the adoption of coercive measures that may impair the freedom to have or to adopt the religion or belief of one’s choice. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. The States Parties to this Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. This Covenant reproduces and extends the recognition of the right to freedom of thought, conscience and religion contained in Article 18 of the UN Universal Declaration of Human Rights.

1.8. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation, including discrimination based on religion or opinion (Article 1(a)), and is expressly referred to in the fourth recital of Directive 2000/78/EC.

II. DEFINITIONS OF RELIGION OR BELIEF IN EU LAW

Neither the concept of religion nor the concept of belief is defined by EU law - it is not defined in the Framework Directive - nor is it usually defined in the legislation of the Member States. This is acknowledged in the 2008 Commission Report to the European Parliament and the Council on the implementation of Directive 2000/78/EC (2008/225 final 2/EU), stating that while the prohibition of discrimination on grounds of religion or belief has been transposed in all Member States, most Member States do not define the conditions in their legislation.

The Commission noted that the delimitation between “religion” and “belief” can sometimes be problematic, in particular when it can be linked to ethnicity, either because an ethnic character is attributed to a religious group, or because the practitioners of a religion belong predominantly to specific ethnic groups.

The protected scope encompasses both religion (both in terms of beliefs or dogmas related to divinity, as such, and ritual or worship practices linked to them), and other relevant convictions, of a philosophical or moral nature, concerning important aspects of life, of an essential or even transcendental nature, but not necessarily linked to belief in the deity. It remains to be clarified by the ECJ whether non-religious belief needs to be expressed through communal or individual practices that can be assimilated to some extent to those of religions in order to merit protection under European law.

The degree of protection that dissent from established orthodoxy within each religion may deserve (if any) is a matter of debate. The borderline between religion or conviction and political beliefs or opinions has not yet been judicially determined, something that may be particularly sensitive in relation to certain religious fundamentalisms linked to specific political ideologies.

In its judgment of 25 May 1993 in the case of *Kokkinakis v. Greece* (ECtHR 25-5-93, Case *Kokkinakis v. Greece* No. 14307/88), the ECtHR declared that the freedom of thought, conscience and religion guaranteed by Article 9 of the ECHR constitutes one of the foundations of a democratic society within the meaning of the ECHR, its religious dimension being one of the most essential elements of the identity of believers and their conception of life.; but it is also a precious asset for atheists, agnostics, sceptics or the indifferent. It is “a manifestation of the pluralism, clearly conquered over centuries, consubstantial to our society”.

Religions with a relatively smaller following are also protected by the ECtHR (ECtHR 23-6-93, *Hoffmann v. Austria* No. 12875/1987, concerning

Jehovah's Witnesses; 24-2-98, *Larissis v. Greece* Nos. 23372/1994, 26377/1995 and 26378/1994, concerning the Pentecostal Church), as well as certain doctrines commonly known as sects, such as Druidism (ECtHR 14-7-87, *Chappell v. the United Kingdom* No.12587/86), Scientology (ECtHR 14-7-80, *Case X and Church of Scientology v. Sweden* No. 8282/78), the Centre of Divine Light (ECtHR 19-3-81, *Case Omkarananda and Centre of Divine Light v. Switzerland* No.8118/77), the International Society for Krishna Consciousness (ECtHR 8-3-94, *ISKCON et al. v. United Kingdom* No. 20490/92), or non-religious mono-creeeds such as Pacifism (ECtHR 5-12-78, *Arrowsmith v. United Kingdom* No. 7050/75) or Veganism (ECHR 10-2-193, *H. v. United Kingdom* No. 18187/91).

III. PROTECTION OF FREEDOM OF RELIGION AND BELIEF. POSITIVE AND NEGATIVE ASPECTS

The EU legislator refers, in Recital 1 of Directive 2000/78/EC, to the fundamental rights as guaranteed by the ECHR, Article 9 of which provides that everyone has the right to freedom of thought, conscience and religion, and that this right includes freedom to manifest one's religion or belief, either alone or in community with others and in public or in private, in worship, teaching, practice and observance. The judgment of the ECJ of 5 September 2012, *Federal Republic of Germany v Y and Z* [ECJ (Grand Chamber) 5-9-12, *Federal Republic of Germany v Y and Z*, C-71/11, EU:C:2012:518], held that the right to freedom of religion enshrined in Article 10(1) of the Charter corresponds to the right guaranteed by Article 9 ECHR and, in accordance with Art.52(3) of the Charter, has the same meaning and scope as it.

In the same Recital 1 of the Framework Directive, the Union legislator also refers to the constitutional traditions common to the Member States as general principles of Union law. Among the rights which derive from these common traditions and which have been reaffirmed in the Charter is the right to freedom of conscience and religion, recognised in Article 10(1). According to this provision, this right implies the freedom to change religion or belief and the freedom to manifest one's religion or belief, either individually or in community with others and in public or private, in worship, teaching, practice and observance. Given that both the ECHR and, subsequently, the Charter express a broad conception of the concept of religion, by including not only the right to believe religiously, but also to manifest such beliefs, it can be understood that the EU legislator assumed such a conception in Directive 2000/78/EC, so

that it is reasonable to interpret the (as far as we know, undefined) concept of religion in Article 1 of the Directive as covering both the fact of believing religiously and the fact of manifesting such beliefs, and this is recognised in paragraph 28 of the judgment handed down by the ECJ in the *Achbita/G4S Secure Solutions* case, to which we will refer in detail later on.

The freedom to manifest one's religion or belief may not be subject to restrictions other than those which are prescribed by law and which are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others¹. Thus participation in the life of the community is a manifestation of religion, which enjoys the protection of Article 9 of the Convention (ECHR). "Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention" (ECtHR 26-10-00, *Hassan and Tchaouch v. Bulgaria* No. 30985/96, para. 62)².

There is, therefore, a dual dimension to these freedoms: an internal one (the intimate belief, the absence thereof, the modification of personal beliefs or convictions in the internal sphere) and an external one, relating to the manifestation of these, expressing them verbally, through participation in rites, cults or activities of religious or other beliefs or, where appropriate, through attributes or actions, such as clothing or dietary practices. The aforementioned judgment of the ECJ of 5 September 2012 (C-71/11) states that freedom of religion constitutes one of the pillars of a democratic society and is a fundamental human right, so that interference with it may even be considered persecution, but this does not in any way mean that any interference with the right to freedom of religion constitutes an act of persecution which obliges the competent authorities to grant refugee status. On the contrary, the existence of a serious violation of that freedom which affects the person concerned to a considerable extent is necessary for the acts in question to be considered as persecution.

The ECtHR stated in its relevant judgment, already referred to in the *Kokkinakis v. Greece* case, and with regard to the outward manifestation of

¹ Exhaustive list: vid. ECHR judgments 14-6-07, case *Svyato-Mykhaylivska Parafiya v. Ukraine* No.77703/2001 and 5-4-07, case *Church of Scientology Moscow v. Russia* No.18147/02.

² See also ECHR judgments 14-6-07, *Svyato-Mykhaylivska Parafiya v. Ukraine* No.77703/01 paras 112-113; 31-7-08, *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria* No.40825/1998 para 61; 5-10-06 *Salvation Army Moscow Branch v. Russia* No.72881/2001 para 58.

religious beliefs, that freedom of religion is also freedom to “manifest religion”. Testimony, in words and deeds, is linked to the existence of religious convictions. In the terms of Article 9 of the ECHR, the freedom to manifest religion is not only exercised collectively, “in public” and in the circle of those who share the same faith, but also “individually” and “in private”; it implies, in principle, the right to try to convince others, for example by “teaching”, without “the freedom to change one’s religion or belief” enshrined in Article 9 having to remain a dead letter. However, in a democratic society, where many religions coexist within the same population, it may be necessary for this freedom to be limited by the need to reconcile the interests of different groups and to ensure respect for the convictions of all.

The ECtHR judgement 27-6-00, *Cha’are Shalom Ve Tsedek v. France* No. 27417/1995 recognised the ritual slaughter of an animal as an essential aspect of a protected religion (in this case, Judaism). However, it declared unacceptable the practice of such slaughter outside state regulation (the latter in the interest of public health and order), since the violation of Article 9 ECHR would only occur if the prohibition of private ritual slaughter prevented the orthodox Jew from eating meat, which was not the case as access to meat through butcher shops where animal slaughter took place both in accordance with religious orthodoxy and state regulation had been proven. Also, in relation to the outward manifestation of religious beliefs, the ECtHR has handed down judgments 4-12-08, *Kervançi v. France* case no.31645/2004 and *Dogru v. France* case no.27058/2005, related to the prohibition of the headscarf in physical education classes in French public schools, before the entry into force of the 2004 law banning the headscarf in schools. Two young French women brought legal proceedings against the French State for having been excluded from their school for wearing the headscarf during physical education classes. The applicants alleged that their right to practice religion had been infringed and that they had been deprived of their right to education, although they continued their studies by correspondence. The ECtHR held that “the wearing of the headscarf may be regarded as an act motivated or inspired by religion or religious conviction”, and that a state such as France may prohibit a pupil in a secular school from wearing a sign that manifests his or her religious affiliation. The ECtHR judgment of 10-11-05, *Leyla Sahin v. Turkey* No. 44774/1998 also upheld the prohibition of the wearing of the Islamic headscarf in a Turkish public university, in defence of the secularity then prevailing in the State³. On 1 July 2014, the ECHR (Grand Chamber) handed down a judgment in the case

³ Cf. ECtHR 6-11-08, case *Leela forderkreis E.V. and others v. Germany* No.58911/00.

of *S.A.S. v. France* No. 43835/2011, declaring the ban on the full-face veil in public places to be in line with the ECHR.

The external dimension of religious freedom also translates into the possibility of exercising, free from any coercion by the public authorities, those activities that constitute manifestations or expressions of the religious phenomenon relating, among other things, to acts of worship, religious teaching, public assembly or demonstration for religious purposes, and association for the community development of this type of activity.

Freedom of belief, whatever its nature, religious or secular, represents the recognition of a sphere of action immune from state with no other limitation, in its manifestations, than those necessary for the maintenance of public order protected by law. It therefore protects an *agere licere* consisting of professing the beliefs of one's choice and conducting oneself in accordance with them, as well as maintaining them vis-à-vis third parties and being able to proselytise about them. This constitutional power has a particular manifestation in the right not to be discriminated against on the grounds of creed or religion, so that different beliefs cannot support differences in legal treatment (ECtHR 23-6-93, *Hoffmann v. Austria* case no. 12875/1987 nr. 33 and 36, by reference to nr. 38). However, it has a different intensity depending on whether it is projected on one's own conduct and the disposition that one makes of it, or on the repercussions that this conduct in accordance with one's own beliefs has on third parties, be they the State itself or private individuals, either by requiring them to observe a duty to abstain from interfering with one's freedom of belief or by requiring them to become the object and addressees of those same beliefs.

The right of believers to believe and conduct themselves personally in accordance with their convictions is not subject to any limits other than those imposed by respect for the fundamental rights of others and other constitutionally protected legal assets; but the right to manifest their beliefs to third parties through their public profession, and the proselytising of these, adds to the former the limits indispensable for maintaining public order protected by law. The public authorities will violate this freedom, therefore, if they restrict it outside or in breach of the limits set by constitutions; or, even when they protect their acts within these limits, if they disturb or impede in any way the adoption, maintenance or expression of certain beliefs when there is a causal link between the actions of the public authorities and these restrictions and when these are in any way disproportionate (ECtHR 23-6-93, *Hoffmann v. Austria* no.12875/1987 nr.36; 26-9-96, *Manoussakis* case nr.18748/91, nr.47, 51, 53; 24-2-98, *Larissis v. Greece* nr.23372/1994; 26377/1995; 26378/1994 nr.54).

Freedom of belief finds, on the other hand, its most obvious limit in its negative manifestation, i.e. in the right of the third party concerned not to believe or not to share or not to tolerate the acts of proselytism of others (ECtHR 25-5-93, Kokkinakis case no.14307/1988, paras.42-44 and 47; 24-2-98, Larissis case No.23372/1994, 26377/1995 and 26378/1994 paras.45 and 47); and not to be compelled to declare one's beliefs (ECtHR 21-2-08, Alexandridis v Greece No.19516/2006); being the moral integrity of whoever suffers the external manifestations of a religious profession with moral intimidation, or even involving inhuman or degrading treatment, a clear restrictive limit (ECtHR 25-5-93, Kokkinakis case n.14307/1988 nr.48; 24-2-98, Larissis case nr.23372/1994, 26377/1995 and 26378/1994 nr.53).

In the sphere of the employment relationship, in addition to a possible conflict due to the mere contradiction between the religious beliefs or convictions of an employee and those held or admitted by the employer, especially in ideological, religious or politically inclined companies, affecting negative religious or ideological freedom, relatively more common is the collision between the external manifestation (positive freedom) of beliefs or convictions through clothing or external signs contrary to the uniformity sometimes demanded by the employer, or even in relation to the employer's demand by the believer for an effective accommodation of the work performance compatible with an active religious practice (affecting extremes such as work festivities, breaks or specific leave, among others).

Article 4(2) of the Framework Directive allows for a specific exception to the principle of equal treatment in the case of churches and other public or private organisations whose ethics are based on religion or belief. This would allow such entities to employ a person of the same religion or belief if that religion or belief is a genuine, legitimate and justified occupational requirement in relation to the ethos of the organisation, and this is due to the nature of the employer's activities or the context in which they are carried out. This exception only allows for different treatment on grounds of religion or belief and cannot be used to justify discrimination on another ground such as sexual orientation; it must also be clearly linked to the nature of the activities carried out.

Some Member States have adopted provisions in their national legislation in line with Article 4(2) of the Framework Directive. Certain countries have provided for derogations that may go beyond the strict limits of the Directive or are ambiguous. Other Member States have decided not to include the derogation envisaged in Article 4(2).

IV. PROHIBITION OF DISCRIMINATION ON GROUNDS OF RELIGION IN THE EMPLOYMENT RELATIONSHIP. JUDICIAL DOCTRINE

Judicial doctrine in a number of EU Member States arising from the adoption of the Framework Directive has highlighted frequent conflicts between the outward expression through symbols or clothing of religious affiliation by employees and the obligation, required by the employer by virtue of its managerial power, of external uniformity of the workforce, or even the prohibition of the display by employees during their working hours of religious or political symbols. Some of these cases have been considered as human rights issues (raising the question of freedom of religious expression) rather than discrimination cases, but they are nonetheless indicative of the fact that this area can become a sensitive one in the implementation of the Directive. Indeed, disputes arising from the use of clothing and/or personal ornaments (jewellery, symbols) in the workplace are becoming increasingly common in European courts.

On 14 March 2017, two important rulings were handed down by the ECJ (Grand Chamber), concerning the outward manifestation of religious faith through external and visible clothing (in particular, the Islamic headscarf).

The first of these, the judgment of the ECJ (Grand Chamber) 14-3-17, *G4S Secure Solutions* (C-157/15, EU:C:2017:203), considers the internal regulations of a company that prevents workers from wearing visible signs of a political, philosophical or religious nature in the workplace, prohibiting a worker (Ms. Samira Achbita) from wearing an Islamic headscarf to work. When she refused to do so, the employee was dismissed, and the ECJ judged the dismissal decision to be in accordance with the applicable European legislation⁴.

The second judgment, ECJ (Grand Chamber) 14-3-17, *Boungaoui and ADDH* (C-188/15, EU:C:2017:204) judges whether the wish of a client of the employer that the contracted services should not be provided by a worker (the engineer Ms. Asma Boungaoui) because she wears an Islamic headscarf is an essential and determining professional requirement in accordance with the law, as she refuses to do it without her headscarf during working hours and is, as a result of that refusal, dismissed (dismissal which the ECJ

⁴ Vid. well-founded criticism of this ECJ judgment in “Je suis Achbita!” by Joseph H.H. Weiler, *International Journal of Constitutional Law*, Volume 15, Issue 4, October 2017, Pages 879-906, <https://doi.org/10.1093/icon/moy001> Published: 19 February 2018

judges from the point of view of the prohibition of discrimination on grounds of religion or belief).

On 17-4-18, the Grand Chamber of the ECJ ruled on a case of rejection of a job application based on religious convictions (or, specifically, on the absence of such convictions: ECJ 17-4-18, *Egenberger* (C-414/16, EU:C:2018:257), in which a denominational entity (evangelical) required the applicant to belong to the Christian or Protestant Churches.

On 11-9-18 the Grand Chamber ruled in a judgment (ECJ 11-9-18, *IR* (C-68/17, EU:C:2018:696)) on a case of dismissal for cause in an act of an employee contrary to the employer's (Catholic) religious ideology (getting married after a divorce).

On 22-1-19 the Grand Chamber of the ECJ delivered a judgment (ECJ 22-1-19, *Cresco Investigation GmbH* (C-193/17, EU:C:2019:43)) concerning national legislation granting certain workers a holiday linked to a religious holiday (Good Friday), considering its justification and the obligations of private employers and the national judge arising from a possible incompatibility of their national law with Directive 2000/78.

On 15-7-21 the Grand Chamber of the ECJ handed down a judgment (ECJ 15-7-21, *WABE* (joined cases C-804/18 and C-341/19, EU:C:2021:594)) concerning internal rules of two private companies prohibiting, in the workplace, the visible wearing of any political, philosophical or religious sign or the wearing of large, conspicuous political, philosophical or religious signs, the Court ruled on the existence of direct or indirect discrimination, the proportionality of the decision, the balancing of religious freedom and other fundamental rights, the legitimacy of the neutrality regime adopted by the employer and the need to prove the existence of economic damage to the employer.

On 13-10-22 - the Second Chamber of the ECJ delivered its judgment (ECJ 13-10-22 concerning the proceedings between L.F and S.C.R.L. (case C-344/20, EU:C:2022:774) and as a result of a preliminary ruling on the internal rules of a private company prohibiting any manifestation of religious, philosophical or political convictions in the workplace, whether verbally, through dress or in any other way.

Finally, on 28-11-23 - and these are the only 8 judgments of the ECJ on discrimination in employment on grounds of religion - the Grand Chamber of the ECJ delivered a judgment (ECJ 28-11-2023, in the context of a dispute between OP, contract staff of the Commune d'Ans (Commune d'Ans, Belgium) and the latter (C-148/22, EU:C:2023:924) concerning the possible discriminatory status on grounds of religion or belief of a public administration's

employment regulation prohibiting the visible wearing of any philosophical or religious sign in the workplace (in this case, the wearing of the Islamic headscarf), based on a requirement of neutrality in contacts with the public, superiors and colleagues.

We will consider these rulings of the ECJ, together with others of the ECtHR, in relation to the prohibition of discrimination on grounds of religion or belief.

1. Prohibition of direct or indirect discrimination on grounds of religion or belief in the field of employment

Directive 2000/78/EC establishes a framework against discrimination on grounds, *inter alia*, of religion or belief, in order to ensure that the principle of equal treatment is applied in the Member States, prohibiting either direct discrimination (where a person is, has been or would be treated less favourably than another person in a comparable situation on any of the prohibited grounds), or indirect discrimination (where an apparently neutral provision, criterion or practice may put persons with a religion or belief at a particular disadvantage compared with other persons), unless there is an objective justification with a legitimate aim and unless the means of achieving this aim are appropriate and necessary. This is without prejudice to the measures provided for by national law which, in a democratic society, are necessary for public security, the prevention of disorder and criminal offences, the protection of health and the protection of the rights and freedoms of citizens. The Framework Directive applies to all persons, both in the public and private sector, including public bodies, in relation to employment and working conditions (including dismissal and remuneration).

In *Achbita/G4S Secure Solutions*, the ECJ has to decide whether Article 2(2)(a) of Directive 2000/78/EC must be interpreted as meaning that a prohibition on wearing an Islamic headscarf under an internal rule of a private undertaking which generally prevents the visible wearing of any political, philosophical or religious sign in the workplace constitutes direct discrimination prohibited by that directive. It is a question of deciding on an internal rule which concerns the wearing of visible signs of political, philosophical or religious convictions and, therefore, concerns any manifestation of such convictions without distinction. The European Court concludes that that rule *treats all the employees of the undertaking equally*, since it imposes on them, in a general and undifferentiated manner, in particular a neutrality of dress which

precludes the wearing of such signs. Consequently, and since it is not established that the application to Ms Achbita of the domestic rule at issue was different from the application of that rule to any other employee, the conclusion in law must be that that rule does not establish a difference in treatment based directly on religion or belief which is prohibited by the Framework Directive and cannot, therefore, be classified as direct discrimination.

Ex officio, the ECJ then examines whether the prohibition on the use of visible religious signs may amount to prohibited indirect discrimination, which would be the case if such an apparently neutral prohibition were in fact to cause a particular disadvantage to persons professing a particular religion or belief. Such a difference in treatment would not, however, constitute indirect discrimination if it could be objectively justified by a legitimate aim and if the means of achieving that aim were appropriate and necessary.

Although it is for the national court to assess the facts and determine to what extent the domestic rule is compatible with the requirements of the Framework Directive, the ECJ provides certain useful indications for resolving the specific dispute (in this case, concerning Ms Achbita, but with obvious interpretative interest for many others).

Specifically:

1. As regards the requirement of the existence of a legitimate aim to undermine the possible existence of indirect discrimination, the desire to pursue a regime of political, philosophical or religious neutrality in relations with customers in both the public and private sectors must be regarded as legitimate. An employer's desire to present a neutral image to his customers is linked to the freedom to conduct a business, recognised in Article 16 of the Charter, and is legitimate, in particular when the employer includes in the pursuit of this aim only those employees who, in principle, will be in contact with his customers.

The interpretation that the pursuit of such a purpose allows the restriction, within certain limits, of freedom of religion is further corroborated by the case law of the European Court of Human Rights concerning Article 9 of the ECHR (ECHR 15-1-13, *Eweida and others v. United Kingdom* Nos.48420/10, 59842/10, 51671/10 and 36516/10, nr.94).

2. As regards the appropriateness of an internal rule such as that prohibiting employees from visibly displaying signs of political, philosophical or religious convictions, it is capable of ensuring the correct application of a neutrality regime, provided that that regime is actually pursued in a consistent and systematic manner (the judgment of the ECJ cites, in that regard, the judgments of 10 March 1999, *Hartlauer* (C-169/07, EU:C:2009:141) nr. 55,

and 12 January 1999, *Petersen* (C-341/08, EU:C:2010:4) nr. 53). It will therefore be for the referring court to determine whether the undertaking “had, prior to Ms Achbita’s dismissal, established a general and undifferentiated policy of prohibiting the visible wearing of signs of political, philosophical or religious beliefs in respect of members of its staff who come in contact with its customers”.

3. As to whether the prohibition at issue is necessary, it must be ascertained whether it is limited to what is strictly necessary. In particular, it must be ascertained whether the prohibition on the visible wearing of any sign or item of clothing which may be associated with a religious belief, or a political or philosophical conviction concerns only employees of the undertaking who are in contact with customers. In such a case, such a prohibition must be regarded as strictly necessary to achieve the aim pursued.

A certain doctrinal sector has criticised the possible indirect discrimination that an apparently neutral requirement (prohibition of the display of religious symbols in a professional environment) could generate with respect to followers of religions that require such an external manifestation (such as Islam or Judaism), as opposed to others whose dogma does not require it (e.g. Christianity).

In the *Bougnaoui and ADDH v Micropole* case, the question to be determined is no longer whether the existence of an internal rule of the undertaking prohibiting the wearing of any visible sign of political, philosophical or religious convictions constituted direct or indirect discrimination, including an analysis of a possible justification for excluding the latter hypothesis, since the prohibition on Ms Bougnaoui’s wearing an Islamic headscarf at work was based on a customer’s request. The question to be determined in accordance with the law is therefore whether the willingness of an employer to take account of a customer’s wish that services should no longer be provided by a worker who, like Ms Bougnaoui, has been sent by that employer to the customer’s place of work and wears an Islamic headscarf constitutes a genuine and determining occupational requirement within the meaning of Article 4(1) of Directive 2000/78/EC (“Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate”).

The ECJ has consistently held that it follows from Article 4(1) of the Framework Directive that what must constitute a genuine and determining occupational requirement is not the ground on which the difference in treatment is based but a characteristic related to that ground⁵ and that, according to Recital 23 of that Directive, it is only in very rare circumstances that a characteristic linked in particular to religion can constitute a genuine and determining occupational requirement. Moreover, the characteristic in question can only constitute such a requirement “by reason of the nature of the particular occupational activity concerned or of the context in which it is carried out”. The ECJ concludes that the concept of “genuine and determining occupational requirement” within the meaning of the Framework Directive implies a requirement *objectively* dictated by the nature of the professional activity concerned or by the context in which it is carried out. On the other hand, it cannot cover *subjective* considerations, such as the employer’s willingness to take into account the particular wishes of the client.

The ECtHR has also considered this problem in various judgments. Thus, in the judgment handed down on 15 January 2013 in the so-called *Eweida and Others v. United Kingdom* case (already referred to as cited in the *Achbita* ECJ), the cases raised by the workers Nadia Eweida and Shirley Chaplin, who disagree with the restrictions imposed by their respective companies on the wearing of a visible cross around their necks, were considered. The workers requested the Court’s protection, arguing that such employer practices infringed their freedom of religion, and in particular the right to freely manifest their religion.

Ms. Eweida’s case concerns the introduction by British Airways of a new uniform in 2004 which, replacing the previous high-collared blouse, included an open-collared one for women. The company’s regulation required that any religious accessories or clothing of the employee be covered by the uniform. If this was impossible - due to the nature of the object and the way it was to be worn - a special approval was required, unless it was already included in the company’s uniform guide. Following a request from some workers, the company authorised Sikh men to wear a white or dark blue turban and Muslim women of ground staff to wear the *hijab*, as the company considered such items to be compulsory in some religions, and it was not feasible to conceal them under the uniform. Nadia Eweida, a practising Coptic Christian and an

⁵ The *Bougnauoui v Micropole* judgment of the ECJ cites to this effect the judgments of 12-1-10, *Wolf* (C-229/08, EU:C:2010:3) app.35; 13-9-11, *Prigge and others* (C-447/09, EU:C:2011:573) app.66; 13-11-14, *Vital Pérez* (C-416/13, EU:C:2014:2371) app.36, and 15-11-16, *Salaberria Sorondo* (C-258/15, EU:C:2016:873) app.33.

airline worker, began to wear a visible cross as a sign of her commitment to her faith. After several requests from the company - initially heeded - for her to comply with the uniform rules, she finally refused to remove or hide the cross and was suspended from work and pay until such time as she decided to comply with her contractual obligation to wear the uniform. Days later, she was offered an administrative job with no contact with the public that did not require a uniform, an offer she refused. As a result of media pressure after the case became public, in November of the same year British Airways announced a revision of its uniform policy in relation to the use of visible religious symbols, authorising the use of the cross and Star of David, and the employee returned to her job in February of the following year.

Shirley Chaplin is the case of a Christian nurse practitioner in a public hospital with a uniform policy which, to minimise the risk of cross-infection, required staff to limit as much as possible the wearing of jewellery, allowing the use of one plain ring and one plain pair of earrings, and prohibiting the wearing of necklaces, in order to avoid the risk of injury when handling patients. The same uniform regulations stipulated that any worker wishing to wear a particular type of clothing or jewellery for religious or cultural reasons had to apply to his or her superior, who could only prohibit it on justified grounds. Ms. Chaplin's request to be able to wear a cross necklace was denied because of the risk of injury when handling patients, as well as the health and safety hazard that could arise from the necklace coming into contact with open wounds or other organs.

The ECtHR handed down its judgment on 15 January 2013 in both cases. After reaffirming the freedom of thought, conscience and religion recognised in art. 9 of the ECHR as one of the basic foundations of a democratic society, the judicial decision attempts to specify its dimensions and content and what legitimate limits may be imposed on its exercise.

The judgment reaffirms the distinction between religious freedom in its internal and external dimensions. The former is unconditional and includes the right to hold any religious belief and to change religion or belief. In its external dimension, it is subject to any limits that may be necessary in a democratic society for public safety, for the protection of public order, health or morals, or for the protection of the rights or freedoms of others. A guarantee of legality is also established, imposing that any limitation that may be established on these grounds must be prescribed by law.

In the case of Nadia Eweida there are two conflicting interests: the fundamental right of the worker to publicly manifest her religious beliefs through symbols, versus the legitimate business interests of projecting a corporate image.

Although both positions are a priori legitimate, the ECtHR understands that the corporate measure produced a disproportionate interference in the worker's right to manifest her religion, in violation of Article 9 of the ECHR. Without disregarding the legitimate power of the company to issue uniforms to workers, the Court understands that this cannot imply the prohibition of wearing religious signs, even if they are visible, as long as they are harmless (without an excessively onerous burden for the company) *and there has been prior tolerance by the company in relation to the use of religious clothing by other workers*.

The Shirley Chaplin case deserves a different solution. In this case, the interests at stake are not only those of the employer, protected by its legal power to organise and manage the business, and those of the employee, in relation to the exercise of her right to religious freedom, but also general interests and those of third parties necessary in a democratic society. In this sense, it seems clear that the reason for the restriction on the use of jewellery, including religious symbols, was the protection of the health and safety of patients and of the workers themselves, an argument that is fully inserted in the legitimate limitations that Article 9(2) of the ECHR itself establishes in relation to the external dimension of religious freedom. Thus, weighing up the interests at stake, the ECtHR understands that the worker's right to manifest her religion must give way in favour of other rights worthy of protection, especially those related to the health and safety of the workers themselves and of third parties.

The judgement of the ECtHR 15-2-01, *Dahlab v. Switzerland*, case no. 42393/98, considered the situation of Lucia Dahlab, a teacher in a public primary school in Geneva who was not allowed by her employer to wear the hijab at her workplace. The ECtHR considered that the restriction imposed on teachers in relation to the free manifestation of their religion and convictions is justified since there is an overriding public interest, an interest embodied in the principle of public educational neutrality and the principle of secularism of the State, prevailing in Switzerland, which transcend mere business interests and form part of the interests and effectiveness of government action, amounting to a legitimate limitation under Article 9(2) of the ECHR.

In relation to educational neutrality, the Court argues that it is difficult to assess the impact that an external symbol such as the *hijab* could have on the freedom of conscience and religion of schoolchildren, which, according to their age, four to eight years old, could have some kind of proselytising effect. Furthermore, it points to the dubious cohabitation of the *hijab* with the principle of equality of the sexes. The principle of educational neutrality seeks to protect inappropriate religious manifestations, ensuring religious harmony between parents, students and teachers in the framework of public education,

with the Court understanding that the school could become a place of religious conflict if teachers were allowed to manifest their religious beliefs through their conduct, and especially their dress. In line with the principle of educational neutrality, the Court noted that the measure adopted by the employer, in terms of its public nature, is consistent with the principle of secularism of the Swiss State, a requirement which it considers inescapable in a democratic society. This argument has been criticised because of its possible incompatibility with a pluralism that is also characteristic of democratic societies, which, incidentally, can be democratic without being strictly secular (see, for example, the case of the United Kingdom, where the Head of State is also the head of the Anglican Church; the same is true of Denmark, and there are also notorious references to the Catholic religion in the constitutions of Ireland and Poland, or to the deity in Germany's⁶). The practice of religious proselytising by public school teachers is a different matter. But, as has been written, the visibility of religious pluralism seems more consistent with the position of a neutral state, and also perhaps more educational for pupils, than the fictitious absence of religious belief on the part of teachers. Irrespective of this possible assessment, the ECtHR found that "it is difficult to reconcile the wearing of the Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils". Therefore, weighing the teacher's right to manifest her religion against the need to protect pupils by preserving religious harmony, the Strasbourg court considers that, in the circumstances of the case and taking into account the young age of the children for whom the applicant was responsible as a representative of the state, the Geneva authorities did not exceed their margin of appreciation and that the measure taken is not unreasonable. Moreover, it must be borne in mind that it follows from Article 9(2) of the ECHR itself that "in a democratic society in which several religions coexist within the same population, it may prove necessary to restrict this freedom in order to reconcile the interests of the various groups and to ensure respect for the convictions of each individual".

In any case, it should be recalled that, according to the doctrine of the *Achbita* case, prohibiting employees from visibly wearing signs of political, philosophical or religious convictions is apt to ensure the correct application of a neutrality regime, provided that such a regime is actually pursued in a consistent and systematic manner, and that the will to follow a regime of political,

⁶ Vid passim WEILER, Joseph: Weiler, J.H.H. A Christian Europe? Europe and Christianity: rules of commitment. *European View* 6, 143–150 (2007). <https://doi.org/10.1007/s12290-007-0020-8>

philosophical or religious neutrality in relations with customers in both the public and private sectors must be considered legitimate. As indicated in the ECtHR (Grand Chamber) judgment 6-4-00, *Thlimennos v. Greece* No. 34369/1997, the right to enjoy the rights recognised in the ECHR without being subjected to discrimination is violated not only when States, without objective and reasonable justification, treat differently persons in analogous situations, but also when, without objective and reasonable justification, they do not treat differently persons in different situations.

Considering now the relationship between access to employment and religion, the ECJ has judged a case of rejection of a job application based on religious convictions (or, specifically, on the absence thereof), on 17-4-18 (*Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (C-414/16, EU:C:2018:257)). The Grand Chamber of the European High Court ruled on the question referred for a preliminary ruling by the German Federal Labour Court concerning the rejection suffered by a candidate for employment by an evangelical organisation seeking a qualified person to conduct a study on ethnic discrimination, the organisation having required as a condition for access to employment membership of the Christian or Protestant Churches, and the candidate - Ms. Egenberger - having stated that she did not belong to any of them.

The ECJ ruled that EU law does not preclude a religious body from rejecting an application for employment on the grounds that religious convictions constitute an essential occupational requirement. The requirement of conformity with the ideology is valid if it refers to essential activity (important for the employing organisation), is legitimate (does not extend to neutral jobs), is justified (need must be demonstrated) and is proportional (does not go beyond what is necessary), all of which can be subject to judicial review.

A church or other organisation whose ethos is based on religion or belief may therefore claim in support of an act or decision, such as the rejection of an application for employment in its field, that, by the nature of the activities concerned or the context in which they are to be carried out, religion is an essential, legitimate and justified occupational requirement with regard to the ethos of that church or organisation. But it will be necessary for such a claim, where appropriate, to be subject to effective judicial review which requires assurance that, in that particular case, the criteria set out in the first subparagraph of Article 4(2) of Directive 2000/78 are satisfied, under which a church or other organisation whose ethos is based on religion or belief may lay down a requirement relating to religion or belief if, by the nature of the activity concerned or the context in which it is carried out, religion or belief constitutes a genuine, legitimate and justified occupational requirement in relation to the organisation's ethos. Con-

siderations unrelated to these ethics and to the right to autonomy of the church or organisation in question cannot therefore be legally protected. This requirement must comply with the principle of proportionality. The lawfulness of a difference in treatment based on religion or belief is therefore subject to the objectively verifiable existence of a direct link between the occupational requirement imposed by the employer and the activity concerned. Such a link may arise either from the nature of that activity, for example, where it involves taking part in determining the ethics of the Church or organisation in question or assisting in its preaching work, or from the circumstances in which that activity is to be carried out, such as the need to ensure a reliable representation of the Church or organisation for external purposes.

According to the ECJ, a national court, when hearing a dispute between two individuals, where it cannot interpret the applicable national law in accordance with Article 4(2) of Directive 2000/78, is obliged to ensure, in accordance with its powers, the legal protection afforded to individuals by Articles 21 and 47 of the Charter of Fundamental Rights of the European Union and the full effectiveness of those provisions, disapplying, if necessary, any national rules which contradict them.

A few months later, the same Grand Chamber of the ECJ ruled (by judgment dated 11-9-17 (Case *IR* C-68/17, EU:C:2018:696), on a case of dismissal with cause with regard to the act of an employee contrary to the religious ideology of the employer, resolving the preliminary ruling raised by the German Federal Labour Court. Specifically, the ECJ was asked to decide whether the dismissal of a Catholic doctor who worked (as Director of Service) in a Caritas hospital, subject to the supervision of the Archbishopric and who got married in a ceremony after getting divorced, which led to his dismissal as acting against the Catholic religion (which was that of his employer, and his own), was contrary to EU law.

The European Court ruled that such dismissal was indeed contrary to EU law, and that the national court must disapply any rule contrary to the full effectiveness of non-discrimination on grounds of religion or belief. If the church or company with an ideology imposes religious requirements on its managerial staff, such a decision can be judicially reviewed to ensure non-discrimination. A special religious adherence of managers can only be required if, given the nature of the professional activities concerned or the context in which they are carried out, religion or belief constitutes a genuine, legitimate and justified essential occupational requirement with regard to the ethics of the church or organisation concerned and in accordance with the principle of proportionality.

According to the Court, a church or other organisation whose ethos is based on religion or belief and which manages a hospital establishment in the form of equity company governed by private law may not decide to impose on those of its employees who exercise managerial responsibilities requirements concerning an attitude of good faith and loyalty towards that ethos which are different according to the religion of those employees or their irreligion, without such a decision being subject, where appropriate, to effective judicial review in order to ensure that the criteria referred to in Article 4(2) of Directive 2000/78 are satisfied. On the other hand, a difference in treatment, as regards the requirement of an attitude of good faith and loyalty towards those ethics, between employees in managerial posts, on the basis of their religion or irreligion, is not in conformity with that directive, except where, given the nature of the professional activities concerned or the context in which they are carried out, religion or belief constitutes a genuine, legitimate and justified occupational requirement in relation to the ethics of the church or organisation concerned and is in accordance with the principle of proportionality, which is a matter for the national court to determine.

As can be seen in these last two decisions, the specification of what is an essential occupational requirement linked to religious beliefs is highly casuistic and precludes the establishment of a clear and certain applicable criterion, if it were possible to conceive of its existence in the abstract.

The Grand Chamber of the ECJ delivered a judgment on 29-1-19 in Case C-193/17, EU:C:2019:43, *Cresco Investigation*, in the course of a preliminary ruling procedure brought by an Austrian high court in which, considering the Charter of Fundamental Rights of the European Union (Art. 21) and equal treatment in employment and occupation (Directive 2000/78/EC) with regard to possible direct discrimination on grounds of religion, it analyses a national legislation granting workers who are members of some Christian churches a day's holiday (Good Friday), assessing its justification and the possible obligations of private employers and the national court arising from an incompatibility of their national law with Directive 2000/78.

It should be noted that the provisions at issue in the dispute granted workers professing other religions, whose major holidays do not coincide with the public holidays laid down in the Austrian law on rest periods, the right to be absent from work to celebrate religious rites corresponding to religious holidays upon authorisation granted by their employer by virtue of its duty of care and protection. The ECJ held that such specific compensatory measures under Austrian law could not be regarded as adequately compensating for the 'disadvantage' in question in accordance with the principle of proportionality and, as far as possible, the principle of equality.

The Grand Chamber has interpreted Articles 1 and 2(2) of Directive 2000/78/EC as meaning that national legislation under which, first, Good Friday is a public holiday only for workers who are members of certain Christian churches and, second, only those workers are entitled, if they have to work on that public holiday, to a wage supplement for the work carried out on that day constitutes direct discrimination on grounds of religion.

The measures provided for by that national legislation cannot be regarded either as measures necessary for the protection of the rights and freedoms of citizens within the meaning of Article 2(5) of that directive or as specific measures intended to compensate for disadvantages caused by religion within the meaning of Article 7(1) of that directive.

The Court also added that Article 21 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that, so long as the Member State concerned has not amended, in order to restore equal treatment, legislation under which it grants the right to a public holiday on Good Friday only to workers who are members of certain Christian churches, a private employer subject to that legislation is also obliged to grant the right to a public holiday on Good Friday to its other employees, provided that those employees have asked in advance not to have to work on that day, and to grant them accordingly the right to a salary supplement for the work carried out on that day where the employer has not acceded to that request.

The Grand Chamber also delivered ECJ 15-7-21, *WABE* (joined cases C-804/18 and C-341/19, EU:C:2021:594) concerning two questions referred for a preliminary ruling.

The reference for a preliminary ruling in Case C804/18 was made in the context of a dispute between IX and its employer, WABE eV, (WABE) an association registered in Germany which operates numerous day-care centres, concerning IX's suspension from work following its refusal to comply with the prohibition imposed by WABE on its employees to wear any visible signs of a political, philosophical or religious nature in the workplace when in contact with parents or their children.

The European Court replied to that request by reiterating its view (*Achbita/G4S* case) that Articles 1 and 2(2)(a) of Directive 2000/78 must be interpreted as meaning that an internal rule of an undertaking which prohibits employees from wearing any visible signs of political, philosophical or religious beliefs in the workplace does not constitute direct discrimination on grounds of religion or belief, within the meaning of that directive, against workers who follow certain rules of dress in accordance with religious precepts, provided that that rule is applied generally and without distinction. It adds that a differ-

ence of treatment based indirectly on religion or belief, resulting from an internal rule of an undertaking prohibiting employees from wearing any visible sign of political, philosophical or religious convictions in the workplace, may be justified by the employer's desire to maintain political, philosophical and religious neutrality vis-à-vis its customers or users, provided, first, that such a regime meets a genuine need on the part of that employer (a need which it is for the employer to demonstrate, having regard in particular to the legitimate expectations of those customers or users and the unfavourable consequences which he would suffer without such a regime, as well as to the nature of his activities or the context in which they are carried out); second, that difference in treatment is such as to ensure the proper application of that system of neutrality, which implies that the same system is consistently and systematically applied; and, third, that the prohibition is limited to what is strictly necessary having regard to the actual extent and gravity of the adverse consequences which the employer seeks to avoid by means of such a prohibition.

The reference for a preliminary ruling in Case C-341/19 was made in proceedings between MH Müller Handels GmbH (MH), a company operating a chain of drugstores on German territory, and its employee, MJ, concerning the lawfulness of an injunction issued by MH to MJ to refrain from wearing large, conspicuous signs of a political, philosophical or religious nature in the workplace.

The ECJ responded to that request by holding that indirect discrimination based on religion or belief, arising from an internal rule of an undertaking which prohibits the wearing of visible signs of political, philosophical or religious beliefs in the workplace to ensure a system of neutrality within that undertaking, can be justified only if that prohibition covers all visible forms of expression of political, philosophical or religious beliefs. A prohibition limited to the wearing of signs of political, philosophical or religious convictions which are conspicuous and large in size may constitute direct discrimination based on religion or belief, which cannot, in any event, be justified on the basis of that provision.

Moreover, having considered that the EU legislature did not carry out the necessary reconciliation between freedom of thought, conviction and religion and the legitimate aims which may be invoked as justification for unequal treatment, but left the task of carrying out that reconciliation to the Member States and their courts, Directive 2000/78 makes it possible to take account of the specific context of each Member State and to allow each of them a margin of discretion in the context of the necessary conciliation between the various rights and interests at stake, in order to ensure a fair balance between them. It follows that,

when examining whether there is a difference in treatment on grounds of religion or belief, national provisions protecting freedom of thought, belief and religion, as a value to which contemporary democratic societies have attached increasing importance for many years, may be taken into account as more favourable provisions for the protection of the principle of equal treatment. Thus, national provisions which make the justification of a difference of treatment indirectly based on religion or belief subject to stricter requirements than Article 2(2)(b)(i) - absence of indirect discrimination where there is a legitimate aim and where appropriate and necessary means are applied - of Directive 2000/78, for example, are included as an entitlement under EU law. The Court concludes that national provisions protecting religious freedom may be considered as more favourable provisions within the meaning of Article 8(1) of that directive (possibility for Member States to adopt or maintain more favourable provisions for the protection of the principle of equal treatment than those laid down in the Directive itself) when examining the appropriateness of a difference of treatment based indirectly on religion or belief.

On 15-10-22 the Second Chamber of the ECJ handed down a judgment in the proceedings between L.F. and S.C.R.L. (C-344/20, EU:C:2022:774), in response to three questions referred for a preliminary ruling by a Brussels Labour Court, which admitted being familiar with the aforementioned *G4S Secure Solutions*, *Bougnaoui* and *ADDH* judgments, but had serious doubts about some of the issues involved, including those relating to the comparability of situations. The Belgian court raised the question “whether there is still a margin of appreciation for the national court or whether it is deprived of any possibility of assessing in each individual case the comparability of situations when examining the discriminatory nature of an internal rule of a private company prohibiting the visible wearing of any political, philosophical or religious sign in the workplace”. The Belgian court also questions the equivalence between religious, philosophical and political convictions for the purposes of discrimination because ‘if religion were to be placed on the same level as convictions other than religious ones, this would significantly reduce the scope of search of the person responsible for examining the comparability of situations in the context of assessing the existence of direct discrimination. That would mean that, faced with a domestic rule such as that at issue in the main proceedings, it would not be possible to compare a worker who claims to have a religious conviction with a worker who has philosophical convictions or political convictions’, the question being whether it would be in accordance with European law if a national rule which confers separate protection on religious convictions, philosophical convictions and political convictions, and which

thus seeks to strengthen the degree of protection by emphasising the particularities of each of them and giving them greater visibility, can be regarded as a national provision ‘more favourable to the protection of the principle of equal treatment than those laid down in [Directive 2000/78]’. Finally, the referring court sets out a number of factual criteria which it considers relevant to determine whether a difference in treatment constitutes direct discrimination.

The Court of Justice held that the terms “religion or belief” in Article 1 of Directive 2000/78/EC constitute one and the same ground of discrimination, covering both religious and philosophical or spiritual beliefs. And that - reiterating a criterion already expressed in previous judgments - a provision in an undertaking’s employment regulations which prohibits workers from expressing, orally, through their dress or in any other way, their religious or philosophical convictions, of whatever kind, does not constitute discrimination, in respect of workers who seek to exercise their freedom of religion and conscience by the visible wearing of a sign or article of clothing with religious connotations, direct discrimination ‘on grounds of religion or belief’ within the meaning of that directive, provided that that provision is applied in a general and undifferentiated manner. Finally, it concluded in its last judgment that it would be contrary to European law for provisions transposing Directive 2000/78 to interpret religious convictions and philosophical convictions as constituting two separate grounds of discrimination to be taken into account as more favourable provisions for the protection of the principle of equal treatment than those referred to in that Directive, within the meaning of Article 8(1) thereof.

Finally, with regard to the decisions of the ECJ, its Grand Chamber handed down a judgment on 28-11-2023 (OP and Commune d’Ans, C-148/22, EU:C:2023:924) concerning the possible discriminatory status on grounds of religion or belief of a public administration’s work regulation prohibiting the visible wearing of any philosophical or religious sign in the workplace (affecting, in the specific case, the wearing of the Islamic headscarf), based on a requirement of neutrality in contacts with the public, hierarchical superiors and co-workers.

The applicant performed her duties as office manager with virtually no contact with users of the public service (back office) and, for several years (almost 5), without wearing any sign which might reveal her religious convictions or making any written claim to that effect, until she did so (she asked to wear the Islamic headscarf), which the local authority refused, provisionally prohibiting her from wearing, in the exercise of her professional activity, signs revealing her religious convictions, and subsequently adopted a general regulation on the use of such signs within the municipal administration, introducing an obligation of “exclusive neutrality” in the workplace, understood in the sense that it prohibits

all employees of the municipality from wearing, in the workplace, any visible sign that may reveal their convictions, in particular religious or philosophical convictions, whether or not they are in contact with the public.

The referring court held that the prohibition of the wearing of the Islamic headscarf by the applicant in the main proceedings constituted a difference in treatment directly based on the applicant's religion in comparison with other members of the staff of the municipality, since other signs of belief, in particular religious ones, worn discreetly, had been tolerated by the municipality in the workplace in the past and continued to be so. On the other hand, it considered that this difference in treatment was not justified by essential and determining professional requirements insofar as the applicant performed her duties mainly in the back office, and that such a difference constituted direct discrimination within the meaning of Directive 2000/78, at least until the new regulation was enacted, which the referring court considered to be, on the face of it, indirect discrimination, since it is apparently neutral, but applied with variable geometry, being "exclusive" towards the applicant and "more inclusive" for her colleagues with other convictions. That court therefore provisionally allowed the applicant in the main proceedings to wear a visible sign which might reveal her religious convictions, but only when working in the back office and not when in contact with users or when exercising a function of authority, albeit with doubts as to the conformity with the provisions of Directive 2000/78 of a provision of a work regulation which imposes an obligation of "exclusive neutrality" on all employees of a public administration, even those who are not in contact with users.

The Grand Chamber of the ECJ reasons in its judgment that the legitimate aim of ensuring, by means of a regime of 'exclusive neutrality' such as that laid down by Article 9 of the employment regulations at issue in the dispute, a completely neutral administrative environment can be effectively pursued only if no visible manifestation of convictions, in particular philosophical or religious convictions, is permitted, where workers are in contact with users of the public service or are in contact with each other, since the wearing of any sign, even a small one, jeopardises the suitability of the measure to achieve the aim allegedly pursued and thus calls into question the very consistency of that regime (referring, in that regard, to Joined Cases C-804/18 and C-341/19 WABE and MH Müller Handel, EU:C:2021:594, paragraph 77). Such a rule is therefore necessary.

An internal rule of a municipal administration which prohibits, in a general and undifferentiated manner, members of the staff of that administration from wearing visibly, in the workplace, any sign revealing, in particular, phil-

osophical or religious convictions may be justified by the desire of that administration to establish, having regard to its own context, a completely neutral administrative environment, provided that that rule is appropriate, necessary and proportionate, in the light of that context and having regard to the various rights and interests at stake.

Incidentally, the judgement does not admit a second question on the greater impact that such a measure could (apparently) have on a majority of women and therefore constitute indirect discrimination on grounds of sex, because it falls within the scope of another directive (2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation) and because the order for reference did not contain any indications that would allow the factual situation to be delimited.

2. Remedies and enforceability. Reasonable accommodation

In accordance with the criteria of balancing and exceptionality in the prohibition of conduct linked to the external exercise of the right to religious or ideological freedom, it is necessary to verify whether the prohibition in question is limited to what is strictly necessary. Consistent with this, and as a practical example, in the *Achbita/G4S* case, the ECJ required verification of whether the prohibition on the visible wearing of any sign or item of clothing which may be associated with a religious belief or a political or philosophical conviction concerned only employees of the undertaking who were in contact with customers. If this is the case, the prohibition must be regarded as strictly necessary to achieve the aim pursued. Therefore, as regards the refusal of an employee such as Ms Achbita to refrain from wearing an Islamic headscarf while carrying out her professional activities in contact with her employer's customers, it is for the court of the State which referred the question for a preliminary ruling to determine whether, having regard to the constraints specific to the undertaking and without placing an additional burden on the undertaking, the employer was able, in the face of such a refusal, to offer Ms Achbita a job which would be more suitable for her, such as a job which did not involve visual contact with customers, instead of dismissing her. It is for the referring court, in the light of all the evidence in the case-file, to weigh up the interests involved and to limit the restrictions on the freedoms in question to what is strictly necessary.

In one the 2021 *Wabe* case, the ECJ reiterated the need for a difference in treatment restricting the expression of political, philosophical or religious be-

liefs to be permissible only where such a regime meets a genuine need on the part of the employer (who must prove it), that the difference in treatment is such as to ensure the proper application of a neutrality regime (consistent and systematic application), and that the prohibition is limited to what is strictly necessary in view of the actual extent and seriousness of the adverse consequences which the employer seeks to avoid by means of the prohibition.

The ECtHR has had the chance in various cases to consider the opportunity or enforceability of the reasonable accommodation requested by workers on the basis of their right to freedom of religion, and this in order to allow compatibility between the exercise of this right and the conditioning factors derived from a specific company organisation, requiring positive action to adapt it. The Resolution of the European Commission of Human Rights of 12 February 1981 (*Ahmad v. United Kingdom*) ruled that Article 9 of the ECHR cannot be considered a sufficient legal basis to legitimise the appellant worker, an English language teacher of the Muslim religion, to be absent during school hours in order to attend Friday prayers at the mosque⁷.

Judgment 13-4-06, *Kosteski v. Former Yugoslav Republic of Macedonia* No. 55170/2000 considers a case of a sanction against an employee for absence from work, where the employee sought to justify the sanction by his intention to celebrate a religious holiday. The ECtHR did not consider it proven that such an intention was a manifestation of the true beliefs of the employee, who had to bear the burden of proof of his membership of a particular religious denomination, without this entailing a breach of the right not to declare one's beliefs.

V. THE RELATIONSHIP BETWEEN THE PROTECTION OF HUMAN RIGHTS AND DIRECTIVE 2000/78/EC

The judgments of the ECJ in *Bougnaoui, ADDH/Micropole, Achbita/G4S Secure Solutions* and in Case C-344/20 (*S.C.R.L.*) note that Directive 2000/78/EC recognise in its recitals that the EU respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Furthermore, the right of everyone to equality before the law and protection against discrimination

⁷ In the same sense, *vid.* Resolution of the European Commission of Human Rights 3-12-96, *Tuomo Konttinen v. Finland* case no. 24949/94 and ECHR judgement 3-4-12, *Francesco Sessa v. Italy* case no. 28790/08.

is a universal right recognised in the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, as well as the ECHR, to which all Member States are parties. Convention No 111 of the International Labour Organisation prohibits discrimination in the field of employment and occupation.

In this regard, it is worth recalling the relevance of international treaties, including the ECHR, for the purposes of determining the scope and applicability of fundamental rights. Constitutions of EU countries commonly safeguard those rights and the content of those rights which belong to the person as such and not as a citizen or, in other words, those which are essential for the guarantee of human dignity. In order to determine, specifically, which are those rights and those contents of rights, it is necessary to start, in each case, from the abstract type of right and the interests that it basically protects (that is, its essential content) to specify whether, and to what extent, they are inherent to the dignity of the human person conceived as a subject of law, that is, as a free and responsible member of a legal community that deserves that name and not as a mere object of the exercise of public powers. Constitutional Courts of EU countries tend to recognise that the Universal Declaration of Human Rights and other international treaties and agreements on the same subjects ratified by them are of particular relevance in this process of determination. For this reason, it is often recognised by courts of EU countries the important hermeneutic function of the international human rights treaties ratified by them and, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms, given that compliance with it is subject to the control of the European Court of Human Rights, which is responsible for specifying the content of the rights declared in the Convention which, in principle, the signatory States must recognise as the minimum content of their fundamental rights, though this does not imply a mimetic translation of the aforementioned pronouncement that ignores the normative differences existing between the different constitutions of EU countries and the European Convention on Human Rights.

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CHAPTER 9

PROHIBITION OF DISCRIMINATION ON THE BASIS OF DISABILITY

BERNARDO GARCÍA RODRÍGUEZ

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I. THE SOCIAL REALITY OF DISABILITY IN THE EUROPEAN UNION

Around eighty-seven million people have some type of disability in the European Union¹, with women representing more than 60%², and

¹ Commission Staff Working Document: *EUROPEAN DISABILITY STRATEGY 2010-20 - evaluation* [SWD(2020) 291 final]. Brussels, 27.11.2020 SWD(2020) 289 final/2.

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An Equality Union: A strategy on the

with this group suffering a higher risk of poverty or social exclusion (28.4%), in contrast to people without disabilities (18.4%). More than half of people with disabilities reported feeling discriminated against in 2019³

In the European labour market, the employment rate for people with disabilities is 50.6% (53.3% for men and 48.3% for women), compared to 74.8% for people without disabilities⁴, and the unemployment rate in the European Union for people with disabilities, between the ages of 20 and 64, stands at 17%, compared to 10% for non-disabled people, which prevents many disabled people from leading an independent and active life.⁵

II. NOTION OF DISABILITY

The term disability, nowadays generalized, replaced the term handicap, which was used for decades, within the framework of the modification promoted by the doctrinal field and the World Health Organization (WHO), through the International Classification of Impairments, Disabilities and Handicaps (ICIDH - WHO.1981), and the International Classification of Functioning, Disability and Health (ICF - WHO.2001).

1. Legal concept of disability

1.1 UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The United Nations Convention on the Rights of Persons with Disabilities (adopted in New York on December 13, 2006, ratified by the European

rights of persons with disabilities for 2021-2030. Recital B. Brussels, 3.3.2021.COM(2021) 101 final. European Disability Strategy (2010-2020) | EUR-Lex

³ Special Eurobarometer 493, *Discrimination in the EU* ["Discrimination in the Union,"], May 2019. https://data.europa.eu/data/datasets/s2251_91_4_493_eng?locale=en

⁴ Commission proposal of 17 December 2019 for a joint employment report from the Commission and the Council (COM(2019)0653).

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Union of Equality: Strategy for the rights of persons with disabilities for 2021-2030. Recital AE. Brussels, 3.3.2021.COM(2021) 101 final. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021DC0101>

Union⁶ through Council Decision 2010/48/EC of November 26, 2009⁷, establishes in its Article 1 the following definition:

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.”

1.2 COUNCIL DIRECTIVE 2000/78/EC OF 27 NOVEMBER 2000 ESTABLISHING A GENERAL FRAMEWORK FOR EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION; AND THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE

Council Directive 2000/78/EC of 27 November 2000⁸, which provides for disability as one of the grounds for establishing a general framework for combating discrimination in order to ensure that the principle of equal treatment is applied in the Member States (Article 1), did not establish a concept of disability, and the ECJ held that the United Nations Convention can be invoked to interpret, as far as possible, Directive 2000/78/EC.⁹

Article 3 of Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on accessibility requirements for products and services, takes up verbatim the definition of “persons with disabilities” established in Article 1 of the United Nations Convention; and in the social and labour field, it is necessary to follow the case law of the ECJ, which has been considering and applying the concept of disability contained in the Convention, within the meaning of Directive 2000/78/EC, which “*must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with*

⁶ Under Article 216(2) TFEU, where the European Union enters into international agreements, the institutions of the Union are bound by such agreements and consequently they enjoy primacy over acts of the Union (CSTJ of 21 December 2011, Air Transport Association of America, C-366/10, EU:C:2011:864, nr. 50; and of 11 April 2013, HK Danmark, C-335/11 and C-337/11, EU:C:2013:222, para 28).

⁷ OJ 2010, L 23, p. 35. From the entry into force of this Decision, the provisions of the United Nations Convention on the Rights of Persons with Disabilities form an integral part of the legal order of the European Union (ECJ of 18 March 2014, Z., C-363/12, EU:C:2014:159, nr. 73; and of 1 December 2016, Daouidi, C-395/15, EU:C:2016:917, nr. 40).

⁸ “OJEU No. 303 of December 2, 2000, pages 16 to 22 - OJEU-L-2000-82357.

⁹ ECJ of 11 April 2013, HK Danmark, C-335/11 and C-337/11, EU:C:2013:222, para 32; of 1 December 2016, Daouidi, C-395/15, EU:C:2016:917, para 41; of 11 September 2019, Nobel Plásticos Ibérica, C-397-18, EU:C:2019:703, para 40; and of 18 January 2024, Ca Na Negreta, C-631/22, EU:C:2022:85, para 41.

*various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers”*¹⁰.

The ECJ has clarified that, by virtue of Article 3(1)(c) of the Directive, the Directive applies to all persons, whether in the public or private sector, including public bodies, in particular in relation to the conditions of dismissal.¹¹

The ECJ has held that the obesity of a worker, which prevents him from participating fully and effectively in professional life, on an equal footing with other workers, because of his reduced mobility or the concurrence of pathologies which do not allow him to carry out his work or which create difficulties for him in the exercise of his professional activity, would be included in the concept of disability in Directive 2000/78¹². Also, the fitting of a pacemaker to a worker, a device sensitive to electromagnetic fields emitted in particular on railways, which does not allow him to perform the essential functions of the job to which he was assigned, is a situation that falls within the scope of Directive 2000/78¹³. In turn, the fact that a person is blind implies the concurrence of a disability¹⁴, as well as that of having a reduced level of hearing acuity.¹⁵

On the other hand, the condition of a woman, which prevents her from gestation and childbirth, and which is recognized as a cause of severe suffering for her, does not constitute for the ECJ a disability within the meaning of Directive 2000/78.¹⁶

The ECJ has considered that the fact that a person is recognized as a person with a disability for the purposes of national law does not imply that he or she has a disability for the purposes of Directive 2000/78¹⁷, which makes it clear that the notion of person with a disability in the European standard is autonomous, its interpretation being uniform as a provision of Union law, taking into account the context of the provision and the objective pursued by the regulation in question¹⁸, but independent of the notion of disability that national law may consider.

¹⁰ ECJ of 11 April 2013, HK Danmark, C-335/11 and C-337/11, EU:C:2013:222, nr. 38; of 11 September 2019, Nobel Plastiques Ibérica, C-397/18, EU:C:2019:703, nr. 41; and of 10 February 2022, HR Rail, C-485-20, EU:C:2022:85, nr. 34.

¹¹ ECJ of 18 January 2024, Ca Na Negreta, C-631/22, EU:C:2022:85, nr. 35.

¹² SSTJUE of 18 December 2014, FOA, C-354/13, EU:C:2014:2463, aps. 59 and 60; and of 18 January 2018, Ruiz Conejero, C-270/16, EU:C:2018:17, aps. 29 y 30.

¹³ ECJ of 10 February 2022, HR Rail, C-485-20, EU:C:2022:85, aps. 35 y 36.

¹⁴ ECJ of 21 October 2021, TC, C-824/19, EU:C:2021:862, par. 42.

¹⁵ ECJ of 15 July 2021, C-795/19, EU:C:2021:606, aps. 29 y 30.

¹⁶ ECJ of 18 March 2014, Z., C-363/12, EU:C:2014:159, aps. 79 and 82.

¹⁷ ECJ of 18 January 2018, Ruiz Conejero, C-270/16, EU:C:2018:17, nr. 32.

¹⁸ CSTJ of 18 January 1984, Ekro, C-327/82, EU:C:1984:11, nr. 11; of 16 June 2016, Pebros Servizi, C-511/14, EU:C:2016:448, nr. 36; and of 1 December 2016, Daouidi, C-395/15, EU:C:2016:917, nr. 50.

2. Illness and disability

For the ECJ, illness as such cannot be considered as a reason in addition to those other reasons in relation to which Directive 2000/78 prohibits any discrimination¹⁹; there is a distinction between illness as such and disability, differentiating this situation compatible with work attendance from simple sick leave. But the ECJ has also ruled that disability, as referred to in Directive 2000/78, must be interpreted as meaning that it may include a condition caused by an illness medically diagnosed as curable or incurable, where that illness involves a limitation, resulting in particular from physical, mental or psychological ailments, which, in interaction with various barriers, is liable to prevent the full and effective participation of the person concerned in working life on an equal footing with other workers, and if that limitation is of long duration²⁰. In this sense, the fact that the temporary incapacity regime of domestic law has been applied, cannot exclude the qualification of the limitation of capacity as lasting, within the meaning of Directive 2000/78, interpreted in the light of the United Nations Convention²¹, and from another perspective, the fact that a person is in a situation of temporary incapacity, under national law, of uncertain duration, due to an accident at work does not mean, in itself, that the limitation suffered by that person can be qualified as lasting, in accordance with the concept of disability in the aforementioned Directive.²²

For the ECJ, the indications which make it possible to consider that a limitation is lasting include, in particular, that, at the date of the allegedly discriminatory act, the disability of the person concerned does not present a clear prospect of ending in the short term, or that the disability is likely to be significantly prolonged before the person concerned is restored to health, the court hearing the proceedings in which discrimination on the grounds of disability is alleged must base itself on all the objective elements available to it, in particular on documents and certificates relating to the condition of the person concerned, drawn up in accordance with current medical and scientific knowledge and data.²³

In short, illness and disability are not synonymous, and Directive 2000/78 does not contain any indication to suggest that workers are protected under the prohibition of discrimination on the grounds of disability as soon as any illness

¹⁹ ECJ of July 11, 2006, Chacón Navas, C-13/05, EU:C:2006:456, ap 57.

²⁰ CSTJ of 11 April 2013, HK Danmark, C-335/11 and C-337/11, EU:C:2013:222, nr. 47.

²¹ ECJ of 18 January 2018, Ruiz Conejero, C-270/16, EU:C:2018:17, aps. 29 y 30.

²² STUE of 1 December 2016, Daouidi, C-395/15, EU:C:2016:917, para. 65

²³ ECJ STJUE of 1 December 2016, Daouidi, C-395/15, EU:C:2016:917, aps. 56, 57 and 59.

appears²⁴, although they are sometimes related²⁵. Perhaps the expression illness *versus* disability is appropriate, but not as conflicting terms, but in the classical Latin meaning of the word *versus* translated as “*towards*”, so that in some cases illness can lead to disability, when it entails a limitation, of long duration, resulting from physical, mental or psychological ailments which, in interaction with various barriers, may prevent the full and effective participation of the person concerned in professional life on an equal footing with other workers, being included in the concept of disability, within the meaning of Directive 2000/78.²⁶

3. Supervening incapacity, permanent incapacity and disability

The concept of incapacity refers, according to scientific doctrine and jurisprudence and following the use of ordinary language, to an inability or lack of professional faculties originating in the worker, either due to lack of preparation or updating of knowledge, or due to deterioration or loss of work resources, speed, perception, skill, ability to concentrate, etc.

It has been questioned at the ECJ whether a national legislation which establishes as an objective cause for termination of the employment contract the inability of the worker, known or arising after the beginning of the employment relationship, unless it occurred prior to the completion of the probationary period, in which case it may not be alleged subsequently as an objective cause for termination of the employment relationship.

The question arises as to whether such regulation complies with the conditions of reasonable accommodation established in Articles 5 of Directive 2000/78, and 2, 4th of the United Nations Convention, as those necessary and

²⁴ ECJ of July 11, 2006, Chacón Navas, C-13/05, EU:C:2006:456, par 46.

²⁵ In the European Parliament Resolution of 18 June 2020 on the post-2020 European Disability Strategy (2019/2975(RSP) P9_TA(2020), recital n/, it is stated that *Eurofound* pointed out the lack of clarity regarding the inclusion of the concept of (chronic) “disease” in the definition of disability.

For its part, the proposal for a Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning the accessibility requirements for products and services, in addition to containing a definition of “persons with disabilities”, initially included within its scope of protection “persons with functional limitations”, defined as those “*who have physical, mental, intellectual or sensory impairments, impairments related to age or other causes linked to the functioning of the human body, permanent or temporary, which, in interaction with various barriers, reduce their access to products and services, leading to a situation requiring adaptation of such products and services to their particular needs*”. In the final text of Directive (EU) 2019/882 no such provision for the protection of persons with functional limitations, other than persons with disabilities, was included.

All this highlights the problems of definition and the relationship between disability and disease in the European Union’s regulatory framework.

²⁶ ECJ of 1 December 2016, Daoudi, C-395/15, EU:C:2016:917, nr. 41.

appropriate modifications and adaptations of the physical, social and attitudinal environment to the reality of persons with disabilities that do not impose a disproportionate or undue burden, when required in a particular case, in a practical manner, to facilitate accessibility and participation and to facilitate accessibility and participation and to facilitate accessibility and participation, social and attitudinal environment to the reality of persons with disabilities that do not impose a disproportionate or undue burden, when required in a particular case in a practical manner, to facilitate accessibility and participation and to ensure to persons with disabilities the enjoyment or exercise, on an equal basis with others, of all rights.

On the other hand, the situation of permanent disability, understood as the situation of the worker who, after having been subjected to the prescribed treatment, presents serious anatomical or functional reductions, susceptible of objective and foreseeable definitive determination, which diminish or annul his or her working capacity, cause in some countries of the UE the regular termination, without compensation, of the employment contract, by recognizing the benefit, to the person to whom the situation of permanent disability for work is recognized, an economic benefit charged to the public Social Security system. The ECJ considered that such national legislation undermines the useful effect of Article 5 of Directive 2000/78, interpreted in the light of Article 27(1) of the UN Convention, according to which the exercise of the right to work, including for persons who become disabled during employment, and the maintenance in employment must be safeguarded and promoted, so that by assimilating a “total permanent disability”, which only affects the usual functions, to the death of a worker or to an “absolute permanent disability”, which designates an incapacity for all work, such national legislation is contrary to the objective of professional integration of people with disabilities referred to in Article 26 of the Charter²⁷.

4. People especially sensitive to occupational hazards and disability

The ECJ held that Directive 2000/78 must be interpreted as meaning that the state of health of a worker recognized as being particularly sensitive to the risks arising out of work, within the meaning of national law, which prevents him from performing certain jobs because of the risk to his own health or to other persons, is covered by the concept of disability within the meaning of the Directive, where that state of health entails a limitation of capacity resulting,

²⁷ ECJ of January 18, 2024, *Ca Na Negreta*, C-631/22, EU:C:2022:85, par. 50.

in particular, from long-term physical, mental or psychological impairments which, in interaction with various barriers, are such as to prevent the person concerned from participating fully and effectively in working life on an equal footing with other workers, it being for the national court to determine whether those conditions are met.²⁸

This must be related to the obligation of reasonable accommodation required by Articles 5 of Directive 2000/78, and 2, 4th of the United Nations Convention, which for the Court of Justice must be understood in the sense that they refer to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal footing with other workers, and the company must adopt appropriate measures, ie, effective and practical measures to adapt the workplace to the disability, for example, by adapting the facilities, equipment, work patterns, assignment of functions or provision of training or framing means, without such measures imposing a disproportionate burden on the company, taking into account, in particular, the financial and other costs involved, the size, financial resources and total turnover of the company and the availability of public funds or other types of assistance.²⁹ It should also be recalled that it is relevant that according to Recital 17 of Directive 2000/78, there is no obligation to recruit, promote or retain in a job a person who is not competent, able or available to perform the essential functions of the job in question, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.³⁰

III. EMPLOYMENT AND OCCUPATION PROTECTION MEASURES IN THE FACE OF DISABILITY DISCRIMINATION

1. **General principle of prohibition of discrimination on grounds of disability**

Article 21 of the EU Charter of Fundamental Rights establishes the general principle of non-discrimination and recognizes in Article 26 the right of people with disabilities to benefit from measures guaranteeing their autonomy, their social and professional integration and their participation in the life of the community.

²⁸ ECJ STJUE of 11 September 2019, Nobel Plastiques Ibérica, C-397/18, EU:C:2019:703, nr. 51.

²⁹ CSTJ of 11 April 2013, HK Danmark, C-335/11 and C-337/11, EU:C:2013:222, para 54; and of 11 September 2019, Nobel Plastiques Ibérica, C-397/18, EU:C:2019:703, para 65.

³⁰ ECJ of 11 September 2019, Nobel Plastiques Ibérica, C-397/18, EU:C:2019:703, nr. 74.

Article 1 of Directive 2000/78 states that its purpose is to establish a general framework for combating discrimination in the field of employment and occupation, including on the grounds of disability, with a view to ensuring that the principle of equal treatment is applied in the Member States, both in the public and private sectors, as regards both conditions of access to employment and conditions relating to employment and work itself.³¹

Directive 2000/78 considers that the principle of equal treatment should be understood as the absence of any direct or indirect discrimination based on the person's disability. Direct discrimination exists when, in a similar situation, a person with a disability has been or could be treated less favorably than another person who does not have such a circumstance³². Indirect discrimination occurs when an apparently neutral provision, criterion or practice may cause a particular disadvantage to persons with a disability, with respect to other persons who do not have such a circumstance.³³

Thus, the ECJ has considered that indirect discrimination occurs when a person with a disability is dismissed for objective reasons, in application of selection criteria consisting of productivity below a certain level, less versatility in the jobs and a high rate of absenteeism³⁴, as these are conditions that, although presented as neutral, have a greater impact on people with disabilities. All of this without prejudice to the fact that the company had effectively adopted the adequate measures and implemented the reasonable adjustments in the sense of article 5 of Directive 2000/78. In such a case, it would not be appropriate to consider such dismissal based on these selection criteria as discriminatory³⁵, since the Directive does not oblige to hire, promote or maintain in a job a person who is not competent, capable or available to perform the essential tasks of the position in question³⁶, reiterating that in any case, the company is obliged to make reasonable accommodation for people with disabilities, which will be discussed later under a specific heading.

³¹ Article 3 of the Directive extends its scope of application in the following terms:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;(c) employment and working conditions, including dismissals and pay;(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

³² Article 2.2.a) Directive 2000/78.

³³ Article 2.2.b) Directive 2000/78.

³⁴ ECJ of 11 April 2013, HK Danmark, C-335/11 and C-337/11, EU: C:2013:222, nr. 68 by analogy; and of 11 September 2019, Nobel Plastiques Ibérica, C-397/18, EU: C:2019:703, nr. 71.

³⁵ ECJ of 11 September 2019, Nobel Plastiques Ibérica, C-397/18, EU: C:2019:703, aps. 73 y 75.

³⁶ Recital 17 Directive 2000/78.

2. The exception due to professional requirements

Article 4 of the Directive contains an exception to the general principle of equal treatment, which shall be non-discriminatory, in particular with regard to disability status, where, by reason of the nature of the particular occupational activity concerned or the context in which it is carried out, there is a characteristic which, related to the disability status, constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

The ECJ clarifies that it is not the ground, namely disability, on which the difference in treatment is based, but a characteristic linked to that ground that must constitute an essential and determining occupational requirement for applying such an exception³⁷, considering that it must be interpreted restrictively, in the light of Recital 23 of Directive 2000/78, which refers to the very few circumstances in which such a difference in treatment may be justified.³⁸

The ECJ has declared that the fact of possessing specific physical abilities may be considered a professional and determining requirement, in the application of the exception to the principle of equal treatment, for the exercise of certain professions such as those of firefighter or police officer³⁹, or prison officer, on the basis of the provisions of Recital 18 of the Directive, which expressly provides that the Directive may not have the effect of obliging the armed forces, or the police, prison or rescue services, to recruit or retain in their posts persons who do not have the necessary skills to perform any functions they may be required to perform in connection with the legitimate objective of maintaining the operational character of those services⁴⁰. Furthermore, the ECJ has pointed out in this regard that, in accordance with Article 2(5) of the Directive, the Directive is without prejudice to measures provided for by national legislation which, in a democratic society, are necessary for public safety, for the prevention of disorder and criminal offences, for the protection of health and for the protection of the rights and freedoms of citizens.⁴¹

³⁷ ECJ of 16 November 2016, *Salaverria Sorondo*, C-258/15, EU: C:2016:873, nr. 33; 15 July 2021, X, C-795/19, EU: C:2021:606, nr. 32; and of 21 October 2021, TC, C-824/19, EU: C:2021:862, nr. 44.

³⁸ ECJ of 13 September 2011, *Priegge*, C-477/09, EU: C:2011:573, nr. 72; of 15 July 2021, C-795/19, EU: C:2021:606, nr. 33; and of 21 October 2021, TC, C-824/19, EU: C:2021:862, nr. 45.

³⁹ ECJ of 21 January 2010, *Wolf*, C-229/08, EU: C:2010:3, aps. 40; 13 November 2014, *Vital Pérez*, C-416/13, EU: C:2014:2371, aps. 40 and 41; and 15 November 2016, *Salaberria Sorondo*, C-258/15, EU: C:2016:873, app. 36.

⁴⁰ ECJ of 15 July 2021, *Tartu Vangla*, C-795/19, EU: C:2021:606, nr. 34.

⁴¹ ECJ July 15, 2021, *Tartu Vangla*, C-795/19, EU: C:2021:606, nr. 36

On the other hand, the ECJ has declared that vision fulfills a function essential for driving motor vehicles, so that a minimum visual acuity requirement for the exercise of the profession of road transport vehicle driver is in conformity with Union law, in order to ensure road safety⁴². Also vision, in relation to the functions of a juror in criminal proceedings and the conditions of its exercise, as a paid professional activity falling within the scope Directive 2000/78, which may involve in some cases the examination and assessment of visual evidence, may be an exception to the principle of equal treatment, as an essential and determining requirement for the profession of juror in such proceedings, with the relevant nuance that such examination and assessment of evidence cannot be carried out, in particular, by means of medical-technical devices.⁴³

3. Reasonable accommodation for persons with disabilities

Article 2 of the United Nations Convention proscribes all forms of discrimination on the basis of disability, including the denial of reasonable accommodation⁴⁴, meaning necessary and appropriate modification and accommodation, not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Article 5 of Directive 2000/78, under the title: “Reasonable accommodation for people with disabilities” defines it in the following terms: *“In order to ensure compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, according to the needs of each particular situation, to enable persons with disabilities to have access to, participate in, or advance in employment, or to be offered training, unless such measures would impose an undue burden on the employer. The burden shall not be regarded as excessive where it is sufficiently alleviated by existing measures in the Member State’s disability policy.”*

The ECJ has stated that the concept of reasonable accommodation must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of people with disabilities in professional

⁴² ECJ of 22 May 2014, Glatzel, C-356, EU: C:2014:350, aps. 54 y 72.

⁴³ STJUE of 21 October 2021, TC, C-824/19, EU: C:2021:862, aps. 52 y 53.

⁴⁴ SSTJUE of 11 September 2019, Nobel Plastiques Ibérica, C-397/18, EU: C:2019:703, nr. 72; and of 18 January 2024, Ca Na Negreta, C-631/22, EU:C:2022:85, nr. 50.

life on an equal basis with other workers⁴⁵; and on the basis of Recitals 20 and 21 of the Directive, it establishes the duty of the company to adopt appropriate, i.e. effective and practical measures, for example by adapting facilities, equipment, work patterns, assignment of functions or provision of training or support, without such measures imposing a disproportionate burden on the company, taking into account, in particular, the financial and other costs involved, the size, financial resources and total turnover of the organization or enterprise and the availability of public funds or other assistance⁴⁶, without this list being exhaustive, and may be of a physical, organizational or educational nature, given that Article 5 of the Directive, in relation to the provisions of Article 2.4 of the United Nations Convention, contains a broad definition of the concept of reasonable accommodation.⁴⁷

It should also be recalled that it is relevant that according to Recital 17 of Directive 2000/78, there is no obligation to recruit, promote or retain in a job a person who is not competent, able or available to perform the essential duties of the job in question, without prejudice to the obligation to provide reasonable accommodation for people with disabilities⁴⁸, notwithstanding the fact that the employing company is obliged to take appropriate measures, i.e. effective and practical measures, taking into account each individual situation, to enable any person with a disability to have access to employment, to take part in employment or to progress professionally, or to be offered training, without placing an undue burden on the company.⁴⁹

For the ECJ, failure to comply with the duty to provide reasonable accommodation for people with disabilities as provided for in Directive 2000/78 means that a dismissal is not justified by the fact that the person is not competent, capable or available to perform the essential duties of the post in question.⁵⁰

Among the measures involving reasonable accommodation, the ECJ has considered job transfers, which allow the disabled person to keep his or her

⁴⁵ CSTJ of 11 April 2013, HK Danmark, C-335/11 and C-337/11, EU: C:2013:222, nr. 54; and of 11 September 2019, Nobel Plastiques Ibérica, C-397/18, EU: C:2019:703, nr. 64; and of 18 January 2024, Ca Na Negreta, C-631/22, EU:C:2022:85, nr. 44.

⁴⁶ 7SSTJUE of 11 September 2019, Nobel Plastiques Ibérica, C-397/18, EU: C:2019:703, nr. 65.

⁴⁷ CSTJUE of 11 April 2013, HK Danmark, C-335/11 and C-337/11, EU: C:2013:222, aps. 49 and 53; and of 10 February 2022, HR Rail, C-485/20, EU: C:2022:85, aps. 40.

⁴⁸ ECJ of 11 September 2019, Nobel Plastiques Ibérica, C-397/18, EU: C:2019:703, nr. 74.

⁴⁹ SSTJUE 10 February 2022, HR Rail, C-485/20, EU:C:2022:85, para. 37; and 18 January 2024, Ca Na Negreta, C-631/22, EU:C:2022:85, para. 43.

⁵⁰ SSTJUE of 18 January 2018, Ruiz Conejero, C-270/16, EU: C:2018:17, ap. 52; of 11 September 2019, Nobel Plastiques Ibérica, C-397/18, EU: C:2019:703, ap. 71; of 15 July 2021, Tartu Vangla, C-795/10, EU: C:2021:606, app. 50; and of 18 January 2024, Ca Na Negreta, C-631/22, EU:C:2022:85, app. 46.

job⁵¹, as well as exempting him or her from the obligation to perform tasks that require compliance with thresholds related to minimum hearing ability required in their job⁵². It is also not excluded that the measure referring to work patterns as reasonable accommodation, excludes the adjustment of schedules, and in particular the possibility that persons with disabilities who do not have or have lost the ability to work full time, perform their work part time⁵³, or are ultimately relocated to another position for which they have the required skills, abilities and availability.⁵⁴

IV. A FINAL NOTE ON THE EUROPEAN DISABILITY (2021-2030)

The European Disability Strategy post-2020, of the European Parliament⁵⁵, and the European Union Strategy on the Rights of Persons with Disabilities for 2021-2030, of the European Commission⁵⁶, which comprise an analysis of European public policies carried out in the last decade and a plan of measures for their implementation in the following decade, foresee the following lines of future action at the European level in the social and labour field:

- Mutual recognition by the States of the condition of disability, applicable to the field of employment and to the provision of services; with the commitment to propose in 2023 the creation of a European Disability Card (paragraph 4).
- Design of vocational training programs that are inclusive and accessible to vulnerable groups, such as people with disabilities, with the involvement of public employment services and with the aim of eliminating skills deficits, especially digital skills deficits, often in cooperation with social enterprises to achieve inclusion in the labour market (section 8).
- Promoting access to quality and sustainable jobs (section 9).
- Consolidate social protection systems, so that along with equitable employment, adequate social protection is implemented, including retirement

⁵¹ SJTUE of February 10, 2022, HR Rail, C-485/20, EU: C:2022:85, par. 41.

⁵² ECJ STJUE July 15, 2021, Tartu Vangla, C-795/10, EU: C:2021:606, ap. 51.

⁵³ ECJ of 11 April 2013, HK Danmark, C-335/11 and C-337/11, EU: C:2013:222, nr. 52.

⁵⁴ ECJ of January 18, 2024, Ca Na Negreta, C-631/22, EU:C:2022:85, par. 46.

⁵⁵ Within the European Parliament Resolution of 18 June 2020 on the post-2020 European Disability Strategy (2019/2975(RSP) P9_TA(2020)).

⁵⁶ Within the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An Equality Union: A strategy on the rights of persons with disabilities for 2021-2030. Brussels, 3.3.2021. COM(2021) 101 final.

schemes, which is an essential prerequisite for ensuring sufficient income for people with disabilities and their families to have a decent standard of living (paragraph 10).

Finally, there is a legal vacuum in the European Union, as equal treatment of people with disabilities is not guaranteed outside the field of employment, for example, in social protection, health care, education or access to goods and services, including housing. Pending the adoption by the Commission of a proposal for a Council Directive on equal treatment, persistent inequalities and discrimination highlight the need for further progress in EU legislation (paragraph 13).

CHAPTER 10

AGE DISCRIMINATION

CARLOS HUGO PRECIADO DOMÈNECH

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I. INTRODUCTION

In this chapter we will examine the regime of the prohibition of age discrimination under European Union law.

We can at this point anticipate that we are dealing with the “poor sister” of all the factors or grounds of discrimination, the one that receives, therefore, the least protection, for various reasons that will be the object of our analysis.

In this regard, we will first outline the regulatory map of age discrimination, both in primary and secondary law, and then analyse how it is dealt with by Direc-

tive 2000/78/EC of the European Parliament and of the Council of 27 November 2000 concerning the general framework for the equal treatment and occupation.

Within it, we will make constant reference to the profuse ECJ case law on age discrimination, connecting it with the main milestones of anti-discrimination protection. Thus, we will deal with the scope of application, the direct and horizontal effectiveness of the principle of prohibition of age discrimination and the concept of age discrimination. On the other hand, the weakness of this anti-discrimination protection will be reflected in the fact that a large part of the analysis will be devoted to the cases in which unfavourable treatment on the grounds of age is admitted, among others, the case of essential and determining professional requirement, the maximum ages of access, mandatory retirement, employment promotion measures or, in short, employment policies.

In light of the above, we will attempt, by way of conclusion, to characterise non-discrimination on grounds of age in the field of EU law.

II. AGE DISCRIMINATION IN THE PRIMARY AND SECONDARY LAW

1. Regulatory framework

1.1 PRIMARY LAW

Age, as a prohibited ground of discrimination, is covered in the CFREU and the TFEU, but not in the TEU, which refers to discrimination in general, without specifying age as an invidious ground.

Article 21.1 of the CFREU prohibits any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

Article 2 TEU establishes respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, as fundamental values of the EU. These values are common to the Member States in a society characterised by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

Article 3(3) TEU states that the Union shall combat social exclusion and discrimination.

Article 10 of the TFEU states that in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 19 TFEU provides that, without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

1.2 SECONDARY LAW

Derivative anti-discrimination law is complex, and is basically set out in 8 Directives, out of which only Directive 2000/78 specifically deals with age as a discriminatory ground, without prejudice to the fact that it is mentioned in other directives. Let us first look at anti-discrimination law in general and then address the regulation of age discrimination under the aforementioned directive.

2. **Anti-discrimination law rules and age**

The anti-discrimination law directives are the seven listed below, in which age is not considered as a factor of discrimination, or it is only mentioned in a very indirect way.

- Directive 79/7/EC of the European Parliament and of the Council of 19 December 1978 on equal treatment for men and women in matters of social security. Age is mentioned in Art.7 by empowering States to exclude the retirement age from the scope of the Directive.

- Directive 92/85/EC of the European Parliament and of the Council of 19 October 1992 on the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding: does not deal with age as a factor of discrimination.

- Directive 2000/43/EC of the European Parliament and of the Council of 29 June 2000 on equal treatment of persons irrespective of racial or ethnic origin: does not deal with age, but only with discrimination based on racial or ethnic origin.

– Directive 2004/113/EC of the European Parliament and of the Council of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services: does not deal with age, but only with sex discrimination.

– Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation: deals only with sex discrimination and does not refer to age.

– Directive 2010/18/EC of the European Parliament and of the Council of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC. It does not refer to age.

– Directive 2010/41/EC of the European Parliament and of the Council of 7 July 2010 on equal treatment between men and women engaged in an activity in a self-employed capacity does not refer to age.

III. THE REGULATION OF AGE DISCRIMINATION IN THE EMPLOYMENT AND OCCUPATION CONTEXT

1. Scope of application

Age discrimination in employment and occupation is regulated by Directive 2000/78. This directive applies only in the context of employment and occupation (Article 1) and establishes, among others, the prohibition of discrimination on grounds of age.

According to Article 3 of the Directive, it applies to all persons, both in the public and private sector, including public bodies, in relation to:

1. conditions for access to employment, self-employment and occupation, including selection criteria and conditions for recruitment and promotion, irrespective of the branch of activity and at all levels of the occupational classification, including promotion;

2. access to all types and levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

3. employment and working conditions, including dismissal and remuneration;

4. membership of and involvement in an organization of workers or employers, or any organization whose members carry on a particular profession, including the benefits provided by such organizations.

States may exclude the application of this directive in the field of the armed forces on the grounds of age (Article 3(4)). In such cases, therefore, we are not dealing with differential treatment on grounds of age that can be justified under Article 6 of the Directive, but simply with an assumption and non-application of the Directive.

As far as its temporal scope of application is concerned, and the competence basis of Directive 2000/78, it is worth mentioning the *Bartsch* Case, judgement of 23 September 2008, *Bartsch*, (C-427/06, EU:C:2008:517), where the ECJ held that Community law does not envisage a prohibition of all discrimination on grounds of age, the application of which the courts of the Member States must ensure when the potentially discriminatory conduct has no link with Community law. Such a link does not arise from Article 13 EC (now Article 19 TFEU) or from Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation before the expiry of the period allowed to the Member State concerned for the transposition of that directive. In this case, therefore, the principle of age discrimination did not apply because the difference in treatment had occurred before Germany had exceeded the deadline for transposition of the Directive. By contrast, in an earlier decision (judgement of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709), the ECJ concluded that it is for the national court to ensure the full effectiveness of the general principle of non-discrimination on grounds of age by disapplying any contrary provisions of national law, even if the deadline for transposing the Directive has not yet expired.

On the other hand, the scope of “employment and occupation” refers to the public and private sector (art.3(1) Directive), and has therefore been interpreted as including not only employment relations, but also civil service relations, including even the professional regime of judges and magistrates, police, firefighters, etc. (judgement of 9 September 2015 *Unland* (C 20/13 EU:C:2015:561); judgement of 21 January 2015, *Felber* (C-529/13 EU:C:2015:20).

From another perspective, it has been held that the Directive includes within its scope a tax regime which provides for the tax treatment of vocational training expenses incurred by a person, which is different according to his/her age, insofar as it is intended to favour young people’s access to training (judgement of 10 November 2016, *Lange* (C-548/15, EU:C:2016:850). In this case, the ECJ further concludes that Article 6 (1) of Directive 2000/78 must be

interpreted as not precluding a tax scheme, such as that at issue in the main proceedings, which allows that, under certain conditions, those who have not reached the age of 30 may deduct vocational training expenses in full from their taxable income, whereas that right to deduct is limited for those who have reached that precise age, in so far as, first, such a scheme is objectively and reasonably justified by a legitimate objective relating to employment and labour market policies and, second, the means of achieving that objective are appropriate and necessary. It is for the national court to determine whether that is the case in the main proceedings.

On the contrary, in the judgement of 2 June 2016, *Korkein* (C-122/15, EU:C:2016:39) the ECJ excludes from its scope of application national legislation that establishes, in certain cases, a higher taxation for income from retirement pensions than for salary income. In that case, the ECJ holds that Article 3(1)(c) of Council Directive 2000/78 must be interpreted as meaning that national legislation such as that at issue in the main proceedings, which concerns an additional tax on income from occupational pensions, does not fall within the material scope of that directive and, consequently, of Article 21(1) of the CFREU.

2. Direct effectiveness and in relations between individuals.

The nature and effects of the principle of prohibition of age discrimination is an important issue that has been dealt with by the ECJ, notably in the *Mangold*, *Küçükdeveci*, *Prigge* and *Dansk Industri* cases.

In the *Mangold* case, previously mentioned, it analyses a German national law which allows, without any limit, and unless there is a close connection with a previous employment contract of indefinite duration concluded with the same employer, entering into fixed-term employment contracts with workers over 52 years of age.

In this case, the ECJ makes an important assessment of the nature and effects of the principle of prohibition of discrimination on grounds of age. The ECJ holds that this principle is a general principle of Community law with direct effect. It is for the national courts hearing a case in which the principle of non-discrimination on grounds of age is at issue to ensure, within the framework of their jurisdiction, the legal protection conferred by Community law on individuals and the full effectiveness of that law by disapplying any provisions of national law that may be contrary to it (judgements of 9 March 1978, *Simmenthal Case* (C-106/77, EU:C:1978:49), 5 March 1998, *Solred* (C-347/96, EU:C:1998:87).

Hence, the ECJ clearly establishes not only the principle of direct effectiveness, but also the principle of horizontal effectiveness of the principle of non-discrimination on grounds of age, when it holds that it is for the national court hearing a dispute between individuals to ensure compliance with the principle of non-discrimination on grounds of age, as laid down in Directive 2000/78, if necessary by disapplying any provisions of national law which are contrary to that principle (irrespective of the exercise of the power of that court, in the cases provided for in the second paragraph of Article 267 TFEU, to refer a question to the ECJ for a preliminary ruling on the interpretation of the principle of non-discrimination on grounds of age).

Later on, this case law interpretation was consolidated by judgement of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:2), in which the ECJ stated that it is for national judges hearing a case where the principle of non-discrimination on grounds of age is at issue to guarantee, within the framework of their jurisdiction, the legal protection conferred by Community law on individuals and its full effectiveness, rendering any provisions of national law that may be contrary to it inapplicable.¹

This interpretation has also been followed in judgement of 14 April 2016, *Dansk Industri* (C-441/14, EU:C:2016:278), which states it in a categorical manner, when it considers that the national court hearing a dispute between individuals falling within the scope of Directive 2000/78, when applying the rules of its national law, must interpret them in such a way that they can be applied in conformity with that directive or, if such an interpretation in conformity is impossible, must, if necessary, disapply any provisions of national law which are contrary to the general principle of non-discrimination on grounds of age. Neither the principles of legal certainty, nor the principle of the protection of legitimate expectations, nor the possibility for an individual who considers himself damaged by the application of a national rule which is contrary to EU law seeking remedy from the Member State responsible for a breach of EU law can call that obligation into question.

Finally, in the same sense, judgement of 4 December 2018, *Minister for Justice and Equality and Commissioner of the Garda Síochána* (C-378/17, EU:C:2018:979), in a case of police trainees claiming before the competent administrative body that they had been excluded because of their age. According to this judgment, each State is competent to determine how the validity of domestic laws should be assessed as well as declaring them generally inappli-

¹ (see, to that effect, judgement of 9 March 1978, *Simmenthal* (C-106/77, EU:C:1978:49), paragraph 21 and judgement of 5 March 1998, *Solred*, (C-347/96, EU:C:1998:87) paragraph 30.

cable, but EU law (primacy) requires that any public body (judicial or administrative) can disapply a national rule (regardless of its rank) which is contrary to it. For this reason, and in the context of Directive 2000/78, EU law precludes the State from creating a specific body to ensure its application and not conferring on it the competence to decide on the non-application of conflicting national rules.

In the area of the effectiveness of the prohibition of discrimination and obligations incumbent on States, it is worth citing the judgement of 8 May 2019 *Österreichischer Gewerkschaftsbund* (C-24/17, EU:C:2019:373), concerning the Austrian Federal Law on the Remuneration and Promotion of State Employees to put an end to a number of cases of discrimination on grounds of age. The ECJ concluded that EU law precludes the termination of age discrimination (employees under the age of 18) by taking into account the remuneration received when the discrimination existed. Restoration of equality implies (in the future) taking into account the situation that would have been enjoyed without discrimination; it also implies (in the past) financial compensation for the damage suffered. In the same sense, the judgement of 8 May 2019 (C-396/17, EU:C:2019:375).

3. Concept of age discrimination

The concept of age discrimination includes conducts that can be included under the categories of direct discrimination, indirect discrimination and harassment, as well as orders to discriminate (Art.3 Directive).

Direct age discrimination can be defined as a situation in which a person is, has been or would be treated less favourably on grounds of age than another person in a comparable situation, in the field of employment and occupation (Art.2 (2)(a) Directive 2000/78).

Indirect discrimination on grounds of age can be defined as cases where an apparently neutral provision, criterion or practice is likely to disadvantage or place at a particular disadvantage persons of a particular age compared with other persons who do not have that status or condition, unless that provision, criterion or practice can be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Art. 2(2)(b) Directive 2000/78).

Indirect discrimination on grounds of age was the subject of the judgement of 21 December 2016, *Bowman* (C-539/15, EU:C:2016:977); the question arises whether a rule in a collective agreement which provides for a longer

period of promotion to a higher level for periods of activity covered at the beginning of the professional career (thus making promotion to the next higher salary level more difficult), entails an indirect difference in treatment on grounds of age. In this case, according to the referring court, it held that the group of workers with the lowest salaries was generally integrated by the youngest workers, so that it cannot be excluded that the arrangements introduced following the 80th amendment of the collective agreement rule disadvantaged the youngest workers in terms of pay.

However, for the ECJ, this fact is not sufficient, since it considers that the periods of schooling taken into account for the professional classification may be taken into account for that classification irrespective of the age of the employee at the time of recruitment. The scheme is therefore based on a criterion which is not linked to the age of the employee, either inseparably or indirectly, and concludes that there is no indirect discrimination.

Age-related harassment: unwanted age-related behaviour which has the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this respect, the concept of harassment may be defined in accordance with the national laws and practices of each Member State (Article 2(3) Directive 2000/78).

In view of the above, we note that most of ECJ case law refers to direct age discrimination, and few decisions refer to indirect discrimination (judgement of 21 December 2016, *Bowman* (C-539/15, EU:C:2016:977), without being any precedents pertaining to harassment on grounds of age.

4. Professional, essential and determining requirement

Directive 2000/78 allows for a difference of treatment on grounds of age in cases where age is a determining occupational requirement (Article 4 of the Directive 2000/78). According to this provision, a difference of treatment will not be deemed discriminatory where, by reason of the nature of the particular occupational activity concerned or of the context in which it is carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

In this respect, it should be made clear from the outset that, as an exception to the prohibition of discrimination, the interpretation of the concept of “genuine and determining occupational requirement” must be restrictive and that, furthermore, its application to the specific case is subject to the principle

of proportionality, which requires the objective to be legitimate and the requirement to be proportionate.

However, in the field of employment and occupation (Directive 2000/78), and in relation to age, in the framework of what can be called public security (armed forces - art.3 (4) -, police, prison or rescue services), the exception seems to be the rule, and it is even permitted not to apply the provisions of the directive in the field of the armed forces.

Thus, the ECJ has accepted the validity of a minimum age for access to certain professions with high physical requirements, such as firefighters (judgement of 12 January 2010, *Colin Wolf v Stadt Frankfurt am Main* (C-229/08, EU:C:2010:3). On the contrary, in the judgement of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:237) the ECJ found that there was age discrimination in national law which set the maximum age for the selection of local police officers at 30 years, considering that it was a disproportionate measure to achieve the objective pursued, as it was clearly unnecessary to guarantee local police officers a reasonable period of activity prior to retirement within the meaning of Article 6(1)(c) of Directive 2000/78.

In the judgement of 15 November 2016, *Salaberría Sorondo* (C-258/15, EU:C:2016:873) the selection of Ertzaintza officers limited to candidates under 35 years of age was discussed. In this case, the Court (Grand Chamber) held that Article 2(2) of Council Directive 2000/78 read in conjunction with Article 4(1) thereof, must be interpreted as not precluding a rule such as that at issue in the main proceedings, which provided that candidates for posts as officers of a police force who perform all the operational or executive duties of that force must not have reached the age of 35 years.

5. Specific limitations on the prohibition of age discrimination

Article 6 of the Directive 2000/78 provides for a very wide range of limitations to the right not to be discriminated on grounds of age. It thus becomes the most degraded anti-discrimination ground, as has been rightly pointed out by the doctrine, since instead of the exceptions to the prohibition of discrimination being few, specific and limited, the broadness with which they are formulated, their indeterminacy and the generosity with which they have been interpreted have turned the exception into the rule.

First, Article 6 of Directive 2000/78 starts from a general clause, which allows differences of treatment on grounds of age if they are objectively and reasonably justified, within the framework of national law, by a legitimate aim,

including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving this aim are appropriate and necessary.

It can be seen that we are dealing with a general clause of limitation of fundamental rights, in the sense provided for under Art. 52 of the CFREU; with the only peculiarity that Art. 6 of the Directive indicates -exemplarily and generously- three legitimate purposes for proceeding to an unfavourable treatment on grounds of age: employment policies, labour market and vocational training.

However, the ECJ (e.g., judgement of 5 March 2009, *Age Concern*, C-388/07, EU:C:2009:128) has perhaps interpreted the limitation clauses of the principle of prohibition of age discrimination too generously, so that it has held that Member States have a wide margin of appreciation in the choice of means to achieve their social policy objectives.

However, according to the ECJ, this margin of discretion cannot lead to the application of the principle of non-discrimination on grounds of age being undermined.

Mere generalizations about the suitability of a given measure to contribute to employment, labour market or vocational training policies are not sufficient to infer that the objective of this measure can justify the establishment of exceptions to the aforementioned principle, nor do they constitute elements that allow a reasonable estimation that the means chosen are appropriate for the achievement of this objective.² In other words, it does not matter how vague the national legislation is if the means are ultimately proportional; this means admitting the possibility of implicit limits to fundamental rights, with the consequent risk to legal certainty.

In this regard, the ECJ, opening up the field of limitation of the fundamental right too wide, has concluded that national legislation which does not contain a precise enumeration of the objectives justifying the establishment of exceptions to the principle of prohibition of discrimination on grounds of age is not contrary to the Directive. However, Article 6(1) restricts the possibility of such exceptions to measures justified by legitimate social policy objectives, such as those relating to employment, labour market or vocational training policies. In such cases of vagueness, the national court has been referred to determine whether the legislation at issue in the main proceedings meets a legitimate objective, which will not be very difficult in view of the breadth of the terms ‘employment, labour market and vocational training policies’.

² See by analogy: judgment of 9 February 1999, *Seymour-Smith and Perez* (Case C-167/97, EU:C:1999:60, paragraphs 75 and 76).

Thus, the ECJ has called into question the foreseeability of the limits and the sufficient precision of the rules that contain them in the case of age discrimination, *de facto* disapplying the principle of restrictive interpretation of the limits to fundamental rights, under the umbrella of a very wide margin of appreciation by the States.

Within the generosity with which clauses limiting the prohibition of discrimination have been interpreted, mention should be made of judgement of 7 February 2019, *Escribano Vindel v. Spain* (C-49/18, EU:C:2019:106), where the possible discrimination on grounds of age of younger judges is raised by applying an equal percentage reduction in remuneration for all members of the career, which implies that it affects the younger sectors to a greater extent. The ECJ concludes that Article 21 of the Charter of Fundamental Rights of the European Union and Article 2(1) and (2)(b) of Council Directive 2000/78 are not contrary to a national legislation, such as that at issue in the main proceedings, which, in the context of general wage reduction measures linked to the imperative requirement of eliminating an excessive budget deficit, laid down different rates of salary reduction for the basic and additional salaries of members of the judiciary, which, according to the referring court, resulted in higher percentage reductions in the salaries of members of two lower pay grades in the judicial career than in those of a higher pay grade in the judicial career, even if the former who are paid less, are, as a general rule, younger and usually have less seniority than the latter.

Finally, something that the ECJ has not clarified is what is the essential content of the prohibition of discrimination on grounds of age, since in such cases, according to Article 52 CFREU, the legislator could not limit the right, not even in a proportionate manner. This circumstance has undoubtedly also contributed to turning the rule of the prohibition of discrimination into an exception when it comes to age.

Secondly, Article 6 of the Directive requires respect for the principle of proportionality in the application of the exceptions - although the provision does not expressly mention it - so that the means to achieve the legitimate aims are appropriate and necessary.

On the other hand, Article 6 of the Directive envisages a series of permissible differences of treatment if they comply with proportionality, which are cited in an open, non-exhaustive manner and without the character of *numerus clausus*:

(a) the establishment of special conditions of access to employment and vocational training, employment and working conditions, including dismissal and recommendation conditions, for young people, older workers and

workers with dependants, with a view to promoting their occupational integration or ensuring the protection such persons;

(b) the establishment of minimum conditions as regards age, professional experience or length of service for access to employment or to certain advantages linked to employment;

(c) the establishment of a maximum age for recruitment, which is based on the training requirements of the post in question or on the need for a reasonable period of activity prior to retirement.

On the other hand, Article 6(2) of the Directive provides for an optional exclusion for the Member States from the application of the Directive, consisting of the determination, for occupational social security schemes, of ages for eligibility for retirement or invalidity benefits, including the establishment for such schemes of different ages for workers or groups or categories of workers and the use, within the framework of such schemes, of age criteria in actuarial calculations, provided that this does not entail discrimination on grounds of sex.

An example of national anti-discrimination law in the field of working conditions is provided by judgement of 14 March 2018, *Stollwitzer* (C-482/16, EU:C:2018:180), where the ECJ challenges national legislation which, in order to eliminate age discrimination arising from the application of other national legislation which, for the purposes of classifying employees of an undertaking in the pay system, only takes into account periods of activity completed after the age of 18, abolishes that age limit retroactively and for all those employees, but only allows experience acquired in undertakings operating in the same economic sector to be taken into account. The ECJ explains, in order to reach such a conclusion, that the elimination of discrimination does not mean that the person discriminated under the previous legal regime is automatically entitled to retroactively receive that wage differential or a wage increase for the future. This is only the case as long as the national legislator does not take measures to re-establish equal treatment. In such a situation, compliance with the principle of equality can be ensured only by granting persons in the disadvantaged category the same advantages as those enjoyed by persons by the privileged category, a system which, in the absence of a correct application of EU law, remains the only valid reference system.

Finally, the non-valuation of recalculated seniority in other sectors is not considered discriminatory, because the fact of rewarding the experience acquired in the field in question, which enables the worker to perform his tasks better, constitutes a legitimate aim of wage policy (judgement of 3 October 2006, *Cadman*, C-17/05, EU:C:2006:633).

6. Maximum age of access

The establishment of maximum ages for access has been a recurrent issue in the doctrine of the ECJ, with the directive requiring that this maximum age be based on training requirements for the job position in question or on the need for a reasonable period of activity prior to retirement.

Therefore, we would not be dealing with an essential and determining professional requirement of Art. 4 but with a different purpose (minimum training or reasonable period of activity).

Thus, the first ruling along these lines came with judgement of 28 October 2004, *Lutz Herrera v Commission*, Joined Cases T-219/02 and T-337/02, EU:T:2004:318, in which it was declared that the principle of equal treatment and non-discrimination was not violated for access to the Community civil service by setting a maximum age for access, as there was a proportionate and objective justification, consisting of career prospects and the need for a minimum period of activity.

In this context, it is also worth highlighting the judgement of 12 January 2010, *Wolf* (C-229/08, EU:C:2010:3), in which it was considered that there was no infringement of the principle of non-discrimination on grounds of age by a national regulation that set the maximum age for the recruitment of civil servants in the fire service at 30 years. In this case, however, the justification for less favourable treatment was not under Article 6, but under Article 4 of the Directive, i.e. the existence of an “essential and determining occupational requirement”, consisting of an interest in ensuring the operational character and proper functioning of the professional fire service.

On the contrary, in judgement of 13 November 2014, *Vital Pérez*, (C-416/13, EU:C:2014:237), it was considered that a national regulation that sets the maximum age for the selection of local police officers at 30 years of age was, however, disproportionate to achieve the objective pursued, in such a way that it violated both Article 4 and Art. 6(1)(c) of Directive 2000/78, so that the ECJ analysed the infringement both in terms of the essential and determining professional requirement, and in terms of the difference in treatment justified by the existence of training requirements for the job position in question or the need for a reasonable period of activity prior to retirement.

Combining age discrimination and freedom of association, it is worth citing the judgement of 2 June 2022, *HK v Danmark and HK v Privat* (C-587/20, EU:C:2022:419), which analyses the case of the President of a trade union who wishes to stand for re-election, despite the fact that the Statutes set the age limit for access to office at 60 years, and concludes, on the one hand,

that an age limit established in the statutes of a trade union in order to be able to stand for its Presidency falls within the scope of Directive 2000/78: breadth of the concept of “workers”. On the other hand, that trade union freedom is not absolute and its exercise may be subject to limitations, provided that these are provided for by law and respect its essential content and the principle of proportionality.

7. Mandatory retirement

The establishment, by law or by collective agreement, of a mandatory retirement age may involve discrimination on grounds of age. It also affects the right not to be dismissed without just cause (Art. 30 CFREU), however, the ECJ has only analysed it from the perspective of the prohibition of discrimination on grounds of age.

The first case to comment on is judgement of 17 October 2007, *Palacios de la Villa* (C-411/05, EU:C:2007:604). The ECJ analyses a question referred for a preliminary ruling by the Employment Court no. 33 of Madrid, in relation to the 10th Additional Provision of the Spanish Workers’ Statute, which allowed the use of mandatory retirement as an instrument to carry out employment policy. Royal-Decree Law no. 5/2001 of 2 March 2001 on urgent measures to reform the labour market in order to increase employment and improve its quality, validated by Law 12/2001 of 9 July 2001, repealed, with effect from 11 July 2001, 10th Additional Provision. The repeal of that provision gave rise to a large number of disputes in which the validity of clauses laid down in collective agreements legitimising the mandatory retirement of workers was debated. As a result, the Spanish legislator passed Law 14/2005 of 1 July 2005 on clauses in collective agreements relating to reaching the ordinary retirement age, which entered into force on 3 July 2005.

In this context, the Employment Court no.33 of Madrid decided to refer the following questions to the ECJ for a preliminary ruling:

“Does the principle of equal treatment which precludes any discrimination on grounds of age, recognised by Article 13 of the Treaty and Article 2(1) of Directive 2000/78, preclude a national law which considers valid the compulsory retirement clauses laid down in collective agreements which require, as the sole conditions, that the worker has reached the ordinary retirement age and fulfils the conditions laid down in the Spanish State’s social security legislation for access to the contributory retirement benefit?

If the answer to the previous question is yes,

Does the principle of equal treatment, which precludes any discrimination on grounds of age, recognised by Article 13 of the Treaty and Article 2(1) of Directive 2000/78, require me, as a national court, not to apply the Single Transitional Provision in this case?

The ECJ replied to those questions that the prohibition of any discrimination on grounds of age, as implemented by Directive 2000/78/EC, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, with regards as valid compulsory retirement clauses laid down in collective agreements which require, as the sole conditions, that the worker has reached the retirement age limit set by national legislation at 65 years of age and that he or she meets the other social security conditions for entitlement to the contributory retirement benefit, provided that

- such a measure, although based on age, is objectively and reasonably justified, within the framework of national law, by a legitimate aim relating to employment policy and the labour market, and
- the means employed to achieve this general interest objective are not inappropriate and unnecessary in this respect.

In the Judgement of 12 January 2010, *Petersen* (C-341/08, EU:C:2010:4) the ECJ held that there was age discrimination by national legislation providing for an age limit of 68 years for the practice of the profession of contracted dentist when such a measure has the sole purpose of protecting the health of patients against the diminished capacity of such dentists from that age, since the same age limit did not apply to non-contracted dentists.

On the other hand, the ECJ concluded that Article 6(1) of Directive 2000/78 must be interpreted as not precluding such a measure where its purpose is to share out employment opportunities in the profession of contracted dentist between the generations, if, having regard to the labour market situation in question, it is appropriate and necessary to achieve that objective.

Therefore, in this case the difference in treatment was not considered to be justified in view of the intended purpose.

In the judgement of 12 October 2010, *Rosenbladt* (C-45/09, EU:C:2010:601) a rule included in a collective agreement containing clauses for automatic termination of employment contracts of workers who have reached retirement age, at the age of 65, was considered to constitute a difference in treatment justified by a legitimate aim, such as employment, labour market or vocational training policies. Furthermore, the ECJ held that the general applicability of the agreement did not imply discrimination provided that the agreement did not deprive workers falling within its scope of application of

the protection against age discrimination conferred on them by Articles 1 and 2 of Directive 2000/78.

Also worthy of comment is judgement of 18 November 2010, *Georgiev* (Cases C-250/09 and C-268/09, EU:C:2010:699); which concerns national legislation providing for the compulsory retirement of university professors who have reached the age of 68 and the continuation of their activity beyond the age of 65 only on the basis of fixed-term contracts entered into for a maximum period of one year, extendable twice, because it has a legitimate and proportionate objective, linked to employment and labour market policy, such as the establishment of quality teaching and the optimal distribution of professorships between generations.

In the Judgement of 13 September 2011, *Prigge* (Case C-447/09, EU:C:2011:573) a collective agreement for airline pilots which provides for the automatic termination of employment at the age of 60, despite the fact that national and international regulations set this age at 65. The ECJ considers that a measure such as the one at stake, which sets the maximum age at which pilots may no longer carry out their professional activity at 60, despite the fact that national and international regulations set that age at 65, is not a measure necessary for public safety and health protection, within the meaning of Article 2(5) of the Directive itself.

As regards the essential and determining occupational requirement, the ECJ considers that Article 4(1) of Directive 2000/78 must be interpreted as meaning that it precludes a clause in a collective agreement, such as that at issue in the main proceedings, which sets the age limit beyond which pilots are deemed no longer to possess the physical capacities necessary to carry out their activity at 60 years of age, even though national and international legislation fixes that age at 65 years of age.

And finally, the ECJ, from the perspective of the justifications for the difference in treatment based on age, understands that the first paragraph of Article 6.1 of Directive 2000/78 must be interpreted as meaning that aviation safety does not constitute a legitimate objective within the meaning of that provision.

In the Judgement of 5 July 2012, *Hornfeldt* (ECJ Case C-141/11, EU:C:2012:421), the ECJ holds that the second subparagraph of Article 6(1) of Directive 2000/78/EC must be interpreted as not precluding a national measure, such as that at issue in the main proceedings, which allows an employer to terminate an employee's contract solely on the ground that the employee has reached the age of 67, without taking into account the amount of the retirement pension which the person concerned will receive, if such a

measure is objectively and reasonably justified by a legitimate aim relating to employment and labour market policies and constitutes an appropriate and necessary means of achieving that aim.

Another case is the Judgement of 21 July 2011, *Fuchs* (Cases C-159/10 and C-160/10 EU:C:2011:508), in which it is established that the Directive does not preclude a law, such as the Hessisches Beamtenengesetz, as amended by the Law of 14 December 2009, which provides for the compulsory retirement of civil servants for life, in particular public prosecutors, when they have reached the age of 65, although it allows them to continue working until the maximum age of 68, if the interest of the service so requires, provided that this law aims to establish a balanced age structure in order to favour the employment and promotion of young people, to optimize personnel management, as well as to prevent possible disputes concerning the suitability of the employee to work beyond a certain age, and to achieve this objective by appropriate and necessary means.

On the mandatory retirement of judges and its impact on judicial independence, the judgement of 24 June 2019, *Commission v. Poland* (Case C-619/18 EU:C:2019:531), in which a law lowering the retirement age for Supreme Court Judges from 70/72 to 65 years, which allows two extensions of three years (but on a discretionary basis), the ECJ concludes that Poland violates Art. 19(1) TEU (“Member States shall provide for such remedies as are necessary to ensure effective judicial protection in areas covered by Union law”) by lowering the retirement age for Supreme Court Judges appointed before 3 April 2018 and conferring on the President of the Republic the discretionary power to extend their activity. In the same sense, see judgement of 5 November 2019, *Commission v Poland* (Case 192/18, EU:C:2019:924), as well as judgement of 19 November 2019, *A.K.* (Cases C-585/18, 624/18 and 625/18, EU:C:2019:982).

On the other hand, related to retirement, although not mandatory retirement, it is worth mentioning judgement of 7 October 2019, *Safeway* (Case C-171/18, EU:C:2019:839), in a case of a pension plan that provides for retirement at 60 for women and 65 for men; this regulation was declared discriminatory, and six years later the age of 65 was established for the whole group. The ECJ declared that EU law precludes a pension plan (in order to eliminate age discrimination) from retroactively and unfavorably equalizing the ordinary retirement age for the period between the communication and the adoption of that measure, even if authorised by national law and the deed of incorporation of that plan.

Another interesting ruling on mandatory retirement in terms of exceptions to non-discrimination on grounds of age is judgement of 7 November 2019,

Cafaro (C-396/18, EU:C:2019:929), according to which EU law allows mandatory retirement (at the age of 60) of pilots, provided that this is necessary for reasons of public safety and it is proportionate. It is for the national court to decide whether these two conditions are met. Measures aimed at preventing air accidents by checking the fitness and physical capacities of pilots ensure public safety and can legitimise exceptions to non-discrimination on grounds of age. It is not necessary to apply the same rule to pilots of aircraft operating on matters relating to national safety as to pilots flying commercial airlines.

8. Measures to promote employment

Article 7 of the Directive 2000/78 provides for so-called positive action. With a view to ensuring full equality in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages caused by any of the grounds referred to in Article 1.

In this regard, the ECJ has admitted unfavourable treatment on grounds of age in the implementation of employment promotion measures.

Thus, for example, in the Judgement of 18 June 2009, *Hutter* (C-88/08, EU:C:2009:381), which deals with national legislation which, in order to avoid disadvantaging general education in relation to vocational training and to promote the integration of young apprentices into the labour market, excludes periods of employment completed before the age of 18 from being taken into account for the purposes of determining the step to be taken into account by contract staff in the public service of a Member State, and considers it to be in accordance with the Directive, without entailing discrimination on grounds of age.

Another case is the Judgement of 18 November 2010, *Kleist* (C-356/09, CLI:EU:C:2010:703) in which the Court declares that Article 3(1)(c) of Directive 76/207/EC of the European Parliament and of the Council of 9 February 1976, on the application of the equal treatment between men and women in terms of employment, training, professional promotion and employment conditions, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, must be interpreted as meaning that a national legislation which, in order to promote access to employment for younger persons, allows an employer to dismiss workers who have acquired the right to a retirement pension, given that women acquire that right at an age five years younger than the age at which men acquire it, constitutes discrimination on grounds of sex prohibited by that directive. In this case, the ECJ did

not consider that there was age discrimination, because the referring court had not clearly raised this issue.

9. Employment policies

Employment policies have constituted an important group of cases on which the ECJ has ruled in relation to the justification of less favourable treatment on grounds of age.

In the referred *Mangold* case, the ECJ examines a German national law which allows, without any limit, and unless there is a close connection with a previous employment contract of indefinite duration concluded with the same employer, entering into fixed-term employment contracts with workers over 52 years of age.

The ECJ considers that the clear purpose of this legislation is to facilitate the occupational integration of older unemployed workers, who have greater difficulty in finding alternative employment, and that such an objective “objectively and reasonably” justifies, as required by the first subparagraph of Article 6(1) of Directive 2000/78, a difference in treatment on grounds of age.

However, the ECJ considers that the application of this legislation is disproportionate, because it leads to a situation in which all workers over 52 years of age, irrespective of whether they were unemployed immediately before concluding the contract and irrespective of the length of any period of unemployment, could, until such time as they could claim payment of a retirement pension, enter into fixed-term employment contracts which could be renewed indefinitely. This large group of workers, determined solely on the basis of age, will have the risk of being excluded, for a large part of their careers, from the benefit of employment stability, which, however, as the Framework Agreement makes clear, is an important factor in the protection of workers.

In conclusion, the ECJ considers that such legislation, by using the worker’s age as the sole criterion for the application of a fixed-term employment contract, without it having been shown that fixing an age limit as such (regardless of any other considerations relating to the structure of the labour market concerned and the personal situation of the person at hand -being objectively necessary for the attainment of the objective of vocational integration of older unemployed workers-), goes beyond what is appropriate and necessary in order to attain the objective pursued. The principle of proportionality requires that exceptions to individual rights must, as far as possible, reconcile the prin-

ciple of equal treatment with the requirements of the objective pursued (judgement of 19 March 2002, *Lommers*, C-476/99 EU:C:2002:183).

In the above mentioned *Küçükdeveci* case ECJ, a national dismissal law that does not take into account the period of work completed before the worker reached the age of 25 years for the calculation of the length of notice is analysed.

This is a German law which treats less favourably employees who start working for the employer before they reach the age of 25. That national legislation thus establishes a difference in treatment between persons with the same length of service on the basis of the age at which they joined the undertaking.

As to whether that difference in treatment is based on an objective and reasonable justification, the referring court submits that the objective of the national legislation at issue in the main proceedings is to offer the employer greater flexibility in the management of staff by relieving the burden on that employer of the dismissal of young workers, from whom it is reasonable to require greater personal or occupational mobility.

However, the ECJ considers that this legislation is not suitable for achieving this objective, since it applies to all workers who joined the company before reaching the age of 25, regardless of their age at the time of dismissal.

In this case the ECJ concludes that: European Union law, and more specifically the principle of non-discrimination on grounds of age, as laid down in Directive 2000/78, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that periods of work completed by a worker before reaching the age of 25 are not to be taken into account for the purposes of calculating the period of notice of dismissal.

In the Judgement of 12 October 2010, *Andersen* (C-499/08, EU:C:2010:600) national legislation under which workers are entitled to receive a retirement pension paid by their employer under a pension scheme into which they have joined before the age of 50 and cannot, for that reason alone, receive a special redundancy payment intended to promote the reintegration into employment of workers with more than 12 years' service in the company, was declared discriminatory.

In the Judgement of 8 September 2011, *Hennigs* (C-297/10, EU:C:2010:600) a measure provided for by a collective agreement, such as that at issue in the main proceedings, which provides that, within each grade, the basic salary step of a public employee is determined according to the age the employee has upon recruitment, is to be regarded as discriminatory as unjustified. In this regard, the fact that EU law precludes such a measure and that it is contained in a collective agreement does not infringe the right to negotiate and enter into collective agreements recognised by Article 28 of the CFRUE.

The ECJ upholds the possibility of temporary discrimination by collective agreement for a transitional and time-limited period, provided that it is intended to ensure that employees already employed can make the transition to the new system without having to suffer a loss of income.

On the other hand, it is worth mentioning the Judgement 6 December 2012, *Odar* (C-152/11, EU:C:2012:772) in which national legislation under a social welfare scheme of an undertaking which provides, in respect of its employees aged over 54 who are dismissed for economic reasons, that the severance to which they are entitled is to be calculated according to the earliest possible date of retirement (contrary to the general method of calculation), was held to be non-discriminatory, according to which that severance is based, *inter alia*, on length of service in the undertaking, with the result that the severance paid is lower than the allowance resulting from the application of that general method, although it is at least equal to half of the latter, and which takes into account, when that other method of calculation is applied, the possibility of obtaining an early retirement pension on account of a disability.

In the judgement of 19 June 2014, *Specht* (Cases C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005) the ECJ analyses German federal law on the remuneration of civil servants, according to which the amount of a civil servant's basic salary at the beginning of his or her civil service relationship depends substantially on his or her age and is increased thereafter primarily on the basis of length of service.

First, the ECJ ruled that the conditions of remuneration of civil servants fall within the scope of the Directive.

Second, the ECJ analyses the remuneration system in question and considers that the remuneration system established by the Law on the remuneration of civil servants gives rise to a difference in treatment based directly on the criterion of age.

Salary seniority', which is determined on the basis of age, is the reference criterion for initial classification in a step in the basic salary scale for officials. Calculation of seniority begins on the first day of the month in which the official reaches the age of 21. If the official has already reached the age of 31, the beginning of the calculation of seniority is delayed by the periods during which he was not entitled to a salary as an official; in particular, one quarter of the periods up to the age of 35 are taken into consideration, whereas the remaining periods are calculated in half. The official receives at least the basic starting salary corresponding to the grade at which he was appointed. Subsequent promotions are based on seniority and performance. The basic salary is increased every two years up to the fifth step, every three years up to the ninth step and

every four years thereafter. In the case of officials who distinguish themselves by sustained outstanding performance, the basic salary for the next higher step may be established in advance.

The ECJ then analyses whether the different treatment on grounds of age is proportionate, and concludes that the answer must be negative.

In this regard, after recalling the wide margin of discretion of the States not only to prioritize one objective over others in terms of social and employment policy, but also to define the measures that will enable them to achieve it³, the ECJ analyses the justification put forward by the German Government, consisting of rewarding previous professional experience in a generalized manner, while guaranteeing a uniform administrative practice.

In this regard, the ECJ has held that the objective of rewarding the experience acquired by an employee, which enables him to perform his duties better, constitutes, as a general rule, a legitimate aim of pay policy (judgement of 8 September 2011, *Hennigs* (C-297/10, EU:C:2010:600), paragraph 72 and the case-law cited), in the present case the classification of an official, on taking up his duties, in a basic salary step according to his age exceeds what is necessary to achieve that objective and therefore constitutes discrimination on grounds of age.

On the other hand, the ECJ considers that Article 2 and 6. and 6(1) of Directive 2000/78 do not preclude national legislation such as that at issue in the main proceedings, which defines the arrangements for reclassification under a new system of pay applicable to officials who were already in post before the entry into force of that legislation and which provides, (i) first, that the salary step at which those officials are now classified is to be determined solely on the basis of the amount of the basic salary which they received under the old system of pay, the latter entailing discrimination on the grounds of the age of the official, and, (ii) second, that the subsequent evolution in the new salary grading is to be determined from that time onwards solely on the basis of the professional experience acquired since the entry into force of those rules.

As regards compensation for breach of the right not to be discriminated on grounds of age, the ECJ draws on the principles of equivalence and effectiveness and concludes that EU law does not require that officials who are discriminated must be paid retroactively an amount equivalent to the difference between the remuneration which they actually received and that corresponding to the highest step in their grade. Likewise, it holds that EU law does

³ See judgement of 17 October 2007, *Palacios de la Villa* (Case C-411/05, EU:C:2007:604), paragraph 68, and judgement of 12 October 2010, *Rosenbladt* (Case C-45/09, EU:C:2010:601), paragraph 41.

not preclude a national rule, such as that at issue in the main proceedings, which provides for an obligation on the official to claim his entitlement to financial benefits which do not derive directly from the law within a relatively short period of time, namely before the end of the current financial year, provided that such a rule does not infringe either the principle of equivalence or the principle of effectiveness.

In the Judgement of 11 November 2014, *Schmitzer* (Case C-530/13 EU:C:2014:235) it is concluded that Directive 2000/78 precludes national legislation which, in order to put an end to a situation of age discrimination, takes into account periods of training and service prior to the age of 18 but which, at the same time, states only in respect of civil servants who suffer such discrimination a three-year extension of the period required for promotion from the first to the second level of each type of employment and of each salary bracket.

In the judgement of 21 January 2015, *Felber* (C-529/13 EU:C:2015:20), national legislation which excludes periods of studies completed by an official before the age of 18 from being taken into account for the purposes of granting a pension entitlement and calculating the amount of his retirement pension, where, on the one hand, such a measure is objectively and reasonably justified by a legitimate aim relating to employment and labour market policies and, on the other hand, constitutes an appropriate and necessary means of achieving that aim, is considered to be in conformity with Directive 2000/78.

In the Judgement of ECJ 28 January 2015, *Starjakob* (C-417/13, EU:C:2015:38) considers that Directive 2000/78 precludes national legislation which, in order to put an end to age discrimination, counts periods of service completed before the age of 18, but which at the same time includes a rule, which in reality applies only to workers who are victims of such discrimination, which extends by one year the period required for promotion in each of the first three salary steps, and which in so doing definitively maintains a difference in treatment on the basis of age.

On the other hand, in the Judgement of 9 September 2015, *Unland* (C-20/13 EU:C:2015:561) the ECJ concludes that the Directive precludes national legislation such as that at issue in the main case, whereby the basic salary of a judge is determined at the time of appointment solely on the basis of that judge's age.

However, the directive does not preclude national legislation which lays down the detailed rules for the reclassification under a new system of remuneration of judges already appointed before the entry into force of that legislation and which provides that the salary step in which they are now classified is to be determined solely on the basis of the amount of the basic salary which they

received under the old system of remuneration, even though that system was based on discrimination due to the age of the judge, as long as the difference in treatment which that legislation entails can be justified by the objective of protecting acquired rights.

Thus, preservation of acquired rights becomes a justification for discrimination when it is in *favour of an employee*.

In the Judgement of 14 April 2016, *Dansk Industri* (C-441/14, EU:C:2016:278), Directive 2000/78 is held to preclude national legislation under which a worker cannot receive severance pay if he is entitled to a retirement pension paid by his employer under a pension scheme into which he joined before the age of 50, irrespective of whether he chooses to remain in the labour market or to retire.

In the Judgement of 16 June 2016, *Lesar* (C-159/15, EU:C:2016:45), national legislation which, for the purposes of granting pension rights and calculating the amount of an official's retirement pension, precludes taking into account periods of apprenticeship and work completed by the official before reaching the age of 18, in so far as such legislation seeks to ensure a uniform determination in the context of a retirement scheme for civil servants of the age of eligibility for that scheme and the age of eligibility for the retirement benefits granted thereunder, is not discriminatory.

In the Judgement of 10 November 2016, *Lange* (C-548/15, EU:C:2016:850) the ECJ concluded that Article 6(1) of Directive 2000/78 must be interpreted as not precluding a tax scheme, such as that at issue in the main proceedings, which allows, under certain conditions, persons who have not attained the age of 30 to deduct vocational training expenses in full from their taxable income, whereas that right to deduct is limited for those who have reached that age, in so far as, first, such a scheme is objectively and reasonably justified by a legitimate objective relating to employment and labour market policies and, second, the means of achieving that objective are appropriate and necessary. It is for the national court to determine whether that is the case in the main proceedings.

In the Judgement of 19 July 2017, *Abercrombie* (C-143/16 EU:C:2017:566), the ECJ concludes that Article 21 of the CFREU, and Directive 2000/78, must be interpreted as not precluding a provision which allows an employer to conclude a contract of discontinuous employment with a worker under 25 years of age, whatever the nature of the benefits to be provided, and to dismiss that worker on his 25th birthday, since that provision pursues a legitimate employment and labour market policy objective and the means provided for achieving that objective are appropriate and necessary.

In the Judgement of 28 February 2018, *John* (C-46/17, EU:C:2018:131) it is ruled that national legislation which allows the postponement of the termination of the employment contract set at the ordinary retirement age for the sole reason that the worker acquires the right to a retirement pension is not discriminatory on grounds of age, simply because it does not constitute less favourable treatment.

The ECJ considers that the national legislation intended to provide, in accordance with the wishes of the social operators, for the possibility of extending, if necessary and subject to certain conditions, the employment relationship beyond the normal retirement age, in a flexible manner and with due regard for legal certainty. It allows an exception to the principle of automatic termination of the employment contract when the worker reaches the normal retirement age. In contrast to younger workers, a worker who reaches ordinary retirement age can be offered the choice between extending the employment relationship or leaving the labour market for good.

The fact that the parties to the employment contract at issue have the possibility of postponing the date of termination of the employment relationship several times, unconditionally and without limitation in time, does not undermine the above assessment. On the contrary, such a possibility helps to reinforce the favourable or advantageous nature of the provision at issue in the main proceedings, in so far as it constitutes a means of prolonging the employment relationship, a prolongation which cannot in any event take place without the agreement - during the employment relationship - of the two parties to the contract.

In the judgment of 14 February 2019, *Horgan and Keegan* (C-154/18, EU:C:2019:113), the ECJ went so far as to validate the double salary scale, in a case of teachers recruited after 1 January 2011, with salaries 10% lower than those received by those who joined before, who, moreover, were placed in the first salary step, while those who joined before that date were placed in step 2. According to the ECJ, under EU law, there is no discrimination (indirect, on grounds of age) when teaching staff recruited after a certain date are placed at a lower salary and professional level than that previously applied. It justifies this by stating that the objective pursued (structural cost reduction) justifies the measure, even if the majority of the group concerned is under 25 years of age. The ECJ validated a “criterion that makes the application of the new rules depend solely on the date of incorporation as an objective and neutral element”.

It is also interesting the Judgement of 27 February 2020, *Land Sachsen-Anhalt* (Cases C-773/18 to C-775/18, EU:C:2020:125) where the ECJ holds that EU law does not preclude the payment of additional remuneration (to judicial

staff) which depends in part on the age at which they were recruited, provided that it does not perpetuate a difference in treatment on grounds of age (see also judgement of 8 September 2011, *Hennigs*, Case C-297/10, EU:C:2010:600, according to which it is not permissible for the basic salary step of a public employee to be determined according to his age at the time of recruitment).

Within employment promotion measures, it is worth highlighting judgement of 15 April 2021, *Olympiako Athlitiko Kentro Athinon* (C-511/19, EU:C:2021:274), which analyses the case of a public employee since 1982 who in 2021 moves to a labour reserve and the following year is dismissed without compensation; national law provides for this for those who have contributed 35 years and reached the age of 58. The ECJ considers that EU law allows public employees who meet the requirements for a full retirement pension during a certain period to access a special situation (lower remuneration, without promotion or severance pay), given that there is a legitimate employment policy objective, and concludes that the difference in treatment based on age is justified, as this “labour reserve” allows for the distribution of employment, with young people gaining access to it.

Also noteworthy is judgement of 20 April 2023, *W and CE v. Landespolizeidirektion Niederösterreich and Finanzamt Österreich* (Case C-650/21, EU:C:2023:300), which analyses national legislation under which an official’s classification is determined on the basis of his length of service under a previous pay scheme which was found to be discriminatory (in that it only allowed account to be taken of periods of service prior to the official’s appointment which had been completed after he reached the age of 18 years) and the new rule continues to be discriminatory, since it continues to take into account of a difference in treatment between officials who acquired professional experience, even if only partially before reaching 18 years of age, and those who obtained experience of the same nature and of comparable duration after reaching that age.

This judgment concludes that Articles 1, 2 and 6 of Council Directive 2000/78 read in conjunction with Article 21 CFRUE, are to be interpreted as precluding national legislation under which an official’s classification is determined on the basis of his length of service in a previous pay scheme which has been found to be discriminatory - in so far as it allowed only periods of qualifying service prior to the official’s appointment which were completed after he reached the age of 18 to be taken into account for the purposes of determining that length of service, to the exclusion of periods completed before that age - since that legislation provides that the initial calculation of the official’s qualifying periods completed before his appointment is to be corrected by deter-

mining a date of comparison for the purposes of which, in order to establish that length of service, account is now taken of the qualifying periods completed prior to his appointment, before he reached the age of 18 years where, first, as regards periods completed after reaching the age of 18 years, only the ‘other periods’ which are eligible are taken into account in half and, secondly, those ‘other periods’ are increased from three to seven years, but are taken into account only if they exceed four years.

On the other hand, Judgement of 27 April 2023, *BVAEB (Montant de la pension de retraite)* (C-681/21, EU:C:2023:349), according to which, unless there is a reason of general interest, national legislation which provides for the assimilation, with retroactive effect, of a category of officials previously privileged by national legislation on retirement pension rights to a category of officials previously disadvantaged by the same legislation, cannot be corrected by equalizing “downwards” those favoured by discrimination with those disadvantaged by it. It does not therefore appear that discrimination cannot be corrected by ‘downward’ equalization, putting those favoured by the discrimination on the same footing as those disadvantaged by it

IV. CHARACTERISTICS OF THE PROHIBITION OF DISCRIMINATION IN EU LAW, IN PARTICULAR WITH REGARD TO AGE

On the basis of the complex normative framework that we have just outlined, we are now in a position to reach some initial conclusions on the aspects of equal treatment and non-discrimination in Community law.

The principle of equal treatment is a general principle of European Union law, recognized by Article 20 of the CFREU, of which the principle of non-discrimination laid down in Article 21(1) CFREU is a specific expression.

The principle of equal treatment requires that comparable situations should not be treated differently and that different situations should not be treated identically, unless such treatment is objectively justified (judgement of 16 December 2008, *Arcelor Atlantique and Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 23).

Although the concept of equal treatment is therefore broader and therefore encompasses the prohibition of discrimination, some directives seem to identify the two when they say: the principle of equal treatment shall mean the absence of any direct or indirect discrimination based on any of the grounds referred to in Article 1 (Article 2 Directive 2000/78).

However, a distinction must be made between formal equality, as a starting point, which is limited to equal treatment, and non-discrimination as an objective, which is identified with material equality and which admits positive actions which, although formally discriminatory, are aimed at removing the obstacles that prevent or hinder the participation of citizens or the groups they belong to in political, economic, social or cultural life.

Examples of positive action are employment promotion measures, adjustments required from employers for disabled workers, social security contribution rebates or the reservation of a certain percentage of jobs for disadvantaged groups.

2) Equal treatment and non-discrimination has a complex, non-uniform regulation regime. There is no comprehensive regulatory treatment of discrimination and, on the contrary, there are differences in the legal regime of the different causes of discrimination which are not justified from the perspective of equality and non-discrimination as a fundamental right. As a result of this “pathology”, we find definitions of the same concepts: direct discrimination, indirect discrimination, harassment, etc.; in different rules regulating the matter, and not always in a coincidental way.

A systematic and comprehensive treatment of equal treatment and non-discrimination is therefore lacking.

3) Anti-discrimination protection is fragmentary, both in terms of the cases and their scope:

– In terms of grounds: they are linked to sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation in the field of employment. They do not include, for example, social status (degree of wealth/poverty); or illness (judgement of 8 November 1990, *Hertz* (C-179/88, EU:C:1990:384).

- In terms of areas: they differ according to the grounds, since
 - Gender is protected in the field of work, self-employment and access to goods and services and social security benefits.
 - Racial or ethnic origin is a universal protection.
 - Age, like religion or belief, disability sexual orientation, is limited to the field of employment or occupation.

We face a fragmentary protection, which ignores important causes of discrimination recognised in our legal system, such as: political ideas (Convention No. 111 ILO and Protocol No. 12 ECHR), birth (Protocol No. 12 ECHR),

marital status (Protocol 12 ECHR), social status (ILO Convention No 111 and Protocol 12 ECHR), relationship with other workers in the undertaking (Protocol 12 ECHR), language (Protocol 12 ECHR).

4) The grounds of discrimination are exhaustive

The exhaustive nature of the anti-discrimination grounds is also evident in the *Hertz* case, when it states that “The dismissal of a female worker on the grounds of repeated sick leave, not caused by pregnancy or childbirth, does not constitute direct discrimination based on sex, since such sick leave would lead to the dismissal of male workers under the same conditions”. In this case, sickness, which could logically be a cause of discrimination, is excluded from the discriminatory grounds because it bears no relation to the quintessential cause of discrimination, gender.

5) The grounds of discrimination are hierarchised:

Protection against discrimination on the grounds of gender is directly and unconditionally applicable (art. 157 TFEU), while the grounds of race or ethnicity, religion or belief, disability, age or sexual orientation are based on an attribution of competence in art. 19 TFEU, which is not directly effective and depends, in any case, on the directives that develop each of the grounds.

Some authors rank them as follows, according to the level of protection and the exceptions to their protection:

1) Gender: unconditional general protection with direct effect. The only exception is the essential and determining professional requirement.

2) Ethnicity: general and unconditional protection. The only exception is the essential and determining professional requirement.

3) Sexual orientation: protection in the field of employment and occupation. In addition to the exception of the essential and determining occupational requirement, there is the exception of public safety.

4) Disability protection in the field of employment and occupation. To the exception of the essential and determining professional requirement is added that of public security and access to the armed forces.

5) Religion and convictions: protection in the field of employment and occupation, in addition to the exceptions of essential and determining professional requirement, ideological or trend companies are added, with a broad character.

6) Age: protection in the field of employment and occupation. It admits numerous exceptions in general, such as all those justified objectively and reasonably, within the framework of national law, by a legitimate aim, including

the legitimate objectives of employment, labour market and vocational training policies.

6) Anti-discrimination protection is, in part, optional: Article 19 TFEU does not prohibit discrimination but merely empowers the Council, acting unanimously and by special procedure, to adopt measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation

7) The principle of prohibition of discrimination on grounds of age is a general principle, i.e. a fundamental right (Art.21 CFREU), which has direct, vertical and horizontal effect and therefore applies to disputes between private individuals, even if the national legislation does not implement or contradicts it, in which case the national court must apply it directly, even if it is contrary to its national legislation.

As conclusions on age, in this panorama of anti-discrimination law that we have just outlined, we could say that among the causes of discrimination, age is “the poor sister”, because protection against age discrimination is optional, limited in scope (employment and occupation), subject to a greater number of exceptions that justify unequal treatment on grounds of age, including the legitimate objectives of employment policies, the labour market and vocational training, which would place it in the last place among the causes of discrimination.

CHAPTER 11

POSITIVE ACTION MEASURES

JESÚS CRUZ VILLALÓN

INDEX: I. Notion and regulatory basis. II. Positive action in the Constitutive Treaties: the Charter of Fundamental Rights of the European Union. III. Compatibility with the prohibition of discrimination. IV. Specific positive action measures in European Union Law. 1. Gender positive action. 2. Positive action on disability. Bibliography.

I. NOTION AND NORMATIVE BASIS

Positive action measures are usually included in the study of the prohibition of discrimination and/or in the principle of equal treatment¹. Although there is no doubt that both have a very close connection to positive action measures, in that they have similar goals of achieving equality among traditionally disadvantaged or marginalized groups, it is nevertheless important to distinguish between the two institutions, since they are sometimes confused and this leads to errors in the delimitation of both their normative basis and their precise legal regime.

First of all, for the purposes of conceptual clarification, it should be specified that in this matter we are dealing with a general category consisting of

¹ For all, SIERRA HERNÁIZ, Elisa: *Acción positiva y empleo de la mujer*. Madrid: Consejo Económico y Social, 1999; BARRÈRE UNZUETA, M.^a Ángeles: *Discriminación, derecho antidiscriminatorio y acción positiva*. Madrid: Civitas, 1997.

equality as a superior value of the constitutional legal system of various Member States and, in particular, as one of the values on which the European Union is based (TEU art. 2). And, in turn, this general category is broken down into at least three different manifestations, partially independent of each other, which would be, firstly, the prohibition of discrimination; secondly, the principle of equal treatment (in other senses, equality before the law and equality in law); and, thirdly, positive action measures.

In these terms, positive action consists of the establishment of measures to treat certain social groups, traditionally neglected in the labour market or in social protection, in such a way that they are treated differently from the rest with a view to correcting or overcoming their situation of greater weakness in social relations and, therefore, to achieving material equality, through the imposition of actions that essentially entail behaviors of doing, while discrimination only entails behaviors of not doing due to their merely prohibitive nature.

Thus, while discrimination is oriented, in the negative, towards interventions of mere prohibition of those behaviors that involve harm or damage to disadvantaged groups, positive action is presented in the reverse, in the positive sense, as favorable treatment of such groups. This very different opposing action of each figure has led in its early stages to positive action also being referred to as reverse discrimination, positive discrimination or *reverse discrimination*. In our opinion, however, such a denomination is not at all accurate, causes confusion and should be rejected, especially because the term “discrimination”, by its very essence, incorporates in legal texts a negative evaluation, a predisposition to its rejection, an attitude of legal condemnation for being situated in the sphere of the illegal and, as such, to be proscribed. For this reason, in our opinion, the expression positive action or *affirmative action* is more plausible. Thus, positive action measures are nowadays to be considered in terms of their lawfulness, of an attitude in favor of their compatibility with the values of a social and democratic State governed by the rule of law, and even of the need to impose them in order to achieve material equality.

However, the original denomination as reverse discrimination or positive discrimination finds its *raison d’être* in the fact that the first step that had to be taken, for the introduction of such measures, was none other than to elaborate a legal construction that would make it possible to make the prohibition of discrimination compatible with the adoption of such measures. This also explains why in some legal systems the only normative references were the legal provisions on the prohibition of discrimination, or why these references were the most developed in terms of their legal regime and, in particular, those that adopted a fuller recognition and greater guarantees as to their effective compliance.

Thus, from the point of view of its legal basis, it should be pointed out that positive action measures cannot be based on those precepts that are limited to prohibiting conduct involving pejorative treatment, since we insist, it is a matter of establishing rules that incorporate favorable treatment. As one of the first Community documents identifying the purpose of such gender-related measures would say, they are aimed at “eliminating the de facto disparity to which women are subjected in working life and promoting their integration into the labour market”². As stated in the same Recommendation, “existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures”. In other words, the prohibition of discrimination can only lead to a condemnation of acts harmful to equality but is not proactive in the effective achievement of material equality. The prohibition of discrimination is at the level of formal equality, while positive action measures are in the sphere of material equality. However, there is still conceptual confusion, insofar as positive action measures are sometimes considered to be a manifestation of the prohibition of discrimination, based on an identification between the right to equality and the prohibition of discrimination.

Based on the foregoing, the aim is to identify whether or not there are two parallel mandates in the European Union legal system, which would allow us to detect an assimilated regulatory basis for positive action measures.

Before entering into this task of identification, it is appropriate to establish a final conceptual precision regarding the type of normative interventions that can be verified in this area when the legislator, in establishing the legal regime of a given institution, takes one of the traditional causes of social exclusion or marginalization as a criterion, either to determine the scope of application, or as a requirement or effect of the rule of reference. Up to now we have referred to the fact that this type of taking into consideration can be negative, prohibiting discrimination, for the sake of formal equality, or positive, in terms of positive action, with a view to achieving material equality. What we are interested in emphasizing here is that a third category of interventions can be presented that, while establishing differences in treatment, are neither discriminatory nor positive in nature. The legislator may sometimes take as a reference some of the traditional causes of job segregation, leading to an increase in differences in hiring or working conditions (and, there-

² Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women, <http://data.europa.eu/eli/reco/1984/635/oj>.

fore, not included in the category of positive action measures), although they have an objective, reasonable and proportionate purpose other than the achievement of material equality (and, therefore, are not included among the cases of discriminatory treatment). The most significant examples of this third category (neither discrimination nor positive action) are to be found in the field of certain measures to promote the employment of workers with greater difficulties in entering the labour market, which consist of introducing fewer burdens or obligations for employers; therefore, measures that in practice lead to an increase in detrimental differences of treatment in hiring (temporary employment) or in working conditions (pay, labour flexibility), but which are expressly declared to be lawful and, therefore, non-discriminatory. Some Directives expressly empower the Member States to adopt this type of differential measures, excluding the possibility that they constitute discrimination and, moreover, it is clear that they are not included in the list of positive action measure. The most emblematic example of this is when differences of treatment on grounds of age are justified under national law “by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary”³. It is true that these are measures aimed at promoting the employment of this type of disadvantaged groups, thus trying to encourage employers to decide to employ them as opposed to the rest of the workers, which could at first sight have a certain similarity with positive action measures; however, in our opinion, they cannot be included within the category of positive action measures when these promotion or incentive measures are materially materialized in a pejorative treatment in comparative terms for these groups of workers. Finally, it is possible to identify actions that, although they have the character of specific protection with respect to women due to their pregnancy, in particular, they are so due to their special exposure to risk for physiological reasons and are not strictly speaking among the positive actions, and even their omission is considered to be strictly discriminatory treatment from the perspective of EU law⁴.

II. POSITIVE ACTION IN THE TREATIES: THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Within the original law, it is relatively easy to identify the key precepts regarding the prohibition of discrimination, while the same is not true in rela-

³ Dir 2000/78 art.6.

⁴ ECJ judgement of 19 October 2017, Otero Ramos, C-531/15, EU:C:2017:789.

tion to positive action, on the premise that the former cannot be based on the latter. In the Treaty on European Union and the Treaty on the Functioning of the European Union, we find express appeals to equality as one of the basic values to be respected by the Union (TEU art. 2), although it is not easy to deduce from this a recognition at such a level of positive action, at least understood in the sense of measures to promote and encourage material equality. Similarly, the Treaty on European Union declares that the Union shall combat social exclusion and discrimination (TEU art. 3.3) and shall respect the equality of citizens of the Union (TEU art. 9), as well as the mandate to try to combat any discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation (TEU art. 10). Similarly, the Treaty on the Functioning of the European Union contains explicit references to the elimination of inequalities and the promotion of equality between men and women (TFEU art. 8), to the prohibition of any discrimination on grounds of nationality (TFEU art. 18), empowering the Union to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (TFEU art. 19), to the abolition of any discrimination between nationals of the Member States in the field of free movement of workers (TFEU art. 45.2), to the harmonization of national legislation on equality between men and women as regards labour market opportunities and treatment at work (TFEU art. 153.1.i), to equality between male and female workers as regards pay (TFEU art. 157.1) as well as in matters of employment and occupation (TFEU art. 157.3), although, once again, no express recognition of positive action measures is derived from the above. As we shall see in the following section, what can be deduced from these precepts is the possible compatibility of positive action measures with the rules prohibiting all types of discrimination, but only in a very lukewarm manner a mandate in the strict sense of the need to introduce such positive action measures, something qualitatively different, a differential nuance that is not always sufficiently marked.

In this legal logic, in the Treaty on the Functioning of Treaty of Functioning of the European Union, the most that can be found is the attribution of competence to the EU in order to harmonize the labour legislation of the Member States, which would allow the incorporation of this type of measures into the internal national legislation, but with full freedom or not to do so by the institutions of the Union, but not in terms of mandating them to adopt measures of this scope, as is found in the constitutional texts of some Member States: working conditions, integration of persons excluded from the labour market, equality between men and women as regards labour market opportunities and treatment at work, as well as the fight against social exclusion (TFEU art. 153.1.b, h, i and j).

Initially, something not very different is found in the Charter of Fundamental Rights of the European Union hereforth, CFREU, based on its recognition as a binding text in the traditional line of guaranteeing fundamental rights and public freedoms, including those of a labour and social nature. Beyond this, however, there is no significant sign that the Charter intends to make a qualitative leap forward, advancing in some areas in the European project's desire to effectively incorporate strict positive action measures into the Union's legal system.

In fact, in a first approximation, we remain at the more classic level of formal equality, at most not preventing positive action measures. Thus, the declaration of the principle of equality before the law (CFREU art. 20) is initially presented in the most classic conception of the principle of equality from the formal perspective, while the reference to discrimination is also presented in its traditional formulation prohibiting conduct detrimental to the equality of disadvantaged groups (CFREU art. 21).

In some passages, the merely passive perspective is expressly contemplated, in the sense of merely permissive of positive action measures, of compatibility with discrimination, but not proactive of actions aimed at material equality. This merely permissive aspect is the one that is included in relation to equality between men and women: "The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex" (CFREU art. 23). Such a provision was already anticipated with the reform of the Community Treaty in previous years, specifically through the Treaty of Amsterdam in 1999, now incorporated into the Treaty on the Functioning of the European Union: "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers" (TFEU art. 157.4). These are, in fact, the first and most direct mentions of the hypothesis of incorporating positive action measures, albeit in terms of the possibility or non-contradiction with the Charter and the Treaty on the Functioning of the European Union, but not as an expression of a program or plan for their establishment. For the rest, it is indisputable that in the background lies the will to admit protective measures in favor of women, as a traditionally neglected or marginalized group in the labour market. On the one hand, the premise of this is that we are faced with a specific situation of underrepresentation in the area in which the measure is imposed,

which nowadays implies the impossibility of measures of universal application, since there may be areas, territories, sectors or companies in which such underrepresentation does not exist; on the other hand, despite the indisputable purpose of protecting working women, the rule is drafted in a totally neutral key, which would not exclude the admission in some areas of measures for the protection of male workers, if a clear situation of underrepresentation is detected. Finally, it should be noted that such mentions relating to the introduction of positive action measures refer in the Charter exclusively to differences based on sex, but are not introduced generically for any type of traditional situations of materially unfavorable treatment based on other causes that are traditionally found among those typical of social marginalization and whose negative differential treatment is qualified as discriminatory.

The decisive step in the design of a social policy incorporating positive action measures is taken with respect to certain specific groups traditionally facing greater difficulties, segregated or excluded from the labour market, such as the disabled, young people or those who assume greater family responsibilities and find it difficult to reconcile professional and family life. An example of the former is found when it is established that “the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community” (CFREU art. 26). Example of the second when it is stated that “Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education” (CFRUE art. 32). An example of the third when it is provided that in order to “reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child” (CFRUE art. 33.2).

It should be noted, however, that these express forms of admission of positive action measures are not without the general difficulties that can be seen today in the implementation and effective enforcement of the Charter, as a result of its general clauses, despite the solemn declaration of the Charter as legally binding as primary law. In this regard, we refer in particular to the obstacle that may arise from the fact that the Charter as such does not extend the scope of application of Union law beyond the competences of the Union. However, in our opinion, this does not constitute a decisive impediment, since

what is decisive in this respect is that the Union assumes broad competences in the field of labour harmonization, both as regards the system of employment contracts and working conditions. Therefore, this opens the way to the possibility that the European institutions, when implementing their harmonization policy, may consider it appropriate -although it cannot be said that the Charter strictly speaking obliges them to do so- to adopt positive action measures in relation to women, the disabled, young people and people with family responsibilities. In this way, a rule of primary law is established that is clearly addressed to secondary law, when the latter proceeds to develop its competence for the harmonization of labour legislation.

III. COMPATIBILITY WITH THE PROHIBITION OF DISCRIMINATION

In concrete terms, positive action measures do not find their historical origin in interventions from Community law, nor can it be said that, at present, with a few emblematic exceptions, measures of this type of innovative scope can be identified within current European Union law. On the contrary, such measures are essentially to be found in initiatives originating in the national laws of the Member States. Thus, the starting point in this field of EU law is merely negative, if one wishes simply to go against the grain or, at best, to avoid slowing down the positive action measures established in the legislation of the Member States.

In particular, almost all the interventions by the Court of Justice of the European Communities, first, and the Court of Justice of the European Union, successively, have been to determine to what extent national positive action measures are feasible from the point of view of Community law. In particular, the question repeatedly referred for a preliminary ruling is usually to ask the Court to what extent the national positive action measures are compatible with the European legal system's requirement of formal equality, of equal treatment of all workers, in a principle, above all, concerning formal equality between men and women; in other words, whether or not the national measures of favorable treatment of female workers could lead to discriminatory conduct against male workers by disadvantaging them. Since in this area the national positive action measures are of greater comparative protection in favor of women as a disadvantaged social group, with greater difficulties in the labour market, it is a question of analyzing to what extent this does not entail harmful discriminatory treatment of men with respect to

women workers. From this point of view, it can be said that Community case law has in some cases had the effect of limiting the intensity of national positive action measures and, in the best of cases, of admitting them as possible, albeit always subject to relatively important conditions. Moreover, although judicial judgments to this effect have so far focused essentially on the contrast between men and women, its doctrine can be transferred by analogy to the rest of the causes or grounds of discrimination contemplated within the European system.

The first case, particularly emblematic to this effect, was particularly intense in the debate surrounding the Kalanke case, which resulted from the presentation of a preliminary ruling on the regulations of a German Land that established measures of preference for women over men in a selective process of professional promotion within a Public Administration⁵. In this judgment, the Court adopted a position essentially of prevention, if not outright rejection, of positive action measures in this field, without prejudice to leaving some slight openness to their implementation. On the one hand, the ruling was categorical in not admitting them automatically and indiscriminately, especially in the case of measures which, in a selective process, would give preference to women over men. Specifically, it is based on the premise that, although the Directive in force at the time authorized the adoption of positive action measures, under the expression of measures aimed at promoting equal opportunities between men and women, this should be interpreted restrictively, insofar as it constitutes an exception to an individual right enshrined in the Directive such as that of equal treatment between men and women. Accordingly, the judgment stated that the Directive at issue precluded “national rules such as those in the present case which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are under-represented, under-representation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organization chart.”. It is true that there is a slight opening nuance when in the decision it is also stated that the Directive does not preclude measures aimed at promoting equal opportunities for men and women, in particular to correct *de facto* inequalities affecting women’s opportunities, its precise and limited purpose is to authorize measures which, although discriminatory in appearance, are effectively aimed at eliminating or reducing *de facto* inequalities which may exist in the

⁵ Judgment of 17 October 1995, Eckhard Kalanke, C:1995:322..

reality of social life. It adds, moreover, that this provision thus authorizes national measures in the field of access to employment, including promotion, which, favoring women in particular, are intended to improve their ability to compete in the labour market and to develop a professional career on an equal footing with men. However, such nuance was certainly reduced, because the judgment led to a very restrictive conclusion on positive action measures as indicated above, against guaranteeing absolute and unconditional preference for women in an appointment or promotion, which does not constitute an acceptable positive action measure, since it goes beyond a measure to promote equal treatment and replaces it with its result, equal representation, which could only be achieved through the application of such equality.

With the passage of time, this doctrine will end up being partially corrected, admitting the compatibility with the European legislation of national laws that establish positive action measures. However, at no time has the Court expressly admitted that it has corrected its initial doctrine, but has justified different rulings in subsequent judgments and, therefore, the admission of national positive action measures, since the factual situations that it analyzes in these other preliminary rulings are of a different tenor and these other national provisions do not establish an automatic rule of preference. The judgments that will follow, although some have valued them in terms of greater openness and permissiveness in compatibility, considered by some to be more sensitive to the admission of positive action, in our opinion, however, they are reduced openings and of mere nuance with respect to the preceding doctrine, since they maintain in any case an intense prevention and palpable rejection of them. In all cases, the unavoidable requirement, which has remained unchanged up to the present, is that the candidates must have the same qualifications and, therefore, it is never admissible to select a woman if the man has greater professional skills. This has been stated in several judgments⁶.

It is worth noting the fact, probably not by chance, that this group of judgments began in 1995 and ended in 2004, without any new preliminary rulings having been made since then concerning mechanisms of access to employment or professional promotion with a certain preference for women over men. This is probably due to the fact that, to a large extent, these types of preference procedures have become less frequent, or have been conside-

⁶ Judgments of 11 November 1997, Marschall, C-409/95, EU:C:1997:533, 28 March 2000, Badeck, C-158/97, EU:C:2000:163, 6 July 2000, Abrahamsson, C-407/98, EU:C:2000:367, 19 March 2002, Lommers, C-476/99, EU:C:2002:183, 30 September 2004, Briheche, C-319/03, EU:C:2004:574.

rably softened in their intensity, in order to avoid new convictions by the Court of Justice.

The first of the judgments that gives the go-ahead to an positive action measure occurs on the occasion of the Marschall case of 1995 already cited. In this case, although it is expressly stated that the Court upholds the first of the rulings, which establishes the doctrine of the Kalanke case, also cited above, the ruling is of a different sign only because the rule of preference for women is not automatic; nevertheless, an important change can be noticed. The novelty lies in the fact that Marschall admits the preference of women based on the premise of the equal professional worth of both men and women aspiring to the job, a fact that was not even recognized by Kalanke, at least not with sufficient clarity and forcefulness. Thus, in Marschall, it will be stated that the Directive does not preclude national legislation which, “in cases where candidates of both sexes are equally qualified, from the point of view of their aptitude, competence and professional performance, obliges preference in promotion to be given to female candidates in those sectors of activity of the administration which, at the level of the post in question, have fewer women than men, unless there are reasons in the person of a male candidate which tip the balance in his favor”. However, it not only rigorously demanded the premise of identical professional abilities among the candidates, but with excessive zeal added as an additional requirement that “this rule guarantees, in each particular case, to male candidates with equal qualifications as female candidates, that the applications will be subject to an objective assessment that takes into account all the criteria relating to the person of the candidates of both sexes and ignores the preference given to female candidates when one or more criteria cause the balance to tip in favor of the male candidate”. The second condition imposed by this judgment is much more difficult to understand; in fact, it is difficult to understand how it is required that the selection criteria established by the national rule “are not discriminatory to the detriment of female candidates”, when we are not dealing here with possible discriminatory measures against women and, by their very essence, such measures always have the effect of benefiting female candidates; moreover, the preliminary question arises precisely because of the suspicion that the formula introduced could contain a difference in treatment detrimental to men. The only way to understand the judicial clarification is that this requirement to ensure that the female candidate is not put behind the male candidate must be made on the premise that the equality of conditions is not distorted by the use of selection criteria that indirectly benefit men

over women, otherwise it would be a false equality because it conceals an indirect discrimination.

In these judgments, it should be especially noted that the positive action measures affected regulations specifically aimed at regulating the matter in the area of public administrations. This perspective is particularly relevant for certain Member States, where there is traditionally a differentiated regulation for public employees who are subject to a regime subject to special conditions deriving from the employer's unique status. The most significant aspect in this regard is that, as the Administration intervenes in this area as the employer, it is subject to a stricter mandate for the public authorities, which must select their personnel in accordance with criteria of equality, merit and ability. In short, the fact that the public authorities must respect the principle of equal treatment (and not only the prohibition of discrimination, which is what limits the actions of the private authorities) does not prevent this type of positive action measures from also being implemented in the field of public employment. In any case, the fact that all the cases affected public employees, whether they were employees or civil servants, is explained not so much because the formula is less conflictive in the private sector, but because the only area in which it seems that these mechanisms of preference in selection have been tested in the law of the Member States to date is in the public sector.

As a result of the two preceding judgments, an important change took place in European Union law, by establishing express compatibility between formal equality and the prohibition of discrimination in European Union law, on the one hand, and positive action measures, on the other. In particular, as regards differentiation on grounds of sex, this compatibility was expressly elevated to the status of law. This change first took place as from the Treaty of Amsterdam in 1999, and was successively incorporated into the text of the Treaty on the Functioning of the European Union, in the terms already described, especially as regards differences based on sex: "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers" (TFEU art. 157.4). Subsequently, something similar was done when it was recognized in the terms already indicated in the Charter of Fundamental Rights of the European Union (CFREU art. 23).

In the same way and in broad terms, this compatibility is expressly included in secondary legislation⁷, with respect to equality between men and women⁸, racial or ethnic origin⁹, age¹⁰, disability¹¹, as well as for the rest of the groups contemplated in the general Directive, i.e., in addition to the last two mentioned, religion or conviction and sexual orientation¹².

In any case, we reiterate that the most relevant aspect is that it is understood that all these changes, both in the original and in the secondary law, are produced as a consequence of the restrictive nature of the admission of positive action measures by the aforementioned previous judgments and with the intention of extending the compatibility of positive action measures with the prohibition of discrimination contemplated in European legislation. In other words, it can be understood that these legislative changes were aimed at influencing the case law of the Court of Justice, with the intention of making it more permissive with regard to positive action measures. In spite of this, it seems that these legislative changes have had little practical impact in the course of successive rulings, at least up to the present time.

Within the strict positive action measures, one usually starts with what are known as “entry-level” positive actions; that is, by admitting as lawful those adopted by national legislations that seek to achieve equal opportunities at the starting point in the supposed professional career of all, in their professional insertion and promotion; in what could also be called measures aimed at offering a scenario of equal opportunities to the disadvantaged group with respect to the privileged one. The main exponent of this type of

⁷ Cfr. SCARPONI, STEFANIA and STENICO, ELEONORA: «Le azioni positive: le disposizioni comunitarie, le luci e le ombre della legislazione italiana», in VV. AA. (BARBERA, MARZIA coord.); *Il nuovo Diritto antidiscriminatorio. Il quadro comunitario e nazionale*. Milán: Giuffrè editore, 2007, pgs. 423 ss.

⁸ “Member States may maintain or adopt the measures referred to in Article 141 (now Art.157), paragraph 4, of the Treaty with a view to ensuring full equality in practice between men and women in working life” (Dir 2006/54/EC Art.3).

⁹ “With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages affecting persons of a particular racial or ethnic origin” (Dir 2000/43/EC art.5).

¹⁰ “Member States may provide that the determination, for occupational social security schemes, of ages for eligibility for or entitlement to retirement or invalidity benefits, including the establishment for such schemes of different ages for workers or groups or categories of workers and the use, within the framework of such schemes, of age criteria in actuarial calculations, shall not constitute discrimination on grounds of age, provided that this does not involve discrimination on grounds of sex” (Dir 2000/78/EC art.6.2).

¹¹ “as regards persons with disabilities, the principle of equal treatment shall not constitute an obstacle to the right of Member States to maintain or adopt provisions concerning health and safety protection in the workplace, or to measures intended to create or maintain provisions or facilities to protect or promote the integration of such persons into the world of work” (Dir 2000/78/CE art.7.2).

¹² “With a view to ensuring full equality in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures aimed at preventing or compensating for disadvantages caused by any of the grounds referred to in Article 1” (Dir 2000/78/EC art.7.1).

measures is the achievement of equal professional training possibilities, which in this key positive action would take the form of offering training courses aimed exclusively at the underrepresented social group as a means of guaranteeing equality at the outset. These formulas were initially criticized, but today they are practically unquestioned.

Thus, for example, the Court of Justice will accept positive entry measures, especially those relating to selective vocational training. In particular, it is not against EU Law “a national rule which, in so far as its objective is to eliminate underrepresentation of women, in trained occupations in which women are underrepresented and for which the State does not have a monopoly of training, allocates at least half the training places to women, unless despite appropriate measures for drawing the attention of women to the training places available there are not enough applications from women”¹³ and will therefore be considered lawful.

Measures that give preference to women in the access of their children to day-care centers can also be classified as positive action from the outset. Thus, in a specific ruling, it will be declared that the Directive “does not preclude a regulation adopted by a Ministry to remedy the considerable under-representation of women among its staff and which, in a context characterized by a manifest lack of adequate and affordable childcare facilities, reserves the childcare places it subsidizes and makes available to its staff in limited numbers to female civil servants, whereas civil servants may have access to them only in cases of urgency which it is for the employer to assess. This is provided that the exception in favor of civil servants is interpreted, in particular, as allowing access to the childcare system under the same conditions as civil servants to those civil servants who take care of their children on their own”¹⁴.

Similar is the case where a provision in a national collective agreement which reserves to workers who bring up children themselves the right to leave after the expiry of statutory maternity leave is deemed to be compatible with Union law, provided that such additional leave is intended to protect workers both in relation to the consequences of pregnancy and in relation to their maternity¹⁵.

However, from certain positions, it will gradually become clear that positive action cannot remain at the level of equality at the outset, since, despite this, it is clear that *de facto* differences persist. For this reason, progress is

¹³ ECJ Judgment of 29 March 2000, *Badeck* C-158/97, EU:C:2000:163.

¹⁴ ECJ Judgment of 19 March 2003, *Lommers* C-476/99, EU:C:2002:183.

¹⁵ ECJ Judgment of 18 November 2020, *Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle*, C-463/19, EU:C:2020:932.

being made in the field of positive action as a “result”, aimed directly at offering greater possibilities of incorporation into the labour market and in quality jobs, with real possibilities of promotion for traditionally marginalized or underrepresented social groups. It is no longer a matter of mere equality of opportunity in the search for employment or professional promotion, but of direct support for the effective achievement of the desired result by means of selective promotion of women over men; because, once again, this new perspective is opening up for the first time in relation to the treatment of women with respect to men, even though the theoretical construction is carried out in somewhat more generic and abstract terms.

Among the positive action measures of result will be those relating to selection procedures for hiring and professional promotion, granting in these procedures certain types of preferences to underrepresented sectors. However, as we have already mentioned, the case law will continue to reject automatic positive action formulas, since it will continue to require initially, in order to admit as possible the positive action measure, that it be a comparison of workers with identical qualifications. In short, absolute reserve quotas as such are not allowed to be introduced by national legislation, as they are contrary to the principle of equal treatment and the prohibition of discrimination under European law.

This, on the contrary, can be understood as admitting positive action of “flexible result”, as opposed to the automatic ones that we could qualify as “rigid result”. Thus, it will be said by some judgments that a national rule is considered correct that in the event that candidates of both sexes present equal qualifications, from the point of view of their aptitude, competence and professional performance, it is obligatory to give preference in promotion to female candidates in those sectors of activity of the administration which, at the level of the post in question, have fewer women than men, unless there are reasons in the person of a male candidate that tip the balance in his favor. The ruling reiterates in a ham-fisted manner that the measure which in civil service sectors where women are underrepresented, in the case of equal qualifications between candidates of different sexes, gives preference to female candidates whenever it is necessary for the achievement of the objectives of the plan for the promotion of women, is admitted, unless a higher-ranking legal ground precludes this, provided that such rules guarantee that the applications are subject to an objective assessment that takes into account the particular personal situations of all the candidates¹⁶.

¹⁶ Judgment of 28 March 2000, Badeck C-158/97, EU:C:2000:163.

So much so that when it is found that there is no effective equality of qualifications, the measure is declared contrary to the Directive. For example, it is not considered sufficient that the female candidate has sufficient professional skills to occupy the position, but rather that these skills must be at least identical to those of the male candidate. Therefore, the corresponding judgment will declare that the Directive precludes national legislation according to which a candidate for a civil service post belonging to the under-represented sex, with sufficient qualifications for that post, must be selected in preference to a candidate of the opposite sex who would otherwise have been appointed, where this measure is necessary to select the candidate of the underrepresented sex and where the difference between the respective merits of the candidates is not so considerable as to infringe the requirement of objectivity in the filling of the posts. It is not even permissible for such preference measures to be applied exclusively to the filling of a previously limited number of posts, or to posts created within the framework of a specific program of a particular college which allows the application of positive action measures¹⁷.

Other measures that give preferences to certain women, such as the case of widows who have not remarried and who are exempted from the age requirement for access to public employment, are also considered contrary to the Directive. Thus, a regulation which reserves exemption from the age limit for entry into public employment to widows who have not remarried and who are in need of work, to the exclusion of widowers who have not remarried and who are in the same situation is declared contrary to the Directive¹⁸.

It is therefore necessary to note that the most prominent judgments concerning a national positive action measure of preferential treatment for women in matters of reconciliation have also declared that it is in contradiction with the Directive. These are complex measures, in which, on the one hand, there is a difference in treatment between women and men, as they are declared contrary to Union law, insofar as men and women with identical family responsibilities are treated unjustifiably unequally. But, at the same time, from another perspective, it should be pointed out that all interventions in the area of reconciliation are typical and correct positive action measures, insofar as they offer favorable treatment to workers with family responsibilities compared to those who do not have such obligations to take care of the children of the family; in this other perspective of comparison - workers with family responsibilities compared to those who do not - they are positive actions that cannot be criti-

¹⁷ Judgment of 6 July 2000, *Abrahamsson* C-407/98, EU:C:2000:367.

¹⁸ Judgment of 30 September 2004, *Briheche* C-319/03, EU:C:2004:574.

cized in any way. In any case, as the first is the only perspective addressed by the judgments in question, the ruling has always been in contradiction with the antidiscrimination protection of European Union law. In one case, it was declared contrary to the Directive that women who are mothers of a child and who are employees may take leave in various forms during the first nine months following the birth of the child, whereas men who are fathers of a child and who are employees may take such leave only if the mother of the child is also an employee¹⁹. In the other case, national legislation under which a civil servant is deprived of the right to parental leave if his wife is not in employment or occupation, unless, by reason of serious illness or infirmity, she is deemed to be incapable of caring for the child was declared contrary to the same Directive²⁰.

Notwithstanding all of the above, the case law of the Court of Justice has, over time, presented some important nuances, which allow us to detect a certain line of evolution or correction with respect to what was initially indicated.

Thus, for example, it will be allowed to introduce selective criteria at the time of the first filter derived from the choice of candidates to be interviewed. Thus, it will be allowed, on the premise of equal qualifications, to declare that a national regulation is in conformity with the Directive which, in the case of equal qualifications between candidates of different sexes, ensures that qualified women are called for presentation interviews in sectors where women are underrepresented²¹.

In the same way, it will be accepted that a national regulation establishes that for temporary posts belonging to the scientific sector or for scientific assistants, a minimum percentage of female personnel must be foreseen that is at least equivalent to the proportion that women represent among the graduates, doctorates or students of the respective specialty²².

In our opinion, where the greatest degree of openness can be detected is when a certain degree of flexibility is accepted in the identification of the criteria according to which the equal qualification of one candidate to another is determined. Thus, for the most recent rulings, what is relevant is that they are objective requirements, but accepting the introduction of some criteria of this nature that are known to have a greater positive effect on women and rejecting others that have a greater positive effect on men. Specifically, to value with greater relevance skills that are more prototypical of women and less those of

¹⁹ ECJ Judgment of 30 September 2010, *Roca Álvarez*, C-104/09, EU:C:2010:561.

²⁰ ECJ Judgment of 16 July 2015, *Maïstrellis*, C-222/14, EU:C:2015:473.

²¹ ECJ 28-3-00, *Badeck* C-158/97, EU:C:2000:163.

²² ECJ 28-3-00, *Badeck* C-158/97, EU:C:2000:163.

men. Again, however, with its nuances, as it will be stated that this is correct “provided that such regulations guarantee that the applications are subject to an objective assessment that takes into account particular situations of a personal nature of all candidates”. But, at the same time, in the same case, it is allowed, for example, to take into account the ability and experience acquired in the exercise of family work insofar as they are relevant to the aptitude, competence and technical capacity of the candidates, while seniority, age and the date of the last promotion can only be considered if they are relevant in this respect. These criteria, although formulated in gender-neutral terms, and which, therefore, may also benefit men, from a sociological perspective it is clear that they generally favor women. Their aim is clearly to achieve substantive and not merely formal equality by reducing the *de facto* inequalities that may arise in social life. Moreover, what is decisive in the end is that their legitimacy is not denied in the main dispute²³.

Finally, in possibly the most advanced step that has been taken in this area, it is accepted that the qualifications are not strictly identical, but that some type of comparative analysis is possible from a more material rather than formal point of view. For example, on the premise that the candidates are subject to an objective assessment, it is accepted that the requirement consists of candidates possessing *equivalent or appreciably equivalent* merits (our italics) and when the candidacies are subject to an objective assessment that takes into account the particular situations of a personal nature of all the candidates²⁴.

It has even been considered correct that positive action should cover the composition of workers’ representative bodies, as well as corporate management and control bodies²⁵.

It should also be noted that the requirement of professional identity or equivalence has always referred, up to the present time, to favorable treatment of women workers in relation to men. Therefore, we do not know what assessment and criteria would be applied to other causes of difference in treatment for which the discrimination directives allow the lawfulness of positive action measures: age, disability, religious convictions or opinion, sexual orientation, ethnicity or race. In principle, given the way in which the aforementioned judgments argue and taking into consideration that the wording of the Directives when they admit positive action measures is practically identical in its

²³ ECJ 28-3-00, Badeck C-158/97, EU:C:2000:163.

²⁴ ECJ 6-7-00, Abrahamsson C-407/98 EU:C:2000:367.

²⁵ ECJ 28-3-00, Badeck C-158/97, EU:C:2000:163.

wording for the rest of the causes of differential treatment, it could be understood to be extended analogically to these other causes.

However, there would also be another reading, in our opinion much more coherent, which would exclude the analogical extrapolation for what is being assessed in these judgments exclusively in relation to sex. In contrast to the above, it should be noted that the context may be very different in relation to some of these other cases and, therefore, in our opinion, it would not be possible to automatically transfer what the European Court has said regarding differential treatment based on sex to other cases. Otherwise, the automatic transposition of the foregoing reasoning would lead us to understand that we would have to consider as contrary to European law the very widespread and consolidated rules that impose quotas on disabled workers in most of the labour legislation of the Member States. For this purpose, it should be taken into account that what differentiates disabled workers from non-disabled workers is that the former have lower competences, skills and abilities than the rest of the workers, and it is precisely this circumstance that effectively causes their greater handicaps in the full and normal incorporation into the labour market. In short, on this basis it must be understood that a differentiated conclusion must be reached with respect to the disabled, not accepting in these cases analogical interpretations in this respect and, therefore, admitting the correction of quotas or preferences in hiring even in situations in which objectively there is neither identity nor equivalence of professional competencies. In view of this, while it is generally considered that positive action measures should have a limited application in time, as long as the underrepresentation of the disadvantaged group is present, it should be understood that this type of measures, including quotas, should be permanent in time for disabled workers, since the handicap with respect to them is inherent or not merely a social or cultural behavior.

To date, the Court of Justice has not issued any judgment on this matter, since none of this is addressed in the rulings on the disabled. The main rulings issued with respect to the disabled do not go into the most incisive positive action measures, such as quotas for hiring or promotion, but into other less common and not so incisive aspects, such as procedural guarantees prior to dismissal. In the first case, it has accepted as legitimate the national measure, considering that the legislation of a Member State which confers on employees with certain types of disability special *ex ante* protection against dismissal, without conferring such protection on civil servants with disabilities of the same type is compatible with the Directive on the subject. However, even in this case, it is done with the caution that this is permissible provided that no breach of the principle of equal treatment is established, requiring the national court to find that the situations must be based on an analysis

of all the relevant rules of national law governing the position of employees with a particular disability, on the one hand, and of civil servants with the same disability, on the other, having regard in particular to the objective of the protection against dismissal at issue in the main proceedings²⁶. Moreover, it should be borne in mind that the elements of comparison were not exactly between disabled workers and those without such limitations, but between different groups of workers who were all disabled: between those who were “employees” and those who were civil servants, in such terms that it will be ruled that the obligation to comply with Union law will require extending the scope of the national rules protecting employees with a given disability, so that those rules of protection also cover civil servants with the same disability. The second scenario is more in the field of indirect discrimination, although it is based on the premise of not treating the disabled unequally with respect to the rest. This second case refers to the regulation in Spain of objective dismissal for excessive morbidity, now repealed, where by excluding justified absences from work from the calculation of absences that could be dismissed in a fair manner, it did not include absences resulting from illnesses attributable to the worker’s disability. The ruling in question qualifies as indirect discrimination the failure to exclude from the computation of these absences those resulting from illness due to disability, assuming that this prevents the computation of absences resulting from an illness caused by a disability. However, even in this scenario of indirect discrimination, the judgment is not unconditional, as it introduces the important nuance that this constitutes indirect discrimination “unless such legislation has the legitimate aim of combating absenteeism and does not go beyond what is necessary to achieve that aim, which is for the referring court to assess”²⁷.

To conclude this section, it should be noted that the Member States have also in some cases introduced positive action measures in the field of Social Security, which in the same terms have been analyzed by the Court of Justice from the perspective of their compatibility with the prohibition of discrimination, again with respect to the prohibition on grounds of sex. The difficulty with the initial supplement was that it was paid exclusively to women, only when they had had at least two children, regardless of whether this had penalized their contribution career, and was paid even if they were entitled to the maximum capped pension. The result was that the Luxembourg Court, in a particularly paradigmatic case of a widowed man who had to assume the burden of family responsibilities alone with children from infancy, declared that the Spanish regulations

²⁶ ECJ Judgment of 9 March 2017, Milkova, C-406/15, EU:C:2017:198.

²⁷ ECJ Judgment 18 January 2018, Ruiz Conejero, C-270/16, EU:C:2018:17.

did not respect the prohibition of discrimination between men and women contained in the corresponding Social Security Directive. Specifically, the ruling of the judgment states that the aforementioned directive precludes the national rule that establishes the right to a pension supplement women who have had at least two biological or adopted children and are beneficiaries of contributory permanent disability pensions in any scheme of the national Social Security system, while men in an identical situation are not entitled to such a pension supplement²⁸. As a reaction to the ruling, a new regulation is established, in accordance with another supplement that is given a different name, to mark the differences with the aforementioned, contemplating that both women and men receive this supplement, although establishing certain differences in treatment between women and men, which are justified by its purpose of introducing a positive action measure, with a view to correcting to a limited extent the lower average amount of the contributory pensions of women with respect to men. Thus, the recognition of the supplement for men requires a clear situation of prejudice in the contribution career and, with it, the amount of their contributory pensions, as a result of having had children, while for women a ‘*iuris et de iure*’ presumption of prejudice of such a circumstance with respect to their contribution career is established. In a subsequent ruling, which assessed the extent to which this new regulation is compatible with European Union law, a new ruling was issued which again considered that the recognition of the pension supplement exclusively in favor of women is discriminatory; it only accepted as correct that, in the event that both parents are entitled to the pension, preference should be given to the parent with the lower pension amount, who statistically in most cases is women²⁹.

IV. SPECIFIC POSITIVE ACTION MEASURES IN UNION LAW

There are few provisions in EU legislation that directly establish specific positive action measures. Apart from those relating to the reconciliation of family and professional responsibilities, which are dealt with in other studies in this book³⁰, those incorporated so far in European legislation refer mainly to gender and disability, which are described below.

²⁸ Judgment of 12 December 2019, Instituto Nacional de la Seguridad Social, C-450/18, EU:C:2019:1075.

²⁹ ECJ 15 May 2025, cases C-623/23 and 626/23.

³⁰ In any case, it should be noted that the most important judgments, relating to positive action measures for preferential treatment of women in matters of reconciliation, has been declared contrary to the Directive. I refer to a different treatment in the enjoyment of parental leave: the Parental Leave and Gen-

1. Gender positive action

In the area of gender, beyond generic statements or recommendations for the adoption of positive action measures, those specifically included in the regulations are essentially in the area of diagnosing the situation, monitoring and controlling the detection of possible pockets of pejorative treatment of women, as well as promoting equality measures by the social partners. Among them, the following are worth mentioning:

1. Firstly, the provision of equality bodies, responsible for the promotion, analysis, monitoring and support of equal treatment, with the possibility of adopting the necessary provisions in this regard. The powers of such bodies include: a) providing independent assistance to victims of discrimination in dealing with their complaints of discrimination; b) carrying out independent surveys on discrimination; c) publishing independent reports and making recommendations on any issue related to discrimination; d) exchanging available information with equivalent European bodies³¹.

With regard to this type of body, the following should be emphasized in order to properly assess its scope and function. First of all, the rule does not require the existence of an *ad hoc* body with exclusive powers to promote equal treatment between men and women, since it allows the Member State, when transposing the Directive, to entrust such powers to the body responsible at national level “for the defense of human rights or the safeguarding of individual rights”. In concrete terms, it is allowed that no specific body be set up for this purpose, but that the Ombudsman or a body assimilated to it assume these functions.

On the other hand, although it is apparently stated that such a body will adopt the “provisions” necessary for the development of the powers attributed to it, the term “provisions” is not to be understood in the technical legal sense of the word, which means that the body as such does not have to have legislative or even binding powers to resolve conduct contrary to the principle of equality. *A sensu contrario*, it may assume exclusively control or monitoring, promotional and incentive functions aimed at achieving material equality, but not of a taxing, coercive or punitive nature. In short, it is conceived more in the field of *soft law* than *hard law*.

eral Framework Equality Directives “preclude national legislation under which an official is deprived of the right to parental leave if his wife does not carry out an occupational or professional activity, unless, because of serious illness or infirmity, she is deemed unable to meet the needs of caring for the child” (judgment of 16 July 2015, Maïstrellis, C-222/14, EU:C:2015:473).

³¹ Dir 2006/54/CE art. 20.

Finally, a centralized model is not conceived, with the provision of a single body assuming this type of competencies, but a decentralized model can be designed, with a plurality of bodies assuming assimilated functions. This possibility of a plurality of bodies is contemplated being aware of the complex administrative and political structure of some Member States, which are not in favor of centralized models, accepting their adaptation to political models of federal organization of the State or of similar characteristics to them.

2. On a second level, the same Directive provides for indications to the Member States to adopt measures to encourage social dialogue between the social partners in order to promote equal treatment. These are, once again, measures to encourage monitoring and control of the situation in sectors and companies, as well as to encourage the adoption of promotional measures in this area through collective agreements, codes of conduct, the exchange of experiences and good practices, with full respect for the negotiating autonomy of trade unions and employers' organizations³². Without prejudice to the fact that the corresponding Member States may go beyond the provisions of the Directive by establishing minimum content for collective agreements, for example by making it compulsory to establish equality plans in certain companies, the Union's regulation is also at the level of *soft law*, with the technique of "encouraging" the social partners to adopt measures that effectively result in material equality between men and women.

Finally, in a similar vein, it is envisaged that Member States shall encourage dialogue with non-governmental organizations which have, in accordance with national legislation and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex with a view to promoting the principle of equal treatment.³³

It should be pointed out that these clarifications regarding the essentially *soft law* nature of all these measures to promote material equality are not formulated by us as a criticism of them, nor even as an undervaluation of their scope. On the contrary, experience shows that in practice they have had an enormous capacity for real impact, being an effective vehicle for the transformation of our labour market in many areas, where situations of underrepresentation of women are progressively being corrected, gradually leading to a significant social awareness of the comparative situations of greater job insecurity of women's work and the difficulties of their professional advancement. If such clarifications have been made, they have been in the sense of

³² Dir 2006/54/CE art. 21.

³³ Dir 2006/54/CE art. 22.

clarifying the technical legal scope of the mandates contained in these precepts of the Directive, but not, we insist, of underestimating their real impact.

2. Positive action on disability

In the field of disability, the positive action rule in the strict sense of the term provided for in European legislation focuses on imposing the need for companies to adopt reasonable accommodation in order to ensure equal treatment. Specifically, it states that “employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned”³⁴.

In accordance with the conceptual delimitation we have made at the beginning of this analysis, I would affirm that it is a strict positive action measure, both because of its subjective purpose, exclusively directed in favor of disabled workers in a differentiated manner from the rest of the workers, from the objective perspective, insofar as it imposes an obligation to do and does not establish a mere prohibition of conduct detrimental to the disabled, and from the fact that the European standard imposes an obligation to adopt the measures and not exclusively in the merely permissive perspective of those analyzed in the preceding section, to declare that its introduction is not contrary to the principle of equal treatment or to the prohibition of discrimination.

In spite of this, with a desire to reinforce compliance with this obligation to positively adopt reasonable accommodation measures, it has been understood from various fronts that these measures fall strictly within the scope of the prohibition of discrimination, in the sense that their non-compliance qualifies as discriminatory conduct. Its inclusion within the strict scope of discrimination has been defended from the point of view of the purpose of reasonable accommodation, regardless of whether it is adopted as an obligation to act exclusively with respect to the disabled. Indeed, they are incorporated into the territory of discrimination and not of positive action measures, insofar as it is understood that their non-compliance constitutes an obstacle that prevents or significantly hinders the work of the disabled: if these reasonable accommodations were not

³⁴ Dir 2000/78/CE art. 5.

made, the disabled would not be able to work in those spaces or jobs and, therefore, they would not be hired. This is a legal qualification that goes beyond the merely nominal typological, but has important consequences in the practical field of its specific legal scope. Specifically, by inserting it within the field of discrimination, non-compliance with the obligation to make reasonable accommodations is placed within the scope of the prohibition of discriminatory conduct, with the application therefore of the entire legal sanctioning apparatus so effective against discriminatory conduct, starting with the fact that this opens up the possibility of using judicial proceedings for the protection of fundamental rights to react against non-compliance. This position is reinforced by international law itself, where the International Convention on the Rights of Persons with Disabilities, which includes breaches of this type as discriminatory conduct on the grounds of disability (art. 2). To this end, as we will see below, the key to establishing a breach of the duty to adopt such reasonable accommodations is to take into consideration the extent to which their absence has discriminatory effects on the disabled.

From the strict perspective of European Union law, what is significant is that reasonable accommodation is included in a general Directive for equal treatment in employment, where the typical anti-discrimination protection measures are adopted, although without expressly classifying breaches of the duty of reasonable accommodation as discriminatory conduct³⁵. It should even be noted that some specific rulings have considered that the objective dismissal of an employee based on apparently neutral criteria (lower productivity, less versatility, absenteeism) is indirectly discriminatory on the grounds of disability if the employer has not previously made reasonable accommodations to ensure equal treatment³⁶. Moreover, it has been held that once the official public declaration of permanent disability has been made, the employer is obliged, in advance, to provide for or make reasonable adjustments to the workplace to enable the worker to keep his job, or to demonstrate, if necessary, that such adjustments would constitute an undue burden; thus, the legislation of a Member State that allows the automatic termination of a contract of a worker declared permanently disabled, without taking the necessary prior measures to adapt the job, is considered to be contrary to the Directive³⁷.

The regulation is broad in nature, so that it is thinking both of specific adaptations to the job of the disabled person, so that he/she does not encounter

³⁵ Dir 2000/78/CE arts. 2.2.b.ii and 5.

³⁶ ECJ Judgment of 11 September 2019, Nobel Plásticos Ibérica, C-397/18, EU:C:2019:703.

³⁷ ECJ Judgment of 18 January 2024, Ca Na Negreta, C-631/22, EU:C:2024:53.

difficulties in the performance of his/her services, and of measures of all types of facilities, means of work and of the company's own collective organization suitable for the work of the disabled. It also includes measures to remove obstacles to the training and retraining of disabled workers. From a jurisprudential perspective, the Luxembourg Court has held that the general Equal Treatment Directive precludes national legislation which makes it absolutely impossible to retain in office a prison officer whose hearing acuity does not meet the minimum thresholds of acoustic perception laid down in that legislation, and which does not make it possible to check whether the officer can perform such duties, if necessary after reasonable accommodation, so that the disabled person can be dismissed for failure to pass the hearing acuity test³⁸. Or that the Directive in question precludes a blind person from being deprived of any possibility of performing jury duty in criminal proceedings, without assessing the possibility of reasonable accommodation³⁹. In one case, it has even interpreted the duty to make reasonable accommodation to include the obligation to assign the employee to another job for which the disabled person is competent, if it turns out that he or she is unable to perform the essential functions of the job for which he or she was hired⁴⁰.

In any case, since it is incorporated into a Directive, it lacks direct effectiveness, as is general in all Directives, and therefore requires, in order to be effectively enforced, that it be implemented through the corresponding transposition rule of the corresponding Member State. In particular, the rule of the Directive, as it is contemplated, requires significant precision on the part of the national legislator through the aforementioned transposition, especially due to the use of some indeterminate legal concept that must not be left imprecise in the transposition rule. To this end, the national legislator cannot fail to specify the specific scope of the duty to adapt, otherwise it would lead to a high degree of legal uncertainty for the employer as to when, where and how to adopt reasonable accommodation; and, at the same time, it cannot fail to do so because the Directive imposes an effective duty to adapt, which would otherwise be frustrated and the useful effect of the Directive would be unfulfilled.

This does not necessarily require the legislator to clear up directly through the rule itself the uncertainties derived from such indeterminate legal concepts, since the range of possible situations and the necessary answers in each case can be so varied and multiple, even changing with the passage of time, that a

³⁸ ECJ Judgment of 15 July 2021, *Tartu Vangla*, C-795/19, EU:C:2021:606.

³⁹ Judgment of 21 October 2021, *TC, UB and Komisija za zashtita ot diskriminatsia, VA*, C-824/19, EU:C:2021:862.

⁴⁰ Judgment of 10 February 2022, *HR Rail*, C-485/20, EU:C:2022:85.

general provision cannot resolve it in advance. What is essential, however, is that the transposition rule should resolve the way to overcome the legal imprecision. In other words, the transposition rule must at least establish the procedure or mechanism for clarifying the legal generalities.

Three indeterminate legal concepts are detected in the Directive for this purpose, which in turn are included in the equally imprecise qualification of the measures to be adopted as “reasonable”.

The first of these concerns the fact that the measures must be “appropriate” to the end pursued; it is up to the national legislator to specify in detail how it is known whether or not a measure is or is not appropriate.

The second refers to the fact that the adjustments must be different “according to the needs of each specific situation”, so that the legislator must also establish the way in which the different needs are detected for each specific situation.

Thirdly, the European legislator, in principle, does not oblige the employer to adopt the measures when their cost is “excessive”, unless the public authority itself assumes the cost of the adjustments; this implies that the European standard does not oblige to adopt the adjustments when they are “excessive”. Three considerations must be made clear: the rule imposes an obligation on companies to make adjustments, regardless of the fact that it makes this subject to certain conditions; the rule imposes this obligation on the employer in particular, provided that the cost is not excessive, even if there is no public funding; the rule does not require the public authority to finance the excessive costs, but when the Member State chooses to finance them, the employer is obliged to make the adjustments, regardless of the non-economic inconveniences that this entails. In view of the above, the national legislator has two alternatives to clear up any doubts: either to specify when the cost of an adjustment is or is not “excessive”, without the public authority assuming those costs that overwhelm it as excessive; or to impose on the public authority to assume its costs when the cost is deemed to be excessive. Of course, even when the second alternative is chosen, it must also specify when the cost is excessive so that the employer's knows whether or not he must assume such costs, except of course in the theoretical hypothesis that the public authority assumes all costs, both excessive and not excessive. In any case, it should be clear that this is not a theoretical obligation established in the Directive; contrary to what some have understood, the absence of public financing does not cause the disappearance of the obligation to carry out the adjustments, since in any case the employer obligation is maintained when the cost is not “excessive”, and the term

should be interpreted in a reductive way, since the European legislator's intention to impose such an obligation on companies is clear. So much so that, as we have already indicated, it is expressly stated that the necessary adjustment measures and the costs associated with them cannot be considered as indirect discrimination⁴¹; but a employer measure aimed at preventing the hiring of a disabled worker or his or her assignment to a specific position in order to avoid the adoption of reasonable adjustment measures will constitute discrimination.

⁴¹ Dir 2000/78/CE art. 2.2.b.ii.

CHAPTER 12

FREEDOM OF MOVEMENT OF WORKERS, FREEDOM TO PROVIDE SERVICES AND FREEDOM OF ESTABLISHMENT

EDUARDO ROJO TORRECILLA

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I. INTRODUCTION

The free movement of workers is one of the founding principles of what was originally the European Economic Community (EEC), and remains so today within the framework of the European Union (EU).

The free movement of workers cannot be understood without placing it in close connection with the right to EU citizenship, set out in Article 20 of the TFEU, which recognizes the right to move and reside freely within the territory of the Member States to any person holding the nationality of a Member State. Free movement is recognized to those who are EU citizens because they are nationals of a Member State, establishing a clear and legal separation for legal purposes with those who do not have a nationality of an EU State and who, in order to access, work and stay in an EU State, must respect the European and State regulations on foreigners.

As a fundamental and basic principle of the European construction, the regulation of the free movement of workers has remained substantially unaltered in the original law since its incorporation into the EEC treaty, and it has been in the derived law (Regulations and Directives) where it has reached a greater concreteness, which has especially affected family members, once EU citizenship was recognized for all nationals of a Member State.

The importance of the current Art.45 TFEU was very quickly highlighted in the previous wording of Art.48 EEC Treaty, when the ECJ recognized its direct effect, in Judgment of 4 December 1974, *Van Duyn*, C-41/74, ECLI:EU:C:1974:133. The ECJ recognized the possibility of being directly invoked before national courts, being of the opinion that the Community provisions imposed on the Member States a precise obligation which did not require “the adoption of any other measure by the institutions of the Community or the Member States and which leaves them no discretion as to its implementation”.

The rules in focus in this chapter are Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States; Regulation (EU) No. 492/2011 on the free movement of workers within the union (as amended by Regulation (EU) 2016/589); Directive 2014/54/EU, on measures to facilitate the exercise of the rights conferred on workers in the context of free movement of workers.

According to Directive 2004/38/EC, in order to be able to exercise the rights recognized in both primary and secondary legislation, the worker-citizen must have moved to another country at some point in his or her life, and the regulations do not apply, with the impact this has on family members, if this circumstance has not occurred.

It is a regulation that combines the right of residence and the right to work. The regulation makes it possible for any citizen of an EU State to move freely to another, with no other requirement than that of possessing a document proving his or her personality, for a maximum period of three months. It links the stay in the host State, if it is for a longer period, to the fact of having a salaried job or being self-employed; or having sufficient economic resources so as not to be a burden, and neither her/his family if applicable, for the public treasury; or being enrolled in a recognized educational center and having a health insurance that covers the risks they may face in the host country.

Regulation (EU) No. 492/2011 is a rule closely linked to the status of a worker who is posted to another Member State, and if applicable with his/her family. The main objective is to fully ensure that there is no discrimination on grounds of nationality between workers from all Member States.

Directive 2014/54/EU highlights the free movement of workers as a fundamental freedom of EU citizens and as one of the pillars of the European internal market, and recalls that the rights conferred for the full exercise of free movement have been detailed in Regulation (EU) No. 492/2011. It notes the difficulties regarding the full effectiveness of the right, due to the existence of unjustified restrictions and obstacles to its exercise, “such as non-recognition of qualifications, discrimination on grounds of nationality and exploitation when moving to another Member State”, so that the implementation and monitoring of European legislation on this point should be improved.

II. STUDY OF THE CASE LAW OF THE ECJ

The following is an analysis of some of the most interesting judgments to determine what should be understood as a worker and how the rights recognized by EU law can be exercised, with the intervention of the national courts and tribunals of the Member States being decisive in the formulation of preliminary questions, under Article 267 of the TFEU, which must be resolved by the ECJ.

The references are to a migrant worker, i.e. one who has exercised the right of free movement on the territory of one or more other EU Member States. It is already worth recalling the Judgment of 21 February 2006, *Ritter-Coulais*, C-152/03 ECLI:EU:C:2006:123: in addressing the interpretation of Art.48 of the EEC Treaty, it made clear that any national of a Member State, who has exercised her/his right to free movement of workers and who has practiced a professional activity in another Member State, falls, regardless of his place of residence and his nationality, within the scope of application of such norm.

1. The concept of worker exercising the right to freedom of movement

In its case law on what is to be understood as a worker for the purposes of Article 48 of the EEC Treaty (now TFEU Article 45), the ECJ emphasized the breadth of the concept. In Judgment of 31 May 1989, *Bettray*, C-344/87, ECLI:EU:C:1989:226, it stated that the notion must be defined by reference to objective criteria which characterize the employment relationship by reference to the rights and duties of the persons concerned; the essential characteristic of the employment relationship is that a person performs for a certain period, for the benefit and under the direction of another person, certain services for which he receives remuneration. As long as it is the exercise of real and effective activities, neither the more or less high productivity nor the source of the resources that allow the remuneration can have any kind of consequences with respect to the recognition or not of a person as a worker. The exceptions are those voluntary jobs that do not have any type of economic consideration and the activities of little entity that can be considered as marginal or accessory.

The ECJ has been constructing the notion of worker for the purposes of the application of EU legislation, making it clear that it cannot be interpreted in a restrictive manner, conceptualizing it as any person who performs real and effective work, under the direction of another person, and for which he/she receives remuneration.

2. The exclusion of free movement for employment in the public administration

There is a specific limit to the free movement of workers in the TEU, which is its exclusion regarding jobs in the public administration.

The absence of a concept of public function in the EU text has led the ECJ to establish interpretative guidelines for this provision. According to its doctrine, the exclusion provided for in that provision implies that the employment in question “must be connected with the specific activities of the public sector insofar as it involves the exercise of powers conferred by public law and the responsibility for safeguarding the general interests of the State, to which the specific interests of local authorities must be assimilated”.

Employment in the public service means the performance in the public administration, whether under labour or administrative law, of decision-making functions or tasks of special significance due to their connection or involvement with state sovereignty, which means that a worker can be either a

salaried employee or a civil servant or a person contractually bound to the Administration under administrative law. This was made clear early on by the ECJ in Judgment of 12 February 1974, *Sotgiu*, C-152/73, ECLI:EU:C:1974:13, explaining that the interests which the exception in Article 48(4) of the Treaty makes it possible to protect are satisfied notwithstanding the possibility of limiting the admission of foreigners to carry out certain activities in the public administration; but such provision cannot justify the adoption of discriminatory measures in respect of pay and other working conditions against workers after they have joined the administration. In this respect, the nature of the legal relationship between the worker and the administration is irrelevant.

3. The extension of the scope of application of Art. 45 TFEU

The case law of the ECJ has extended the concept of worker for the purposes of the application of Art. 45 TFEU, i.e. to protect the right of free movement of persons working or wishing to work in another EU Member State.

Judgment of 19 June 2014, *Saint Prix*, C-507/12, ECLI:EU:C:2014:2007, finds its origin in the refusal by the British Secretary of State for Work and Pensions to a citizen of French nationality, who was providing her employment activity in England, of an income supplement regulated by the British Social Protection legislation.

The core of the three questions referred for a preliminary ruling by the UK Supreme Court was whether EU law, and more specifically Article 45 TFEU and Article 7 of Directive 2004/38, should be interpreted as meaning that a woman who stops working or seeking work because of physical limitations related to the last stage of pregnancy and the period following childbirth retains the status of a worker within the meaning of those articles.

The ECJ will answer this question in the affirmative and rule that Art. 45 TFEU must be interpreted as meaning that a woman who stops working or seeking work because of physical constraints related to the last stage of pregnancy and the period following childbirth retains the status of ‘worker’, within the meaning of that article, provided that she returns to her job or finds employment again within a reasonable period of time after the birth of her child. It should be added, in order to better situate the terms of the debate, that the worker effectively returned to work three months after the premature birth of her child.

With regard to the situation in which the worker concerned finds herself, the ECJ adds that although the worker loses his status as such once the em-

ployment relationship has ended, it must be borne in mind, on the one hand, that this status may produce certain effects after the termination of the employment relationship and, on the other hand, that a person who is genuinely seeking employment must also be considered a worker. Hence, it must be concluded that the concept of worker for the purposes of Article 45 of the TFEU, and the rights deriving therefrom with regard to the exercise of the right to freedom of movement do not necessarily depend on the existence or the effective permanence of an employment relationship.

– The extension of the concept of worker, and of indirect affectation for the purposes of Art.45 TFEU, to include senior managers and those undertaking training placements in companies, has been carried out by Judgment of 9 July 2015, *Balkaya*, C-229/14, ECLI:EU:C:2015:455.

The ECJ had to give a preliminary ruling on a question relating to Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, more specifically on what is to be understood by a worker. This is an important question since the inclusion of a person providing services for a company within such a concept is decisive in order to reach the thresholds set in Art.1 to guarantee the exercise of the rights of information and consultation by the workers' representatives when the company is obliged to carry out a collective dismissal procedure.

The ECJ states that what characterizes an employment relationship, its essential characteristic, is the fact that a person performs, for a certain period of time, for the benefit of another person and under his direction, certain services in exchange for which he receives remuneration. It does not matter that the legislation of a State may exclude from the concept of employee certain persons who provide certain services for the company (in this case, as manager); in other words, the nature of the employment relationship under national law, in this case German law, cannot have any consequences whatsoever as regards the status of employee for the purposes of European Union law. What the ECJ must examine is whether or not the legal relationship meets the above criteria, and not how it is regulated by national law. Consequently, it will be necessary to analyze the existing legal relationship to determine whether or not the substantive requirement of dependence or subordination exists, adopting a decision on the matter on the basis of all the facts and circumstances characterizing the relationship between the parties.

After examining the content of the legal relationship between the company and the administrator, the court concludes that the broad powers of direction and management that the administrator has are not a legal obstacle to af-

firming the existence of an employment relationship since there continues to exist a relationship of subordination with the company for which she provides her services. Hence, she must be counted, as a worker for EU law purposes, in the number of terminations decided by the company to determine whether or not a collective dismissal procedure should be processed.

The ECJ considers contrary to Article 1.1 of Directive 98/59/EC the exclusion of those who carry out a training activity in a company, do not receive a salary directly from the company, but are paid a remuneration by a federal labour organization that is identical to that which they would receive if they were hired as workers.

The ECJ reiterates its doctrine that the concept of worker in EU law also covers persons who carry out a preparatory traineeship or apprenticeship in a profession, which may be regarded as practical training connected with the actual practice of the profession in question, since such periods are carried out under the conditions of a real and effective paid activity, also, that “neither the legal context of the employment relationship under national law in the context of which a vocational training or a work placement is carried out, nor the origin of the resources intended for the remuneration of the person concerned and, in particular, as in this case, the financing thereof by public subsidies, can have any consequences as to whether or not a person is recognized as a worker.

4. Free movement and its (non-) application in elections to workers’ representative bodies

It is Judgment of 18 July 2017, *Erzberger*, C-566/15, ECLI:EU:C:2017:562.

The question referred for a preliminary ruling by a German court was whether it is compatible with Art. 18 TFEU (principle of non-discrimination) and Art. 45 TFEU (free movement of workers) for a Member State to grant the right to vote and to stand as a candidate for the election of employees’ representatives on the supervisory body of an undertaking only to employees who are employed at the sites of the undertaking or of the group companies located in the territory of Germany.

Do Art.18 and 45 TFEU violate German regulations on the election (both as electors and as eligible) of staff representatives on supervisory boards of companies by not allowing the participation of employees of subsidiary companies of the group providing services outside Germany (which are about 80% of the total number of employees)?

The answer of the ECJ will follow its consolidated doctrine regarding the non-application of Article 18 of the TFEU, which regulates the general principle of non-discrimination on grounds of nationality, when there are other specific rules prohibiting such discrimination. This occurs in this case, since art.45 regulates such prohibition referring specifically to employees as regards their working conditions. Moreover, such precepts are intended to be applied in disputed legal situations governed by the law of the Union.

The dispute must therefore be resolved by determining whether or not there has been a violation of Article 45 TFEU: it will be necessary to determine whether the dispute in question has any “connecting link” with the possible situations covered by EU law, not including the problem of workers who have never exercised their freedom of movement within the Union and do not intend to do so, it being irrelevant that there are workers who provide services in a subsidiary company located outside German territory and which is controlled by the parent company which does have its headquarters in this territory.

The ECJ states that primary law cannot guarantee to a worker that his posting to a Member State other than his Member State of origin will be neutral in social matters, since, having regard to the disparities between the systems and legislation of the Member States, such a posting may, depending on the case, be more or less advantageous in that respect for the person concerned.

The ECJ therefore accepts, in the absence of harmonization or coordination in the field of labour policies, that each State may be free to determine the criteria for connection to the scope of application of its legislation, provided that they are objective and non-discriminatory.

5. Infringement of freedom of movement due to the exclusive use of one language in employment contracts

The matter was addressed by Judgment of 16 April 2013, Las, C-202/11, ECLI:EU:C:2013:239.

The question referred for a preliminary ruling by a court in Antwerp was whether the Decree of the Flemish Community regulating the use of languages in employment relations between employers and employees infringes Article 45 TFEU, concerning the free movement of workers within the EU, insofar as it obliges any company located in the Dutch language region which hires an employee for a position of an international character to draw up in Dutch, on

pain of nullity, all documents relating to the employment relationship. In essence, the referring court asks the Court to determine whether the principle of freedom of movement for workers precludes a Member State's legislation from imposing use of a specific language in respect of the drafting of written employment documents on conditions which are the same as those laid down by the decree in question on the ground that it would constitute an unjustified and/or disproportionate obstacle to that freedom where the employment relations in question take place in a cross-border context.

For the ECJ, the provisions of European Union law do not preclude the adoption of a policy designed to defend and promote one or more of the official languages of a Member State. Therefore, the objective of promoting and encouraging the use of the Dutch language, which is one of the official languages of the Kingdom of Belgium, constitutes a legitimate interest capable of justifying, in principle, a restriction on the obligations imposed by Article 45 TFEU.

The ECJ recalls that it has already had the opportunity to recognize that such objectives form part of the overriding reasons of general interest which may justify a restriction on the exercise of the fundamental freedoms recognized by the Treaty.

However, in order to satisfy the conditions laid down by European Union law, legislation such as that at issue in the main proceedings must be proportionate to those objectives, and it may be that the parties to a cross-border employment contract do not necessarily have a command of the official language of the Member State concerned, with the result that in such circumstances, the formation of free and informed consent between the parties requires that they be able to draw up their contract in a language other than the official language of that Member State. Legislation which did not merely impose the use of the official language of the State for employment contracts of a cross-border nature, but which also made it possible to draw up a version of those contracts, the text of which was also authentic, in a language known to all the parties involved, would be less prejudicial to the freedom of movement for workers than the legislation at issue in the main proceedings, while still being suitable for securing the objectives pursued by the latter legislation.

The ECJ will declare that Article 45 TFEU concerning freedom of movement for workers within the European Union must be interpreted as meaning that it precludes legislation by a Member State such as that at issue in the main proceedings which imposes an obligation on an undertaking situated in a region where there is only one official language when hiring a worker in the context of employment relations with an international character to use that

language exclusively for the drafting of all documents relating to the employment relationship, on pain of nullity.

6. The maintenance of the worker's status after the termination of the employment contract

The Judgment of 6 November 2003, Ninni-Orasche, C-413/01, ECLI:EU:C:2003:600, concerned the application of the then current Article 48 of the EC Treaty, specifically the refusal by an Austrian Ministry of the application for a study grant by an Italian citizen residing in Austria who had previously had a short-term employment contract.

For the ECJ, a temporary employment carried out for two and a half months by a national of a Member State in the territory of another Member State of which he is not a national could confer on him the status of worker within the meaning of Article 48, provided that the employed activity carried out was not of a merely marginal and ancillary nature, it being for the referring court to carry out the necessary factual verifications.

For the ECJ, circumstances before and after the period of employment were irrelevant, such as the fact that the person concerned did not work in that job until some years after her entry into the host Member State, acquired, shortly after the termination of her short-term temporary employment relationship, the necessary qualifications for a university degree in the host Member State on completion of her secondary education in her country of origin, and, after the termination of the short-term temporary employment relationship and until the start of her university studies, endeavored to find a new job.

The ECJ will declare that a national of the EU, such as the applicant in the main proceedings, in the event that he has the status of migrant worker within the meaning of Article 48 of the Treaty, does not necessarily find himself in a situation of voluntary unemployment, in accordance with the relevant case law of the Court of Justice, merely because his employment contract, concluded from the outset for a fixed term, comes to an end.

7. The importance of differentiating between a scholarship and an employment contract

The question was raised in Judgment of 6 November 2003, Ninni-Orasche, C-413/01, ECLI:EU:C:2003:600.

A scholarship holder of Italian nationality claimed that during his activity he had been subjected to treatment equivalent to that of German doctoral students who were holders of an employment contract and for whom such contracts were reserved.

For the ECJ, a researcher working on a doctoral thesis with a grant should only be considered as a worker within the meaning of Art. 39 of the EC Treaty only if his activity has been carried out for a certain period of time under the direction of an institute belonging to the association which awarded the grant and if he has received remuneration in return for this activity, and that an association governed by private law, such as the one which awarded the grant, must respect the principle of non-discrimination in relation to workers, in accordance with Article 39 of the EC Treaty.

In both cases, the referring court must determine whether or not a worker is involved and whether or not the principle of equality between nationals and foreigners has been respected.

8. Protection of the rights of job seekers

The close relationship between the free movement of workers and the protection to that effect of those seeking employment in another Member State has been addressed in Judgment of 17 December 2020, G. M. A, C- 710/19, ECLI:EU:C:2020:.

The decision of the Foreigners Office to deny the request for the right of residence for more than three months was not in accordance with EU law. It was based on the fact that the evidence submitted was not suitable to prove that he had a real chance of being hired, and only the evidence submitted after a reasonable period of time had been allowed for his knowledge should have been evaluated.

The ECJ rules that Art. 45 TFEU and Article 14(4)(b) of Directive 2004/38 must be interpreted “as meaning that a host Member State is required to allow a Union citizen a reasonable period, starting from the time when that Union citizen registers as a jobseeker, to become aware of job vacancies likely to be suitable for him and to take the necessary steps to be recruited”, and that during that period, the host Member State may require the job-seeker to prove that he is looking for work, and “only after that period has elapsed may the Member State require the job-seeker to prove not only that he is still looking for work but also that he has a real chance of being recruited”.

9. Freedom of movement in the health field and the value of the professional title obtained in another Member State

The issue of free movement of workers in the health sector has been addressed by the ECJ in Judgment of 28 April 2022, *Gerencia Regional de Salud de Castilla y León*, C-82/21, ECLI:EU:C:2022:310.

The dispute arose between an employee and the Directorate of the Regional Health Management of the aforementioned Spanish Autonomous Community, because the latter refused to take into consideration the professional experience acquired by the interested party at Portugal for the purpose of calculating her seniority in the context of the recognition of her professional career.

The ECJ will reach its judgment after stating, in the light of the case-file before the Court of Justice and without prejudice to the verification of that point by the referring court, that it does not appear that taking into account the length of services of the health professional concerned and the individual development achieved by that professional in terms of knowledge, experience in healthcare, teaching and research tasks, as well as in terms of the fulfilment of the healthcare and research objectives of the organisation concerned, can be regarded as an inappropriate measure for the purpose of attaining the objective of a reinforced guarantee of the protection of the interests of the public, experience in health care, teaching and research tasks, as well as in terms of compliance with the health care and research objectives of the organization concerned, may be regarded as an inappropriate measure for achieving the objective of a reinforced guarantee of health protection which that measure appears to pursue.

On the other hand, as regards the assessment of the “strictly necessary” character, the referring court is reminded that it must take into account, first, that the recognition of the professional experience acquired by the applicant worker in the health system of another Member State, in this case Portugal, cannot generally be regarded as an obstacle to the attainment of that objective. Also, that the recognition of such professional experience could be carried out by means of a procedure that offers the interested party the possibility of demonstrating the equivalence of her professional experience acquired in other Member States,

The ECJ concludes that Art. 45 TFEU and Art. 7 of Regulation (EU) n. No 492/2011 must be interpreted as precluding national legislation on the recognition of professional careers in the health service of a Member State which precludes the taking into account, as seniority, of professional experience ac-

quired by a worker in a public health service of another Member State, unless the restriction on the freedom of movement for workers which that legislation entails pursues an objective in the general interest, makes it possible to ensure the attainment of that objective and does not go beyond what is necessary to attain it.

10. **Compensation for isolation during COVID-19. Unjustified difference in treatment**

In Judgment of 15 December 2023, *Thermalhotel Fontana*, C-411/22, ECLI:EU:C:2023:490, the reference for a preliminary ruling concerned the interpretation of Art. 3(1)(a) of Social Regulation (EC) No 883/2004 and Art. 7 of Regulation (EU) No 492/2011.

It was filed in the context of a dispute between a company and the District Administration of Southeastern Styria (Austria), concerning the latter's refusal to compensate the former "for the loss of income suffered by its employees during the periods of isolation at their respective homes in Slovenia and Hungary, imposed as a result of the COVID-19 pandemic by the competent authorities of those Member States".

The questions referred for a preliminary ruling by the Austrian Supreme Administrative Court were as follows:

Does a sickness benefit within the meaning of Article 3(1)(a) of [Regulation No. 883/2004] constitute compensation payable to an employee for pecuniary loss suffered as a result of the impossibility of carrying out his work during his isolation as a person who has contracted COVID-19 or who is suspected of having contracted COVID-19 or of being infectious, where that compensation must initially be paid by the employer to the employee and, from the time of payment, the employer is subrogated to the right to compensation vis-à-vis the Austrian Federal Administration?

If the answer to the first question is in the negative, are Article 45 TFEU and Article 7 of [Regulation No 492/2011] to be interpreted as precluding national legislation under which the grant to workers of compensation for loss of earnings caused by an isolation ordered by the health authorities on account of a positive result in a COVID-19 test (it being the case that such compensation is to be paid initially by the employer to the workers and, from the time of payment, the employer is subrogated to the corresponding right of reimbursement vis-à-vis the Austrian federal administration to be conditional upon the isolation being ordered by a national authority on the basis of national epide-

miological regulations, so that such compensation is not paid to workers who, as cross-border workers, reside in another Member State and whose isolation (“quarantine”) is ordered by the health authority of their State of residence?

To the first question, the answer is negative. In other words, the financial compensation does not constitute a sickness benefit covered by EU legislation in question and therefore does not fall within the scope of the Regulation.

To the second, the most important from the perspective of the exercise of the right to free movement of workers, the answer is clear and unequivocal in favor of the latter. Articles TFEU and 7 of Regulation (EU) n. 492/2011 must be interpreted as precluding legislation of a Member State under which the grant of compensation for loss of earnings suffered by workers as a result of isolation ordered to following a positive result in the COVID-19 test to be made subject to the condition that the imposition of the isolation measure was ordered by an authority of that Member State in accordance with that legislation.

The ECJ reaches this conclusion (see paragraphs 31 to 48) after first considering that the measures adopted were taken for reasons of public health, a circumstance that allows the free movement of workers to be restricted (Art. 45.3 ECJ). However, it immediately rejects that this measure complies with Community law, clearly stating this in paragraph 44, which reads as follows:

“However, the compensation only of persons required to isolate under national legislation (...), inter alia, of migrant workers required to isolate under the health measures in force in their Member State of residence, does not appear to be appropriate to achieve that objective. The compensation of such migrant workers would be just as likely to encourage them to comply with an isolation measure imposed on them, to the benefit of public health. Furthermore, as regards the possibility of monitoring compliance with an isolation measure, it appears, subject to verification by the referring court, that the compensation referred (...) is granted to eligible persons as a result of the imposition of an isolation measure on them and not on account of their compliance with that measure”.

11. Admission to teaching lists only for those who have acquired experience in public centers of the State

In Judgment of 15 June 2023, Ministero dell’Istruzione, dell’Università e della Ricerca, C-132/22, ECLI:EU:C:2023:489, the reference for a preliminary ruling was made by the Administrative Court of the Italian Region of

Lazio. It concerned the interpretation of Art. 45(1) and (2) TFEU and Art. 3(1) (b) of Regulation (EU) No 492/2011.

The petition was filed in the context of a dispute between two Italian nationals who acquired professional experience in Member States other than the Italian Republic, and the Ministry of Education, Universities and Research, regarding the legality of a Ministerial Decree which provided that only candidates who have acquired certain professional experience in Italian public centers of higher artistic, musical and choreographic training will be admitted to the procedure for inclusion in the lists to be drawn up for the recruitment of personnel, through employment contracts for an indefinite period and fixed-term employment contracts, in Italian public centers of higher artistic, musical and choreographic training.

More specifically, the question referred for a preliminary ruling was whether Article 45(1) and (2) TFEU and Article 3(1), (b) of [Regulation no. 492/2011] are to be interpreted as precluding a rule such as that provided for in Article 1(655) of Law n. 205/2017, by virtue of which, in order to participate in the procedure for inclusion in the lists of aptitude intended for the subsequent conclusion of teaching contracts for an indefinite period or for a fixed term in Italian institutions [of higher artistic, musical and choreographic training], only the professional experience acquired by candidates in such national institutions is taken into consideration, without taking into account that obtained in institutions of the same level situated in other European countries, having regard to the specific purpose of the procedure in question which is to combat precariousness in Italy, and, in the event that the Court of Justice does not find that the Italian legislation is contrary in the abstract to the European legal order, whether the measures provided for in that legislation may be regarded as proportionate, in particular, to attain the abovementioned objective of general interest.

The ECJ's judgment is a perfect reminder (see paragraphs 17 to 41) of all its case law on the free movement of workers. It starts from the assertion that the purpose of all the provisions of the Treaty relating to freedom of movement is to make it easier for nationals of the Member States to pursue all types of occupational activity in the territory of the Union and precludes measures which are liable to place such nationals in an unfavorable situation if they wish to pursue an economic activity in the territory of another Member State.

It is stressed that freedom of movement would not be fully realized if Member States could deny the benefit of this provision to their nationals who have availed themselves of the facilities provided for in Union law and who

have acquired professional qualifications in a Member State other than the State of which they are nationals.

Therefore, the ECJ concludes that Art. 45 TFEU and Art. 3(1)(b) of Regulation (EU) n.No 492/2011, must be interpreted as meaning that they preclude national legislation which provides that only candidates who have acquired certain professional experience in national public higher artistic, musical and choreographic training establishments may be admitted to a procedure for inclusion on lists drawn up for the recruitment, by means of employment contracts of indefinite duration or fixed-term contracts, of staff in those establishments and which thus prevents professional experience acquired in other Member States from being taken into account for the purposes of admission to that procedure.

12. Social assistance benefits for the mother of a national of a Member State who has exercised that right

The Judgment of 21 December 2023, *Chief Appeals Officer and Others*, C-488/21, ECLI:EU:C:2023:1013, responds to a reference for a preliminary ruling from the Irish Court of Appeal and deals with the interpretation of Art. 7(1)(d) of Directive 2004/38/EC.

It arises (see paragraph 19) between GV, a Romanian national, who is the mother of AC, also a Romanian national residing and working in Ireland and who obtained Irish nationality through naturalization, and the head of the Appeals Division, the Social Protection Appeals Division, the Minister for Labour and Social Protection, and the Attorney General, Ireland, concerning the award to GV of a disability allowance.

Once the administrative procedure had been exhausted, the benefit claimant lodged an appeal for annulment before the High Court, which annulled the contested decision, considering that art. 11.1 of the 2005 Law was incompatible with Directive 2004/38, since the family member could not be required to remain dependent on a citizen of the Union in order to continue to enjoy the right of residence in the host Member State. The Irish authorities lodged an appeal against this judgment before the court that would make the reference for a preliminary ruling, arguing that the Irish national legislation was in conformity with Community law.

Since the conflict concerned the adequacy of the Directive, and specifically of the aforementioned art. 11.1 to Directive 2004/38, these three questions were referred for a preliminary ruling:

1) Is the right of residence derived by a direct ascendant of a worker who is a citizen of the Union referred to in Article 7(1)(d) of [Directive 2004/38] conditional upon that relative being continuously dependent on the worker?

2) Does [Directive 2004/38] preclude a host Member State from limiting access to a social assistance benefit for a member of the family of a Union citizen worker who enjoys a derived right of residence on the ground that he is dependent on that worker, where access to that benefit would mean that he is no longer dependent on the worker?

3) Does [Directive 2004/38] preclude a host Member State from limiting access to a social assistance benefit for a member of the family of a worker who is a Union citizen and enjoys a derived right of residence on the ground that the payment of that benefit will result in the family member in question becoming an unreasonable burden on the social assistance of the host Member State?"

The ECJ will conclude, on the basis of its settled case-law, that the fact that a national of a Member State who has moved to and resides in another Member State subsequently acquires the nationality of the latter Member State, in addition to his nationality of origin, cannot mean that he is deprived of the right to equal treatment within the meaning of Article 45(2) TFEU, as implemented by Article 7(2) of Regulation No 492/2011, and that the conditions relating to the grant of social advantages must not be stricter than those laid down by the latter provision and that the questions referred, which, in that context, must be understood as meaning that the conditions relating to the grant of social advantages must not be stricter than those laid down by Article 7(2) of Regulation n. 492/2011, and that the requirements relating to the grant of social advantages must not be stricter than those provided for in the latter provision, and that "the questions referred for a preliminary ruling, which, in this context, must be understood as referring to the interpretation of Article 45 TFEU, as applied by secondary law, must be answered in the light of the foregoing considerations.

Having established this legal line, the ECJ goes on to answer the three questions referred for a preliminary ruling and, after examining the EU legislation, concludes that it follows from a combined reading of Article 2(2)(d) and Article 7(1)(a) and (d) of Directive 2004/38 that the direct relatives in the direct ascending line of a worker who is a Union citizen enjoy a derived right of residence for more than three months when they are 'dependent' on that worker, and that it follows from Article 14(2), read in conjunction with Article 2(2)(d) and Article 7(1)(a) and (d), of Directive 2004/38, it follows that a direct ascendant of a worker who is a Union citizen enjoys a derived right of residence for as long as he is dependent on that worker, and this until such time as that ascendant, who has resided legally for a continuous period of five years in

the territory of the host Member State, may apply for a permanent right of residence in accordance with Article 16(1) of Directive 2004/38”

Applying these criteria to the case at hand, the ECJ concludes that the benefit claimant fulfilled the requirement to enjoy as a family member a derived right of residence, and that the citizen who has acquired the nationality of a Member State, and on whom the family member is dependent, is entitled to equal treatment with the nationals of the host State.

It is then necessary to address what should be understood by social advantages, which the ECJ does in paragraphs 64 to 67, referring to its consolidated case law, which has specified that it includes all advantages which, whether or not linked to an employment contract, are generally granted to national workers principally by reason of their objective status as workers or by reason only of their residence in the national territory, and whose extension to workers who are nationals of other Member States thus makes it possible to facilitate their mobility within the Union and, consequently, their integration in the host Member State, and which may include social assistance benefits which fall at the same time within the specific scope of Regulation n. 883/2004, such as, for example, social security which are not covered by a contract of employment such as, as the referring court states, the disability allowance.

The conclusion of all the above, and again with support from previous case law, is that the status of dependent ascendant, within the meaning of Article 2(2)(d) of Directive 2004/38, cannot be affected by the grant of a social assistance benefit in the host Member State, since to decide otherwise would be tantamount to admitting that the grant of such a benefit could cause the person concerned to lose his status as a dependent family member, and thus justify the withdrawal of that benefit, or even the loss by that person of his right of residence, so that such a solution would, in practice, prohibit that dependent family member from claiming that benefit, thereby infringing the equal treatment accorded to the migrant worker.

Finally, the ECJ adds a clarification of undoubted social as well as legal interest, which is that the social security contributions that a migrant worker pays in the host Member State by virtue of the paid activity he carries out contribute to the financing of the social policies of that State and must therefore benefit from them under the same conditions as national workers. Therefore, the objective of avoiding an excessive economic burden on the host Member State cannot be regarded as an overriding reason in the general interest capable of justifying unequal treatment between migrant workers and national workers.

For all the foregoing reasons, the ECJ declares that Art. 45 TFEU, as applied by Art. 7.2 of Regulation (EU) No. 492/2011, in conjunction with Art.

2..2 d), with art. 7.1 a) and d), and with art. 14.2 of Directive 2004/38/EC, must be interpreted as meaning that it precludes legislation of a Member State which allows the authorities of that Member State to refuse to grant a social assistance benefit to a direct ascendant who, at the time when the application for that benefit is submitted, is dependent on a worker who is a citizen of the European Union, or even to withdraw his right of residence for more than three months, on the ground that the grant of such a benefit would have the effect that that family member would cease to be dependent on that worker who is a citizen of the Union and would thus become an unreasonable burden on the social assistance system of that Member State.

13. Cross-border workers. Equal treatment in the receipt of family allowance

Case C802/18, Judgment 2 April 2020.

The dispute concerned, according to the national referring court, the interpretation of Art. 45 TFEU, Art. 7.2 of Regulation (EU) n. 492/2011, Art. 67 of Regulation (EC) n. 883/2004, and Art. 60 of Regulation (EC) n. 987/2009 of the European Parliament and of the Council of 16 September 2009 adopting the implementing rules for Regulation (EC) No. 883/2004. In entering into the resolution of the dispute, the ECJ will not consider the latter two rules to be applicable.

It arose between a cross-border worker, residing in Belgium and providing services in Luxembourg, due to the refusal of the Luxembourg “Caisse pour l’avenir des enfants” (CAE) to grant a family allowance to a minor who had been placed in the worker’s home by a court order.

The CAE withdrew the family allowance he was receiving for the child, by resolution of February 7, 2017 and with retroactive effect from August 1, 2016, the justification for such measure being that he had no filiation link with the worker, and that he should not be considered a “member of the family” of the latter in accordance with Article 270 of the Luxembourg Social Security Code, which includes, for the purpose of receiving the allowance, children born in and out of wedlock and adopted children of that person.

After an initial administrative decision in favor of the appeal filed by the cross-border worker, and a subsequent decision confirming the decision of the CAE, he filed an appeal in cassation before the Supreme Court, which would submit the request for a preliminary ruling to the ECJ.

The doubts raised before the SC were precisely about the exclusion of the disputed case of art. 270, so that its application implied the non-generation of the right, in this case, of the family allowance, under the national legislation for the “non-resident worker”. The question referred for a preliminary ruling was whether the principle of equal treatment guaranteed by Article 45 TFEU and Article 7(2) of Regulation [No 492/2011], as well as Article 67 of Regulation [No 883/2004] and Article 60 of Regulation [No 987/2009], preclude the provisions of a Member State under which cross-border workers may not receive, in respect of minors taken into their household by virtue of a judicial decision, child benefits linked to the exercise, by those workers, of an activity as an employed person in that Member State, whereas all children taken into care by virtue of a judicial decision and residing in that Member State are entitled to such an allowance, which is paid directly to the natural or legal person who has custody of the child and in whose home the child has his or her legal domicile and actually and continuously resides. Does the fact that the cross-border worker is responsible for the maintenance of the child affect the answer to the previous question?

The judgment is a comprehensive and detailed reminder of European law and the case law of the European Court of Justice on the right to free movement of workers within the territory of the Union and the general principle of equal treatment for social and tax benefits, including family benefits.

The ECJ goes on to emphasize that it has already stated that a family allowance such as the one at issue, for the purposes of its granting, in the present dispute is a social advantage and constitutes a social security benefit falling within the category of family benefits, and that the principle of equal treatment precludes any type of discrimination, not only direct discrimination on grounds of nationality but also any form of indirect discrimination which, by applying other criteria of differentiation, in fact leads to the same result.

For the ECJ, in the case in question, no personal right is granted to the children of non-resident workers, since the right is granted to the migrant worker and in a differentiated manner according to the filiation link with each child living in the family home. Likewise, that the indirect discrimination alleged is in no way appropriate or necessary to resolve the alleged problem of the export of Luxembourg family benefits, with a double argument, which is that the objective sought by the rule could be pursued by means of measures that affect resident workers and cross-border workers without distinction.

As for the first argument, it is certainly not without relevance, since the national legislator itself adopted a broad interpretation of the circle of beneficiaries of the subsidy, by granting it to all minors who have a filiation link with the cross-border workers, without having to prove the existence of a common household or the fact that such workers have the main burden of the child.

The legislation of the Member State should therefore, as a general rule, apply to all workers providing services in that Member State, whether or not they are residents, in order to ensure equal treatment.

The thesis of the contribution of migrant workers is of course also applied to cross-border workers, so that the ECJ already advances the thesis of the national legislation being contrary to the Community legislation, in the paragraph, when it states, on the basis of the available data, that in case being considered, under the applicable national legislation, non-resident workers do not benefit under the same conditions as resident workers from the family allowance at issue in the main proceedings in respect of children taken into their homes, in so far as, unlike a resident worker, a cross-border worker does not receive that allowance in respect of a child taken into his home and entrusted to his care.

There is a difference in treatment in strict application of the aforementioned provisions of the Luxembourg Social Security Code, as the ECJ emphasizes, which will be to the detriment, principally, of nationals of other States, insofar as non-residents are mainly non-nationals, so that such a difference constitutes indirect discrimination on grounds of nationality. This conclusion is not affected by the fact that the decision on judicial reception was given by a court other than the State in which the worker provides services, by virtue of the obligation laid down in the abovementioned regulations to apply judgments given in another Member State, i.e. (paragraph 37) to attribute the same legal value to it as to an equivalent national judgment.

Finally, the ECJ ruled on whether child support is of any importance for the purposes of resolving the dispute, answering that it would be so if such a requirement were common to all workers, both resident and non-resident, as otherwise the equal treatment of cross-border workers would be violated.

For all of the above reasons, the ECJ declares that Art. 45 TFEU and Art. 7.2 of Regulation (EU) n. 492/2011, must be interpreted as precluding provisions of a Member State according to which frontier workers are entitled to receive a family allowance, on the basis of the fact that they pursue an activity as employed persons in that Member State, solely for their own children, and not for a spouse's children with whom those workers have no child-parent re-

lationship, but whom those workers support, whereas any child residing in that Member State is entitled to receive that allowance.

14. Restrictions on the free movement of professional footballers and free competition between companies

Case C-650/22 Judgment 24 october 2024

Request for a preliminary ruling made, under Article 267 of its Operating Rules, by the Court of Appeal of the Belgian city of Mons, by decision of 19 September 2022. The dispute concerns the interpretation of Arts. 45 and 101 of the Treaty on the Functioning of the EU, i.e. the provisions governing the free movement of workers and the rules on competition between companies.

The case concerns a retired professional footballer living in Paris who signed a four-year employment contract with a Russian club in 2013. A year later, the club terminated the contract for reasons “that had to do” with the player, starting a dispute in court with cross-petitions from both parties regarding salary rights and compensation.

The player subsequently received an offer from a Belgian club, conditional on him being able to be registered to play and not being jointly liable for any compensation that the player might have to pay to the Russian club, a payment which the player was forced to make (10.5 million euros) by the FIFA “Dispute Resolution Chamber”.

Shortly afterwards, the player was signed by a French club, and filed a claim against FIFA and URBSFA for a ruling on his payment of compensation “for the damage he considered to have suffered due to the unlawful conduct of both associations”, which was upheld by the Belgian court before which the claim was filed, its ruling being appealed before the court that would refer the request for a preliminary ruling to the ECJ.

The ECJ, following a thorough analysis of the case and with extensive reference to the Bosman judgment, it concluded (see paragraph 44) that “... in essence, it cannot be excluded that the various rules at issue in the main proceedings, particularly when considered together, constitute an obstacle to the free movement of workers and to competition. It also takes the view that, in the present case, there are serious, precise and consistent indications that the existence and application of those rules may have constituted an obstacle to BZ’s recruitment by a new professional football club following the termination of his employment contract with Lokomotiv Moscow. Indeed, it states that those rules made it difficult for BZ to be recruited, as demonstrated in particular by

the conditions precedent set by Sporting du Pays de Charleroi in the job offer it sent to him”, and therefore decided to refer this question to the Court for a preliminary ruling:

“Must Articles 45 [TFEU] and 101 [TFEU] be interpreted as prohibiting:

- the principle of solidarity in the payment, by the player and the club wishing to recruit him, of the compensation owed to the club with which the contract has been terminated without just cause, as provided for in Article 17[, paragraph 2] of the [RETJ], in conjunction with the sporting and financial penalties provided for, respectively, in paragraphs 4 and 1 of that same article;
- the possibility that [the national football association] to which the player’s previous club depends may refuse to issue the [CTI], required for a new club to be able to hire the player, if there is a dispute between that previous club and the player (Article 9[, paragraph 1, of that Regulation] and Article 8.2.7 of Annex 3 to [that Regulation])?”.

The ECJ, based on its consolidated jurisprudence, accepts that there are limitations to free movement if they are duly justified, and that they are only suitable to guarantee the achievement of the claimed objective “if they truly respond to the effort to achieve it in a consistent and systematic manner”, and therefore, based on the distribution of powers with the national courts, it concludes that it will be up to the referring Belgian court to determine whether the rules of the FIFA Regulations meet such requirements, “in light of the arguments and evidence presented by the parties”, without prejudice, also in the exercise of its powers, to the ECJ being able to provide guidance to the court for the resolution of the conflict, something that it will do in a fairly broad manner from paragraph 96 onwards.

The Court places particular emphasis on the analysis of the criterion of taking into account national legislation, and, referring not only to its theoretical examination but also to its practical application, concludes that it does not guarantee the right to free movement, and its opinion is as follows:

“The official commentary of the RETJ published by FIFA specifies that, in reality, this first criterion has almost never been applied in practice, since the FIFA CRD mainly applies the regulations adopted by this same association and, only as a supplement, Swiss law. The fact that, in reality, the national legislation of the country in question is not taken into account and, therefore, is not effectively respected, clearly goes beyond what is necessary to maintain a certain degree of stability in the clubs’ squads with a view to guaranteeing the regularity of football competitions between clubs. As regards the second criterion expressly provided for in this provision, relating to the “characteristics of the sport”, this criterion refers to a general concept, although it is not

accompanied by a precise definition that would make it possible to understand by virtue of what and under what modalities this criterion may have to be applied in the calculation of the compensation owed by the player, so that, although this criterion is presented as an “objective criterion”, it is, in reality, open to discretionary application and, therefore, unpredictable and difficult to control. The adoption of a criterion with such characteristics and such consequences cannot, however, be considered necessary to guarantee the regularity of football competitions between clubs.”

It is also manifestly restrictive and not in compliance with the principle of proportionality that the transfer certificate is not issued if there is a dispute between the player and the club for which he previously worked, since this implies the following: “... this provision, the application of which may lead to the player in question being prevented from exercising his professional activity and the new club from fielding that player solely because there is a dispute between the latter and his former club concerning the possible termination of a contract without just cause, is manifestly contrary to the principle of proportionality, especially since its application does not take into account the circumstances of the specific case, in particular the factual context in which the termination of the contract took place, the respective conduct of the player in question and his former club, and the role played or not played by the new club, which is therefore ultimately subject to the prohibition of registering the player and of fielding him in competitions.”

For all the reasons set out above, the ECJ states that

“1) Article 45 TFEU must be interpreted as precluding rules adopted by a private law association, the purpose of which is, in particular, to regulate, organise and control world football, which provide:

- first, that a professional player who is party to an employment contract, who is deemed to have terminated that contract without just cause, and the new club which employs him after that termination are jointly and severally liable for the payment of compensation to the previous club for which the player was employed, which must be determined on the basis of criteria which are imprecise or discretionary, have no objective link with the employment relationship in question or are disproportionate;

- secondly, that where the professional player is employed for a protected period under the employment contract which has been terminated, a sporting sanction must be imposed on the new club prohibiting it from registering new players for a certain period, unless the new club proves that it did not induce that player to terminate the contract, and,

- thirdly, that the existence of a dispute relating to the termination of that contract constitutes an obstacle for the national football association of which the former club is a member to issue the international transfer certificate required for

the player to be registered with the new club, with the consequence that that player cannot take part in football competitions on behalf of the new club, unless it is shown that those rules, as interpreted and applied in the territory of the Union, do not go beyond what is necessary to achieve the objective of ensuring the regularity of football competitions between clubs by maintaining a certain degree of stability in the squads of professional football clubs.

CHAPTER 13

**COORDINATION OF NATIONAL SOCIAL SECURITY SYSTEMS
(REGULATIONS EC/883/2004 AND EC/987/2009)¹**

DOLORES CARRASCOSA BERMEJO²

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¹ This work is part of the results of the following research projects: the MCIU-funded Non-Oriented Research Projects entitled “El régimen jurídico del transition Law y su impacto sobre los derechos de los trabajadores en mares y océanos” (ref. GIU 21/014) and the Project PID2021-122254OB-I00, “La incidencia del Derecho de la UE en las futuras reformas laborales” financed by the Spanish Ministerio de Ciencia e Innovación and the European Regional Development Fund (ERDF).

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I. INTRODUCTION

2025 marks the 67th anniversary of the Social Security coordination Regulations. As early as 1957, the Treaty of Rome foresaw the need for Community rules to ensure that the exercise of freedom of movement did not result in workers losing their social security rights³. The Regulation EEC/3/1958 (the basic one) and ECC/4/1958 (the implementing one), the first substantive regulations adopted by the EEC, were replaced by Regulations EEC/1408/71 and EEC/574/7⁴. This chapter deals with the current Regulations EC/883/2004 and EC/987/2009, applicable since 1 May 2010, which have simplified and replaced the previous regulations. After a series of amendments⁵, the Commission proposed the first major reform of these regulations on 13.12.2016⁶. In the end, this reform could not be adopted before the dissolution of the European Parliament in 2024, although there were approaches in 2019 and 2021.

The coordination Regulations are long, highly technical and complex. They have given rise to more than 500 judgments of the Court of Justice, most of them in response to preliminary interpretative rulings. The competent institutions of each Member State, through the Administrative Commission for the Coordination of Social Security Systems (AC)⁷, have reached a consensus on the interpretation of some of the more complex provisions. Indeed, the AC adopts Decisions and Recommendations, which are published in the Official Journal of the EU⁸, but which are soft law in the sense that they are not legally binding⁹. Similarly, following the COVID-19 pandemic, the AC has issued numerous Guidance notes in relation to international telework, which lacks an ad-hoc regulation in the framework of the Regulations. These Guidance notes

³ EEC Treaty Art.51, EC Treaty Art.42 and currently TFEU art. 48.

⁴ ROBERTS, Simon: «A short history of Social Security coordination» en VVAA *50 years of Social Security Coordination. Past – Present – Future. Report of the conference celebrating the 50th Anniversary of the European Coordination of Social Security*. Prague 7 y 8–2009. EU Commission. P. 8 DOI: 10.2767/94087.

⁵ Regulation EC/883/2004 has been amended by the following regulations: 988/2009; 1244/2010; 465/2012; 1224/2012; 1224/2012; 517/2013; 1372/2013; 1368/2014 and 2017/492. Regulation EC/987/2009 has been amended by the following Regulations 1244/2010; 465/2012; 1224/2012; 1372/2013; 1368/2014 and 2017/492.

⁶ COM (2016) 815 final 2016/0397 (COD) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2016%3A815%3AFIN>.

⁷ The AC is composed of one government representative from each government, assisted by a technical advisor when necessary. A representative of the European Commission itself attends the meetings (Regulation EC/883/2019 Art. 71 et seq.).

⁸ Find an updated list of Decisions and Recommendations <https://ec.europa.eu/social/BlobServlet?docId=4987&langId=en>

⁹ See, among others, judgments of 5 December 1967, Van der Vecht, C-19/67, EU:C:1967:49; 14 May 1981, Romano, C-98/80, EU:C:1981:104, paragraph 20; 8 July 1992, Knoch C-102/91, EU:C:1992:303, paragraph 52; 10 February 2000, FTS, C-202/97, EU:C:2000:75, paragraph 32.

have been compiled and finally published in a AC Decision ¹⁰. There should be coordination between the activities of the AC and those of the European Labour Authority, as one of the main objectives of this “new” agency is to effectively implement and enforce the coordination Regulation, facilitating access to information and cooperation between the national institutions involved ¹¹.

This chapter deals only with the scope of the Regulations and their guiding principles ¹², always taking into account the relevant case law of the Court of Justice.

1. Coordination: basic premises

For a proper analysis of the Coordination Regulations, the following basic premises need to be taken into account:

1. Regulations are an instrument for achieving freedom of movement ¹³ which is also its main hermeneutical canon ¹⁴. The first recital of the preamble of Regulation EC/883/2004 states « *The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.* ». The coordination Regulations counteract the ‘territorialist tendency’ of national social security systems. These rules often wrongly assume that those to whom they are addressed necessarily work and reside with their families on their own territory, and forget those who move internationally ¹⁵.

2. The main legal basis for the Regulations is the TFEU Art. 48, which, as in the previous treaties, calls for the adoption of secondary legislation to protect freedom of movement. In particular, it envisages for a system of coordination of national social security systems which, as a minimum content, should include the aggregation of periods and the export of benefits, which we will discuss later. This article, amended for the first time by the Treaty of Lisbon, contains the following new features compared to the Treaty of Rome:

¹⁰ Decision H14 of 21 June 2023 <http://data.europa.eu/eli/C/2024/594/oj>

¹¹ Regulation (EU)2019/1149 Art. 1(4).

¹² For a more detailed and recent analysis of the current coordination regime, see PENNINGS, F. ‘European Social Security Law’. Intersentia, 7th edition 2022 p.484 or my contribution to the chapter “Trabajo en el extranjero” of the Memento Práctico Social 2024, Madrid, Lefebvre, 2024 marginal 9440-9529 p. 1961-2005.

¹³ See judgment of 13 October 1977, Manzoni, C-112/76, EU:C:1977:152, paragraph 10. In the same vein judgment of 12 June 1997, Merino García, C-266/95, EU:C:1997:292, paragraph 27.

¹⁴ See judgments of 9 June 1964, Nonnenmacher, C-92/63, EU:C:1964:40, and of 23 November 2000, Elsen, C-135/99, ECLI:EU:C:2000:647, paragraph 35.

¹⁵ CORNELISSEN, R.: «Les axes de réforme et les principes généraux du règlement n° 883/2004» Revue Droit Sanitaire Social Janvier-Février, 2010.

- For the first time, coverage of the self-employed is explicitly mentioned. This group had already been covered since the 1980s under a different legal basis¹⁶.
- This article no longer requires unanimity for the adoption of the Regulations, but only a qualified majority under the ordinary legislative procedure of co-decision between the Parliament and the Council¹⁷.

3. The EU legislator did not opt for harmonization, which would have meant the creation of a common social security system for all Member States, a possibility that remains utopian¹⁸. On the contrary, it was chosen coordination, which can be described as a neutral technique¹⁹, in the sense that it does not replace or change national social security systems, which remain the responsibility, the competence, of Member States, albeit in accordance with EU law²⁰. At any rate, it should be emphasized that harmonization and coordina-

¹⁶ In fact, Regulation EC/883/2004 itself, which was adopted before the entry into force of TFEU Art. 48, continues to take as its legal basis for the inclusion of self-employed persons TFEU Art. 308 - former Art. 235 TEC - (recital 2 of the Regulation preamble). This Article 308 introduces a “flexibility clause” which allows the Council to adopt unanimously, despite a lack of clear competence, Commission proposals concerning the internal market, which is one of the main objectives of the EU.

¹⁷ However, as a counterbalance to the abolition of unanimity, certain measures to protect national interests (regarding social security systems, e.g. its scope, cost or financial structure, or affects the financial balance of that system), were introduced in the Treaty on European Union, Art. 48. These measures have not been implemented so far.

¹⁸ The TFEU Art. 153(1)c, maintains the EU’s harmonization competence in the field of social security, as established by the Treaty of Amsterdam. This competence is “merely theoretical, as it has never been used and is not foreseen to be used in the near future”. Apart from the fact that there is no real political interest - not even from the citizens themselves according to the Eurobarometers - in harmonizing these legislations, and the insurmountable unanimity requirement (now 27 Member states), there are other obstacles that could further hinder this hypothetical harmonizing intervention. On the one hand, the need for such an EU intervention to comply with the subsidiarity requirement, and on the other hand, the legal limitation that prevents this intervention from affecting the right of the Member States to define the fundamental principles of their social security systems, or from having a significant impact on the financial balance (TFEU Art. 153 (4)).

¹⁹ See Recital 4 of the Regulation EC/883/2004 Preamble: “It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination”. Directive (EU)2011/24 in relation to health reimbursement overlaps with the chapter on sickness benefits in the Coordination Regulations, but also contains certain harmonization measures. See about the relationship between both instruments CARRASCOSA BERMEJO, D.: «Cross-border healthcare in the EU: Interaction between the Directive 2011/24/EU and the coordination Regulations on Social Security» Springer ERA Forum October 2014, Volume 15, Issue 3. <https://link-springer-com-443.webvpn.synu.edu.cn/article/10.1007/s12027-014-0358-8> and STRBAN G. (ED); BERKI, G.; CARRASCOSA BERMEJO, D.; VAN OVERMEIREN, f.: Access to healthcare in cross border situations. Analytical Report 2016. FreSsco European Commission DG Employment. January 2017.

²⁰ See Judgment 1-8-2022, S, C-411/20, EU:C:2022:602, paragraph 58. Furthermore, national legislators may not enact regulations that impede free movement (Judgment of 26 January 1999, Terhoeve, C-18/95, EU:C:1999:22, paragraphs 37 to 39) or discriminate on grounds of nationality (Judgments of 25 February 1986, Spruyt, C-284/84, EU:C:1986:79, and of 7 July 1988, Stanton, C-143/87, EU:C:1988:378). Of course, national social security legislation must not hinder the freedom to provide services (Judgment

tion should not be seen as antagonistic but complementary legal techniques, since coordination requires a minimum degree of similarity between systems in order to achieve its protective objectives in practice. Furthermore, the coordination Regulations should not widen or increase divergences between systems, nor impose unnecessary ad-hoc differential treatment between them which would add to the inherent differences in the social security systems of the Member States²¹.

4. In a nutshell, the coordinating regulations use a number of instruments to address the social security problems of those who make use of the free movement of persons:

- a) First, they identify the single national legislation applicable to their insurance and the payment of contributions (Title II of Regulation 883/2004). They also identify the legislation(s) under which they can claim one or more benefits in the event of a contingency (Title III of Regulation 883/2004).
- b) Secondly, the Regulations guarantee equal treatment under the applicable national social security legislation by prohibiting any direct or indirect discrimination on grounds of nationality. (Art. 4 Regulation 883/2004).
- c) Thirdly, in order to preserve rights in the course of acquisition and to facilitate the fulfilment of the conditions required for the recognition of benefits under these national legislations, provisions are made for
 - the assimilation of foreign benefits, income, facts or events occurring under other national legislation as if they had occurred in the territory of the legislation which is applied (Art. 5 Regulation EC/883/2004).
 - similarly, the aggregation technique allows specific account to be taken of periods of foreign insurance, employment, self-employment or residence. Aggregation specifically addresses the fragmented nature of migrants' careers, which may prevent them from meeting the qualifying conditions (contributions or residence pe-

of 28 April 1998, Kroll, C-158/96, EU:C:1998:171) or the free movement of goods (Judgment of 28 April 1998, Decker, C-120/95, EU:C:1998:167).

²¹ See, for instance, judgment of 31 May 2001, Leclere Diaconescu, C-43/99, EU:C:2001:303. See previously the paradigmatic judgment of 15 January 1986, Pinna I, C-41/84, EU:C:1986:1, which annulled Regulation EEC/1408/71, art. 73.2, which, with regard to family benefits, derogated from the general rule laid down in the first paragraph of the same provision exclusively in favor of France, and which was considered to contain indirect discrimination on grounds of nationality contrary to the free movement of workers.

riods) required by the applicable national legislation (Art. 6 Regulation EC/883/2004)

- d) Finally, in order to preserve acquired rights to social security benefits, the coordination regulations provide for the exportability of benefits. This prevents the payment of benefits from being made conditional on the maintenance of residence in the territory of the system that owes them. (Art. 7 Regulation EC/883/2004)

5. The coordinating regulations have a purely protective purpose, which is reflected in the so-called ‘Petroni principle’ or the intangibility of national rights²². Indeed, the application of regulations cannot lead to the loss of rights acquired exclusively under applicable national law. This hermeneutic principle, recognised by the ECJ in the case of various benefits²³ only allows Regulations to offer more protection than that resulting from the strict autonomous application of national legislation, preventing them from eliminating or reducing the protection obtained exclusively under the latter. In short, regulations must supplement, or at least not diminish, the protection afforded by the applicable national social security legislation.

6. Social security is Public Law, so once the nationality of the applicable legislation has been determined by the coordination Regulations²⁴, the nationality of both the social security institutions, that can apply that legislation, and the courts, that can resolve any disputes arising from its application, will be the same²⁵. In such cases, the law determines the forum, since the

²² See acknowledging this hermeneutic principle, PERL, G.: «L’interprétation des instruments de coordination de sécurité sociale». RBSS. Aout-Septembre, 1991, p. 468.

²³ This principle implies that the objective of the Treaty would not be achieved if migrant workers, by exercising their right to freedom of movement, were to lose the social security benefits guaranteed to them by the legislation of a Member State. This principle was already recognized in the context of Regulation EEC/3/1958 (judgment of 15 July 1964, Van der Veen, C-100/63, EU:C:1964:65) and then clearly confirmed in the Petroni case on the cumulation of pensions (judgment of 21 October 1975, Petroni, C-24/75, EU:C:1975:129). This principle is reiterated in judgments of 23 October 1986, De Jong, C-254/84, EU:C:1986:78, paragraph 15; 14 December 1989, Dammer, C-168/88, EU:C:1989:652, paragraph 21; 5 October 1994, Van Munster, C-165/91, EU:C:1994:359, paragraph 27; 26 September 2000, Engelbrecht, C-262/97, EU:C:2000:492, paragraph 37.

²⁴ The national law applicable to the social security legal relationship must not coincide with the law governing your employment contract (Private Law), which is determined by other conflict rules (according to Rome Convention of 19-6-1980 -OJEU C334, 30-12-05- or EU Regulation Rome I -Regulation CE/593/2008).

²⁵ See, *obiter dicta*, judgment of 14 November 2002, Baten, C-271/00, EU:C:2002:656, paragraph 44, where it is established that under coordination Regulations there is a “system under which as a matter of principle the exclusive legislative competence of a Member State is matched by the competence of the administrative and judicial authorities of the same State. It follows that legal situations are effectively protected by the designation of a national system competent in its entirety and do not require recognition of judgments relating to that area”.

“territorialist” nature of public social security law prevents social security foreign law from being applied by a national Court. Although the ECJ itself refers to the concept of ‘conflict of laws’²⁶, this cannot exist in the technical legal sense of Private International Law²⁷, since it is impossible for a national court, applying a foreign social security legislation, to impose insurance or benefit obligations on the social security institutions of another Member State. In short, it is not possible for a social security system to assume obligations based on a foreign legislation or by the imposition of a judgment handed down in another Member State²⁸. For instance, considering pensions, more than one legislation could be applicable, and the migrant could be entitled to more than one pension. In such cases “when migrant workers have problems with the calculation of their pro rata temporis pensions, they must take legal action in each of the payer/debtor Member State. This circumstance has never been challenged, because a Member State would not accept that a foreign national court could rule over a decision of its public administration.”²⁹ Indeed, social security is expressly excluded from the scope of the Brussels I bis Regulation, which aims to determine the competent national courts for civil, commercial and employment contracts³⁰.

7. Finally, it should also be remembered that, as common and uniform rules, the Regulations apply directly and take precedence over national legislation. Thus, a breach of the EU coordination rules attributable to any public administration - including the national courts themselves - which causes damage in the field of social security to persons protected by the Regulations would enable them to seek redress before the courts and even to claim compensation from the defaulting Member State³¹.

²⁶ Judgment of 24 March 1994, Van Poucke, C-71/93, EU:C:1994:120.

²⁷ See about the concept of conflict-law FREYRIA, Ch. «Sécurité sociale et Droit International privé» *Revue critique de Droit International privé*. 1956. p. 409.

²⁸ This does not preclude the possibility that, once the main national legislation applicable (to the insurance or protection of the person concerned) has been determined, the coordination Regulations may establish obligations of cooperation between social security institutions, or they may envisage assimilation of conditions or even aggregation of foreign contributions made under foreign legislation applied just in an ancillary way. A comparison of the application of the social security coordination Regulations by national courts in the different Member States in CARRASCOSA BERMEJO, D.; LHERNOULD, J.-P. “MoveS Legal report 2019. The application of free movement of workers and social security coordination rules by national courts”. MoveS. European Commission. 2019. P. 50. ISBN 978-92-76-16224-7 doi: 10.2767/564151 KE-01-20-104-EN-N. <https://ec.europa.eu/social/BlobServlet?docId=22857&langId=en>

²⁹ Carrascosa Bermejo, D., Molina Millán, J. The binding nature of posting PDA1 issued under EU social security Coordination Regulations and the possible role of national courts. ERA Forum 24, p. 79 (2023). <https://doi.org/10.1007/s12027-023-00749-6>

³⁰ Regulation (EU) 1215/2012 Art. 1 (2) c.

³¹ For instance, Judgment of 28 June 2001, Larsy, C-118/00, EU:C:2001:368, paragraphs 33 ff.

2. **Coordination Regulations relationship with the bilateral social security conventions concluded between Member States**

As a rule, the Regulations replace bilateral conventions concluded between Member States prior to their entry into force. By way of exception, the basic Regulation provides that a bilateral agreement may be preferentially applied if two conditions are met: on the one hand, that it is mentioned in Annex II of Regulation 883/2004 itself and, on the other hand, that this convention is more favorable or protective than the Regulations themselves³².

Moreover, the ECJ case-law also allows for the preferential application of these more favorable conventions over the Regulations, even if they were not mentioned in that Annex. The court considers that the conventions, once ratified, are part of the national law of the signatory states. Therefore, in accordance with the aforementioned principle of the intangibility of national rights (the so-called Petroni principle), they would take precedence over the coordinating regulations, which cannot eliminate national rights and can only be of a purely protective nature³³. This preferential application is subject to the additional condition that the rights in the process of being acquired under such conventions must have been created before the entry into force of the Regulations themselves in the two signatory Member States³⁴. This may, of course, have occurred on different dates, depending on their accession to the EU.

II. SCOPE OF APPLICATION OF THE COORDINATION REGULATIONS

1. **Territorial scope of application**

The current territorial scope of the Regulations covers the 27 EU Member States and their outermost regions³⁵. The Regulations also apply, by agreement, in the three countries with which the EU forms the European Economic Area (EEA) (Norway, Iceland and Liechtenstein) and in Switzerland, 31 Mem-

³² Regulation EC/883/2004 Art.8.

³³ Judgment of 7 February 1991, Rönfeldt, C-227/89, EU:C:1991:52, rectifying the previous doctrine set out in the judgment of 7 June 1973, Walder, C-82/72, EU:C:1973:62.

³⁴ Judgments of 9 November 1995, Thévenon, C-475/93, EU:C:1995:371; 5 July 98, Gómez Rodríguez, C-113/96, EU:C:1998:203; 9 November 2000, Thelen, C-75/99, EU:C:2000:608; 5 February 2002, Kaske, C-277/99, EU:C:2002:74.

³⁵ On the Spanish side, the Regulations apply to Ceuta, Melilla and the Autonomous Community of the Canary Islands. For France they apply in Mayotte, Guyana, Guadeloupe, Martinique, Réunion and Saint Martin. For Finland in the Åland Islands and for Portugal in the Azores and Madeira.

ber States in total. Exceptionally, the application of the coordination Regulations to mobility with a final destination in a third country has been allowed if there has been a previous exercise of free movement and there is a sufficient legal link with the social security system of one of these 31 Member States³⁶.

The UK left the EU on 1 February 2020, after long negotiations and much uncertainty³⁷. Brexit was the result of a non-binding referendum in June 2016, preceded by a heated debate on immigration. Earlier there were also shameful concessions made by the European Council itself in an attempt to retain the UK, which distorted the right to free movement of workers³⁸. There are currently two international treaties between the EU and the UK in force which are ‘simultaneously applicable, although not to the same persons at the same time’³⁹. Regarding social security coordination, the Withdrawal Agreement endorses the application of the EU coordination Regulations, in whole or in part, to EU or British citizens who exercised their right to free movement before the end of 2020, as well as to their family members and survivors. For those not covered by the Withdrawal Agreement, essentially for cross-border situations between the EU and the UK arising after 2021, the Trade and Cooperation Agreement applies, in particular a 131-page Protocol on the Coordination of Social Security, which is very similar to the Coordination Regulation, but with certain limitations. For example, important benefits such as family, dependent or special non-contributory benefits are excluded from its scope of application. In addition, neither unemployment benefits nor permanent disability benefits, whether contributory or non-contributory, are exported⁴⁰. The Withdrawal Agreement applies to Gibraltar, which is excluded from the Trade

³⁶ See, for example, the judgment of 29 June 1994, *Aldewereld*, C-60/93, EU:C:1994:271, which upheld the application of the Regulations to a Dutch worker employed by a German temporary employment agency - and insured under the German social security system - for the purpose of being posted to work in Thailand. See also on the application of the Regulations to mobility beyond the 31 Member States: judgments of 19 March 2015, *Kik*, C-266/13, EU:C:2015:188, and of 7 June 2012, *Bakker*, C-106/11, EU:C:2012:328, or, more recently, judgment of 25 November 2021, *QY*, C-372/20, EU:C:2021:962.

³⁷ Thanks to a transitional period set out in the Withdrawal Agreement, the application of EU law was maintained until the end of 2020 even though the UK no longer participated in the EU institutions.

³⁸ Reference can be made, for example, to the indexation of family benefits granted to migrant workers in the UK, who adjust their amount to the standard of living in the country of residence of the children and who receive, in most cases, lower family benefits than their non-migrant co-workers, thus allowing for an inequality of treatment prohibited by the current coordination rule (Regulation EC/883/2004 Art.67), as confirmed years later by the ECJ in the judgment of 16 June 2022, *Commission vs Austria*, C-328/20, EU:C:2022:468. On concessions to the UK, see the document “A new regime for the UK in the EU”, extract from the conclusions of the European Council of 18-19 February 2016, OJEU 23-2-16, C-691 (2016/C 69 I/01). Point 2(e) and Annex 5.

³⁹ See an analysis of both Treaties regarding mobility and social security coordination in CARRAS-COSA BERMEJO, D. “Key Ideas on Mobility and Social Security after Brexit” ERA Forum (2021) Vol 22. P. 387_406. <https://doi.org/10.1007/s12027-021-00685-3>

⁴⁰ *Ibidem*.

and Cooperation Agreement. Therefore, a complicated agreement between the EU and the UK is being negotiated to cover mobility to Gibraltar that has not been signed at the time of writing this chapter.

2. Temporal scope of application

The application of EC Regulation 883/2004 (the basic Regulation), although in force since April 2004, was delayed until 1-5-2010, i.e. until the entry into force of EC Regulation 987/2009 (the implementing Regulation). In principle, they only give rise to rights from this date (1.5.2010); however, their protective purpose and the progressive formation of social security rights require that situations prior to the entry into force of the regulations be taken into account⁴¹. In this sense, the aggregation of periods of insurance, employment and residence completed before 1.5.2010 in other Member States is provided for, including those completed in a State prior to its accession to the EU⁴². Of course, in the case of aggregation of insurance periods, the prior obligation of insurance and payment of contributions in that State is a prerequisite⁴³. The current basic Regulation also offered generous transition periods that allowed the change of applicable legislation to be postponed until 2020⁴⁴.

3. Material scope of application

3.1 COORDINATED NATIONAL LEGISLATIONS

The Regulations coordinate the national social security legislation of the 31 States mentioned. The term legislation has been defined very broadly covering “laws, regulations and other statutory provisions and all other implementing measures”⁴⁵, in force or future, that must be related to certain social security

⁴¹ Among these, it is worth mentioning the possible revision of the benefits amount previously recognized (Regulation EC/883/2004 Art.87.4) or the previous refusal of benefits (Regulation EC/883/2004 Art.91).

⁴² Regulation CE/883/2004 Art.87(2).

⁴³ For example, an Austrian seafarer who worked in the Netherlands (prior to Austria’s accession to the EU in 1995) was not entitled to the required aggregation because he had not paid any contributions in the Netherlands, due to the prohibition of insurance for non-EU nationals under Dutch legislation, which at the time could not be considered against the equal treatment principle (Judgment of 27 October 2016, Wieland, C-465/14, EU:C:2016:820).

⁴⁴ See Regulation EC/883/2004 Art.87(8) or 87a.

⁴⁵ Regulation Art.1(l).

branches. This concept of legislation generally excludes agreements concluded by collective bargaining between employers and employees or by their representatives⁴⁶. So, it is also excluded from coordination Regulations the so called “second pillar of social protection”, regarding, e.g. companies’ pensions established in collective agreements whose protection in cases of employees concerned free movement, is articulated through another EU legislation ad hoc⁴⁷.

Coordinated national social security legislation is that which necessarily connects with any of the following contingencies/risks listed in Regulation EC/883/2004 Art.3: sickness benefits (including healthcare); maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors’ benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits and family benefits. The connection does not have to be very close, allowing coordination of national social security rules on registration, affiliation, registration of companies and contributions⁴⁸. Inclusion concerns general or special schemes (including those for civil servants), it is irrelevant whether they refer to contributory or non-contributory schemes.

This list of contingencies/risks is exhaustive, with each of them covered by a specific chapter of Title III of Regulation EC/883/2004, with provisions not applicable, unless expressly referred to, to a contingency other than the one for which they are intended⁴⁹. This referral occurs, for example, from the chapter on invalidity to the regulation contained in the chapter on old age. When identifying the contingency concerned, in order to determine whether the Regulations apply, it is not the national designation of the benefit (the *nomen iuris*) that must be taken into account but its constituent elements, purpose, conditions for granting it, etc⁵⁰. E.g. the ECJ has defended the coordination of a German legislation associated with the risk of long term care, a

⁴⁶ However, such agreements could be considered if they have been the subject of a decision by the public authorities which makes them obligatory or extends their scope and the Member State concerned makes a declaration to that effect, notified to the President of the European Parliament and the President of the Council of the EU and published in the OJEU. This was the case in France in relation to certain collective agreements regulating supplementary but compulsory old-age benefits (AGIRC and ARRCO), see Regulation EC/1386/2001.

⁴⁷ See Directive EC/98/49/EC and Directive (EU) 2014/50/EU or judgment of 10 March 2011, Casteels, C-379/09, EU:C:2011:131.

⁴⁸ See judgments of 29 June 1994, Aldewereld, C-60/93, EU:C:1994:271; 10 February 2000, FTS, C-202/97, EU:C:2000:75; 19 March 2002, Hervein and others, C-393/99 and C394/99, EU:C:2002:182.

⁴⁹ See judgment of 20 February 1997, Martínez Losada, C-88/95, EU:C:1997:69, where it is confirmed that national rules on unemployment benefits cannot be the subject of coordination rules under the old age chapter of Title III of the basic Regulation.

⁵⁰ See for example judgment of 11 June 1998, Kuusijärvi, C-275/96, EU:C:1998:279, in which a Swedish “maternity” benefit was qualified as a family benefit. The national *nomen iuris* is not relevant for being considered a social security legislation or a tax legislation, see judgments of 15 February 2000, Commission v France, C-169/98, EU:C:2000:85, and of 26 February 2015, de Ruyter, C-623/13, EU:C:2015:123.

contingency not included in the list, considering it to be assimilated to a sickness benefit with which it understood there was a close relationship⁵¹.

In order to facilitate the identification of coordinated national social security legislation, Member States are required to notify the Commission annually of a statement of the national legislation which they consider falling within the objective scope of the coordinating legislation⁵². It should be borne in mind that a Member State may presume the coordination of any national legislation included in the declaration of another Member State. However, the absence of certain national legislation from the declaration does not, by itself, make it possible to state for sure that it does not fall within the substantive scope of the Regulations if the conditions for being included are met. However, other Member States could infer from such an exclusion of the declaration that a specific legislation does not fall within that scope⁵³.

3.2 SPECIAL NON-CONTRIBUTORY BENEFITS (SNCB)

The difficulty of distinguishing between social assistance, which is excluded from the scope of application of the Regulations, and social security led to the express inclusion in the objective scope of the SNCB Regulation with characteristics of both⁵⁴.

The introduction of this category in 1992 responded to the following compromise⁵⁵: on the one hand, its non-exportability was expressly recognized⁵⁶ and, on the other hand, the application of the principle of equal treatment - the prohibition of discrimination on grounds of nationality - was imposed within the framework of the national legislation of the State of residence, which alone was competent for its recognition and payment. In addition, it was possible to aggregate the periods of foreign residence necessary for recogni-

⁵¹ Judgment of 5 June 1998, *Molenaar*, C-160/96, EU:C:1998:84. The failed 2016 EC Proposal to amend the Regulations provided for long-term care benefits to be the subject of a new chapter ad hoc. Furthermore, long term care benefits are defined for the first time, to be the subject of a new chapter ad hoc.

⁵² Regulation EC/987/2009 Art. 9.

⁵³ Judgment of 3 March 2016, *Commission v Malta*, C-12/14, EU:C:2016:135.

⁵⁴ The origin of this regulation is to be found in Regulation EC/1247/1992 which amended the previous basic coordination regulation (Regulation EEC/1408/71).

⁵⁵ Judgment of 11 November 2014, *Dano*, C-333/13, EU:C:2014:2358, paragraph 54. See, in this sense, LHERNOULD, J. P. (ed.), EICHENHOFER, E., RENNUY, N., VAN OVERMEIREN, F. and WOLLENSCHLÄGER, F., *Assessment of the impact of amendments to the EU social security coordination rules to clarify its relationship with Directive 2004/38/EC as regards economically inactive persons*, Analytical Report 2015, FreSsco, European Commission, June 2015, p. 25.

⁵⁶ Express exclusion from the objective scope of Art. 7 of the basic Regulation.

tion⁵⁷. The aim was thus to put an end to the controversial reluctance of some Member States to export certain benefits which were considered internally as social assistance and which, nevertheless, were repeatedly qualified by the Court of Justice as non-contributory social security benefits and, therefore, fully exportable⁵⁸.

The identification of SNCBs is not simple, as they are non-contributory benefits that can affect different contingencies and have been described as hybrids (between social security and social assistance): considering their personal scope of application, their objectives and their implementing rules. To classify a benefit as an SNCB, the following three cumulative requirements must be met⁵⁹. Firstly, the SNCBs must be mentioned in Annex X of Regulation EC/883/2004. Secondly, SNCBs must be a non-contributory benefit⁶⁰. Finally, the purpose of the SNCB must be either replacement or auxiliary coverage of contingencies covered by the Regulations with the aim of guaranteeing beneficiaries a minimum subsistence income or specific protection for people with disabilities⁶¹.

It is also not straightforward to identify the Member State of residence where the Regulations determine that the SNCBs could be recognized. The basic Regulation defines residence very vaguely as “*the place where a person habitually resides*”, as opposed to the term “stay” which is defined as tempo-

⁵⁷ Moreover, in accordance with judgment of 4 November 1997, Snares, C-20/96, EU:C:1997:518, paragraphs 47 and 48, the State of residence must treat benefits due under the legislation of other Member States as if they had been granted under the applicable legislation, as regards entitlement to supplementary benefits; and to take into account a first declaration of invalidity or disability in the territory of another Member State as a first declaration in the State of residence. finally, under these new rules, entitlement to a benefit is not subject to the condition that the claimant has previously been subject to the social security legislation of the State in which he intends to receive the allowance, whereas this was the case prior to the entry into force of Regulation EC/1247/92 (see judgment of 20 June 1991, Newton, C-356/89, EU:C:1991:265).

⁵⁸ See judgments of 9 October 1974, BIASON, C-24/74, EU:C:1974:99, and of 22 June 1972, FRILLI, C-1/72, EU:C:1972:56, which gave rise to the proposal for Regulation COM (85) 396 final (OJEC 1 985 C 240, p.6), which, after a complex procedure, and various judgments in favour of exportability (such as the judgment of 20 June 1991, Newton, C-356/89, EU:C:1991:265), was adopted by Regulation EC/1247/92. On this process see VERSCHUEREN, H. “Les prestations spéciales à caractère non contributif et le règlements communautaires 140817”, *Droit social*, n° 11/1995, pp. 921 930, Nov1995; and SÁNCHEZ RODAS, C.: *La aplicación del derecho comunitario a las prestaciones especiales no contributivas*. Comares, 1997, p.30.

⁵⁹ The identification of this type of services is controversial, the Administrative Commission has tried to clarify the issue in the judgments of 29 April 2004, Skalka, C160/02, EU:C:2004:269; 8 March 2001, Jauch, C-215/99, EU:C:2001:139; 31 May 2001, Leclerc, C-43/99, EU:C:2001:303; 18 October 2007, Commission v European Parliament and Council of the EU supported by Finland, Sweden and United Kingdom, C-299/05, EU:C:2007:608.

⁶⁰ In the sense that its financing must come exclusively from compulsory taxation to cover general public expenditure, and that its recognition and calculation must be independent of the contributions made by the applicant. See, for instance, judgment of 19 September 2013, Brey, C-140/12, EU:C:2013:565, paragraph 35.

⁶¹ See Regulation EC/883/2004 Art.70 (2)(a).ii.

rary residence⁶². The Implementing Regulation provides indicative, non-hierarchical criteria for identifying the residence or “center of interest” of the person in question⁶³. In any case, this is a concept of residence specific to the Regulations and, therefore, does not necessarily coincide with the concept of legal residence used in Directive 2004/38/EC, for the purposes of free movement, or with the concept of tax residence in national rules.

It should be noted that the case law of the Court of Justice seems to have broken the compromise reached in the regulation of SNCBs (non-exportability in exchange for equal treatment in the State of residence), endorsing in several judgments⁶⁴ that some Member States refused to recognize inactive citizens, nationals of other Member States, the recognition of benefits aimed at guaranteeing subsistence (minimum income). The Court argued that these inactive citizens did not meet the legal residence requirement (under Dir 2004/38/EC, the free movement directive, and its transposition), itself required by the national social security legislation of the competent State (the State of residence, this time identified under the Coordinating Regulations). In this context, some SNCBs have been considered as social assistance⁶⁵, so that their application itself prevented them from proving temporary legal residence, as it showed that they did not have sufficient resources and that they intended to become a burden on the social assistance of the host Member State⁶⁶. Surprisingly, the Court found no infringement of the right to equal treatment on grounds of nationality in the refusal of these SNCB subsistence benefits to inactive EU citizens whom it considered to lack legal residence, even though the Member State of residence guaranteed the same benefits to its nationals in the same situation of need.

⁶² Regulation EC/883/2004 Art.1(j) and (k).

⁶³ Regulation EC/987/2009 Art.11 which offers different criteria in case of controversy, such as the duration and continuity of the subject’s presence in the territory of a State or his personal situation etc. In any case, if the application of the criteria does not make it possible to determine the actual place of residence, it is necessary to consider the will of the person, as is apparent from the facts and circumstances, and in particular the reasons that led him/her to move.

⁶⁴ See judgments of 19 September 2013, Brey, C-140/12, EU:C:2013:565; 11 November 2014, Dano, C-333/13, EU:C:2014:2358; 15 September 2015, Alimanovic, C-67/14, EU:C:2015:597; 25 February 2016, García Nieto, C-299/14, EU:C:2016:114.

⁶⁵ Judgment of 19 September 2013, Brey, C 140/12, EU:C:2013:565.

⁶⁶ Temporary legal residence starts after 3 months of temporary stay and ends after 5 years of legal residence when permanent residence starts and equal treatment is granted, as far as this is relevant here, for access to social assistance. During temporary residence, apart from sufficient resources, it is required to have health insurance covering all risks covered in the host Member State (Directive 2004/38/EC art.7). See on both requirements the Commission Guidelines (Brussels, 2.7.2009 COM (2009) 313 final Communication from the Commission to the European Parliament and the Council, pp. 8 and 10). <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:EN:PDF>.

This was the case, firstly, for inactive persons who did not appear to be seeking employment⁶⁷. Secondly, for EU nationals who had worked in Germany for less than one year (11 months) and who lost their status as workers 6 months after the end of their employment according to the free movement directive. These job seekers, in a state of need, were kept in a kind of limbo as they remained. In that Member State from which they could not be expelled, while they accredited that they were actively seeking employment and had real possibilities of being hired⁶⁸. Thirdly, the refusal to recognize this type of assistance benefits during the initial three-month stay in another Member State was also endorsed⁶⁹.

The ECJ went even further, and upheld, in the context of an infringement procedure, just before Brexit, the refusal of common - not special - non-contributory family benefits to inactive persons who did not meet the legal residence requirement⁷⁰. Fortunately, this doctrine can be considered overcome, as it has been clarified that a family benefit cannot be considered social assistance and therefore the equal treatment laid down in the coordination Regulation should prevail⁷¹.

3.3 EXPLICIT EXCLUSIONS

The Regulations exclude from their objective scope of application the so-called social assistance and medical assistance both for persons in a need situation⁷².

⁶⁷ Judgment of 11 November 2014, Dano, C333/13, EU:C:2014:2358.

⁶⁸ Judgment of 15 September 2015, Alimanovic, C67/14, EU:C:2015:597. However, as it was clarified later on by the ECJ case-law, if these jobseekers were the primary carers of their own children attending school in the host Member State, they would have a derived right of residence based on Article 10 of Regulation EC/492/2011 on free movement of workers. This derived right of residence is independent of the free movement Directive, so it is not necessary to fulfil the requirement of sufficient resources established under it in the case of inactive EU citizens temporary residing in another Member State. Judgment of 6 October 2020, Jobcenter Krefeld, C-181/19, EU:C:2020:794, paragraph 34. See CAR-RASCOSA BERMEJO, D. "Chapter 19. The Legal Status of EU National Jobseekers: Their Right to Free Movement and Social Protection"/en/ JORENS, Y. The Lighthouse Function of Social Law. Proceedings of the ISLSSL XIV European Regional Congress Ghent 2023. Springer, 2023.P. 377

⁶⁹ Judgment of 25 February 2016, Garcia Nieto, C299/14, EU:C:2016:114.

⁷⁰ Judgment of 14 June 2016, Commission v United Kingdom, C308/14, EU:C:2016:436. On this judgment, see O'BRIEN Charlotte.: «Don't think of the children! ECJ approves automatic exclusion from family benefits in case C-308/14 Commission v. UK» EU Law Analysis <http://eulawanalysis.blogspot.pt/2016/06/dont-think-of-children-ECJ-approves.html>

⁷¹ Judgment of 1 August 2022, case S, C-411/20, EU:C:2022:602. The ECJ recognized the right of inactive nationals of another Member State to family allowances during the first three months of residence. The Court emphasizes that EU citizens enjoy equal treatment and that exceptions must be applied restrictively and must always be limited to social assistance during the first three months of residence (Dir 2004/38/EC Art. 24.2)

⁷² Regulation EC/883/2004 Art.3(5)(a).

As noted above, it is very difficult to distinguish social assistance from non-contributory social security benefits, whether they are special or not, as it shares constituent elements with them ⁷³. The exclusion of social assistance from the scope of application of the Regulations does not prevent it from obtaining protection under other EU legislation, such as the principle of non-discrimination on grounds of nationality, which protects EU citizens themselves ⁷⁴, or the right to free movement of workers, which prevents such discrimination in access to social benefits ⁷⁵.

Also excluded are the obligations of a shipowner which are not covered by the specific coordination rules on benefits (Regulation EC/883/2004 Title III) ⁷⁶. However, those coordination rules relating to the affiliation relationship, or the payment of social security contributions (Regulation EC/883/2004 Title II) are applicable to shipowners ⁷⁷.

Finally, the following benefits are out of the scope of coordination Regulations: those compensating for damage suffered by individuals, or envisaged in favor of victims of war and military action, victims of crime, murder or terrorist acts, or even damage caused by State agents in the performance of their duties, etc.

4. Personal scope of application

For a long time, the coordination of systems was limited to EU national migrant workers who are or have been covered by the social security legislation of one or more Member States within the material scope of coordination Regulations. Initially, only employees were covered, including frontier workers ⁷⁸ and posted workers ⁷⁹. Later, self-employed workers were also covered ⁸⁰, as well as the civil servants insured under a special social security scheme ⁸¹.

⁷³ Regulation EC/883/2004 Art.3(2). On the difficult delimitation of social assistance and the *vis atractiva* that social security enjoys when the benefits' nature is controversial, see. SÁNCHEZ RODAS NAVARRO, C: «Las prestaciones no contributivas y el Reglamento 883/2004» in *Revista del Ministerio de Trabajo e Inmigración*, nº 64 (2006), pp. 130 et seq.

⁷⁴ TFEU Art.18

⁷⁵ TFEU Art.45 and Regulation UE/492/2011 Art.7. See also, for example, judgments of 27 May 1993, Schmid, C310/91, EU:C:1993:221, and of 12 May 1998, Martínez Sala, C85/96, EU:C:1998:217.

⁷⁶ Regulation EC/883/2004 Art. 3(4)

⁷⁷ Regulation EC/883/2004 Art. 3(2)

⁷⁸ Defined as any person who is employed or self-employed in one Member State and resides in another Member State to which he/she normally returns daily or at least once a week (Regulation EC/883/2004 Art.1(f).

⁷⁹ They are not, as usual, migrants in search of work, but employees sent abroad temporarily by their employers, with whom they already have an employment relationship that is maintained during this posting.

⁸⁰ Regulation EC/1390/1981.

⁸¹ Regulation EC/1606/1998.

Currently, the coordination Regulations cover EU citizens regardless of their professional situation. The requirement is that they have to be subject to the national social security legislation (i.e. by means of insurance or residence), even if it is not occupational, whether general or special, contributory or non-contributory, full or partial, voluntary or involuntary, current or former.

The EU nationality requirement was also nuanced, as stateless persons and refugees who are legally resident in a Member State, insured under a national social security system, and in a situation of transnationality were admitted for coverage. In addition, they may also be nationals of Norway, Iceland and Liechtenstein (EFTA countries that formed the European Economic Area with the EU) or Switzerland, as ad-hoc agreements were signed with these countries⁸².

Irrespective of their nationality, the coordination rule also protects derived social security rights⁸³ of the family members and survivors of the insured persons mentioned in the previous paragraph, which are always defined by the legislation providing the benefits in some cases with the help of the coordination Regulations⁸⁴. The Regulations also specifically protect the rights derived by survivors, in this case necessarily EU, EEA and Swiss nationals, stateless persons or refugees residing in a Member State, who have survived non-EU nationals who, in turn, have been subject to more than one national social security system⁸⁵.

It should be stressed that a reading of the coordination Regulations in isolation could lead to the erroneous conclusion that non-EU nationals are not protected with regard to their original social security rights⁸⁶. However, since June 2003, the coordination Regulations can be applied to non-EU nationals who are legally resident in a Member State and who are linked or insured to a social security system of a Member State when they are in a transnational situation⁸⁷. So the protection is not restricted to family members or survivors

⁸² On the application of both agreements separately to an Austrian citizen who also worked in Liechtenstein and Switzerland, see judgment of 26 September 2024, C-329/23, ECLI:EU:C:2024:802.

⁸³ E.g. widow's, widower's or orphan's pensions

⁸⁴ For instance, if this legislation does not distinguish family members from other beneficiaries, according to the Regulations these are at least: the spouse, minor children and dependent children of full age (Regulation EC/883/2004 Art.1(i) (2)). In addition, if such national legislation requires a cohabitation condition, this condition is deemed to be fulfilled when it is proved that the family member is dependent on the insured person (Regulation EC/883/2004 Art.1(i)).

⁸⁵ The Regulation aims to defend the rights derived from EU national survivors regardless of the nationality of the migrant who caused them (Regulation EC/883/2004 Art.2.2).

⁸⁶ For instance unemployment, old-age pensions...

⁸⁷ Regulation EC/859/2003 and currently Regulation EU/1231/2010 in the framework in force since 1 1 2011. This regulation, like its predecessor, is not applicable in Denmark, where it is directly inapplicable due to its legal basis (Treaty on European Union, Art. 79).

derived rights anymore. Thus, for example, a Moroccan national working and insured in Belgium would have access to the European health insurance card and if he were to suffer a road accident in Spain on his way to his home town, he would be treated by the Spanish health services as if he were Spanish and these institutions would bill Belgium for the cost of the Spanish healthcare treatment provided⁸⁸.

The application of the coordination Regulations to non-EU nationals raises questions such as how are these regulations, which are based on freedom of movement, to be interpreted when they apply to persons who do not have such freedom? In the latter respect, it is worth noting the impossibility of exporting their unemployment benefits if they are not authorized to reside and work in the Member State of destination.

III. COORDINATION REGULATIONS BASIC PRINCIPLES

This section begins by looking at the determination of the applicable national social security legislation, the backbone of any coordination system. In applying the designated national legislation, other principles must be considered: the right to equal treatment, the application of assimilations of facts or conditions and the aggregation/‘aggregation’ technique. The latter technique could be accompanied by the so-called *pro rata temporis* associated with the calculation of pensions. Another important element is the non-accumulation of benefits, in order to avoid over-protection of the migrant, and the coordination of national mechanisms set up for this purpose. The basic principle of the preservation of acquired rights, i.e. the export of benefits, is also discussed. Finally, the essential collaboration between administrations that is essential for the coordination mechanism to work is also addressed.

1. Determination of applicable national legislation

The determination of the applicable national legislation is crucial, as the substantive content of the different coordinated national legislations differs considerably: the level of contributions to be paid, the conditions for recogni-

⁸⁸ On the coverage of foreigners, see judgment of 7 February 2019, *Bogatu*, C-322/17, EU:C:2019:102.

tion of the benefit claimed and even the amount of the benefit may vary significantly. Indeed, “the Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be to the worker’s advantage in terms of social security or not, according to circumstance”⁸⁹.

The EU coordination regulations establish in the Title II of the Regulation EC/883/2004 a complete system of binding and protective conflict rules⁹⁰. It is based on the unicity principle as “it is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom”⁹¹. Furthermore, according to the exclusivity principle, the unicity principle is mandatory, there is only one applicable social security law and only the law designated by the EU conflict rules can be applied⁹², which provides legal certainty.

This system is intended “not only to prevent the simultaneous application of a number of national legislative systems and the complications which might ensue, but also to ensure that the persons covered by Regulation are not left without social security cover because there is no legislation which is applicable to them”⁹³. The binding nature of the EU conflict rules prevents the requirements laid down in the national rules to define their scope of application from detracting from the mandatory application of the national rule selected by the coordination regulations on the basis of uniform and objective criteria. In other words, the provisions of Title II have the effect “to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its na-

⁸⁹ Judgment of 19 March 2002, *Hervein*, C-393/99 and C-394/99, EU:C:2002:182, paragraph 51.

⁹⁰ See judgment of 10 July 1986, *Luijten v Raad van Arbeid*, C-60/85, EU:C:1986:307.

⁹¹ That principle is expressed, *inter alia*, in Article 11(1) Regulation EC/883/2004. See also Recital 15 of the Preamble to Regulation EC 883/2004. Reiterated in judgment of 11 July 2018, *Commission v Belgium*, C-356/15, ECLI:EU:C:2018:555, paragraph 70, and, by analogy, judgments of 12 June 2012, *Hudzinski and Wawrzyniak*, C-611/10 and C-612/10, EU:C:2012:339, paragraph 41, and of 12 February 2015, *Bouman*, C-114/13, EU:C:2015:81, paragraph 33.

⁹² Judgments of 13 October 1976, *Perenboom*, C-102/76, EU:C:1977:71, paragraph 13; 24 March 1994, *Van Poucke*, C-71/93, EU:C:1994:120; 29 June 1994, *Aldewereld*, C-60/93, EU:C:1994:271, paragraph 26.

⁹³ See judgment of 3 May 1990, *Kits van Heijningen*, C-2/89, EU:C:1990:183, paragraph 12, referring to positive conflict rule which may generate the payment of double contributions or overprotection and the so-called negative conflicts which could lead to a coverage gap or lack of insurance.

tional legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned.”⁹⁴ In short, the mandatory nature implies that the national legislation designated by the coordination conflict-rules is invested with an EU competence⁹⁵, and must be directly applicable, replacing the national conflict rules adopted unilaterally under this national legislation. Indeed, their effectiveness cannot be restricted at the national level; the conflict rules are intended to ensure that the persons included in the scope of application of the coordination rules are protected⁹⁶.

As a general rule, Title II identifies the law of the place of work or *lex loci laboris* as the only law applicable to the migrant worker, where he/she must be affiliated and pay contributions. However, as will be seen in the following section, there are important exceptions, which are listed in a table (see section a). In nearly, all of this cases a portable document A1 (a PD A1) is issued by the competent social security institution (see section b). Among these exceptions, only the one relating to the conflict-of-posting rule will be briefly developed (see section c).

The soft law solutions agreed by the Administrative Commission for the case of intra-EU interactive teleworking of employees are also concisely analyzed (see section d).

In addition to the system of conflict rules in Title II, there are some special conflict rules in Title III concerning the claim and calculation of certain benefits. Rules which are of preferential application, which follow a different logic, other principles, also according to the interpretation of ECJ case-law. For instance, the principle of uniqueness or unicity of the applicable legislation is not respected in these two following cases: on the one hand, regarding pensions⁹⁷, for the recognition of which, as a general rule, all the national legislations to which the worker has been subject are

⁹⁴ Judgment of 12 June 1986, Ten Holder, C-302/84, EU:C:1986:242, paragraph 21, where the ECJ underlines that “As the Court pointed out in its judgments of 23 September 1982 in Case 276/81 (Kuijpers [1982] ECR 3027) and in Case 275/81 (Koks [1982] ECR 3013), ‘the Member States are [not] entitled to determine the extent to which their own legislation or that of another Member State is applicable’ since they are ‘under an obligation to comply with the provisions of Community law in force’”.

⁹⁵ LYON-CAEN, Gerard. «La jurisprudence sociale de la Cour de Justice des Communautés en 1964». *Revue Trimestrielle de Droit Européen*, 1965, pág. 84.

⁹⁶ On the residency requirement see judgments of 4 April 1980, Una Coonan, C-110/79, EU:C:1980:112; 4 October 1991, De Paep, C-196/90, EU:C:1991:381; 3 May 1990, Kits Van Heijningen, C-2/89, EU:C:1990:183; 7 July 2005, Van Pommeren, C-227/03, EU:C:2005:431.

⁹⁷ Not only for old age or widow/er benefits, but also for invalidity, if they are type B benefits (i.e. those which take into account the period of contribution to determine their amount)

applied. Thus, in each of these legislations, if the conditions are met, a pension is recognized, the amount of which is adjusted to the period of insurance contribution in each of these legislations by means of the *pro rata temporis* method (see section III.D). On the other hand, regarding family benefits as two national legislations may be applicable simultaneously⁹⁸, the second with a supplementary role⁹⁹.

Nor is the principle of exclusivity respected in the coordination of family benefits. The application of the *lex loci laboris* under the coordination rules does not prevent the State of residence from maintaining the payment of family benefits which it grants for this very reason (residence in its territory) to a person who is not covered for this contingency by the law of the place of employment¹⁰⁰. The ECJ in Bosmann judgment prioritizes the principle of the intangibility of national rights obtained autonomously under the national legislation of residence (Petroni principle), which cannot be lost through the application of the coordination Regulations whose objective must be purely protective¹⁰¹.

Finally, the *lex loci laboris* application is also not respected in a few cases. On the one hand, as already mentioned, in the case of special non-contributory benefits which are recognized only by the legislation of the State of residence¹⁰². On the other hand, in the case of the total unemployment benefits of frontier

⁹⁸ See Regulation EC/883/2004 art. 68(2). Indeed, the priority is given to the family benefit entitlement under the legislation of the Member State where a parent works and live with his/her children, the concurrent family benefit of the other parent working abroad is suspended. However, if the suspended benefit is higher than the prioritized benefit, there is still an obligation to pay a differential supplement to ensure that the beneficiary receives the higher benefit to which their children would have been entitled

⁹⁹ The priority legislation would be the main legislation granting full entitlement and the supplementary legislation would only be responsible for paying a differential supplement, where appropriate, to ensure that children always receive the highest amount (judgments of 19 February 1981, Beeck, C-104/80, EU:C:1981:48; 10 July 1986, Luijten, C-60/85, EU:C:1986:307; 7 July 2005, Weide, C-153/03, EU:C:2005:428; 7 June 2005, Dodl, C-543/03, EU:C:2005:364). See, recently regarding the necessary cooperation between institutions involved, 25 April 2024, C-36/23, EU:C:2024:355.

¹⁰⁰ See Judgment of 20 May 2008, Bosmann, C-352/06, EU:C:2008:290. The case concerned a Belgian national who lived in Germany with her two children but worked in Belgium. The applicable legislation was Belgian (*lex loci laboris*). She was not entitled to benefits in Belgium –due to the age of her children, but was entitled to family benefits in Germany. EU coordination law does not prevent the loss of entitlement in Belgium, but neither does it prevent the acquisition of a German benefit solely on the basis of residence. Similarly, with regard to long term care benefits, see judgment of 16 July 2009, Chamier-Glisczinski, C-208/07, EU:C:2009:455.

¹⁰¹ In this judgment the ECJ avoids coordinating rules, which may be too complex, and bases its decision on the Treaties, always at the expense of the uniform application of secondary coordinating law and of legal certainty on a key issue such as the determination of the competent national legislation, following an interpretation that also calls into question the basic principles of mandatory application and uniqueness.

¹⁰² Regulation EC/883/2004 art.70(4). See section II.C.b.

workers, which must be recognized under the legislation of the Member State of residence on the basis of the foreign salary, even though this Member State has not received any contributions and therefore certain reimbursement systems are established between the institutions involved¹⁰³. The failed EC proposal to amend the Regulations tried to change that controversial rule¹⁰⁴.

1.1 THE LEX LOCI LABORIS AND ITS EXCEPTIONS

The *lex loci laboris*, the legislation of the Member State where the work is carried out, is an appropriate link because it facilitates equal treatment of all employees of a company operating in the same territory, irrespective of their nationality¹⁰⁵. The application of the legislation of the Member State of employment obliges companies to pay the same social security contributions for national and migrant workers, so that these social costs cannot be reduced by ‘importing’ ‘cheaper’ workers. All of them are treated equally. The same applies to self-employed persons who are subject to the legislation of the Member State in which they pursue a professional activity (Regulation EC/883/2004 Art. 11(3)(a)).

All the exceptions to the *lex loci laboris* set out in the following table are necessarily of restrictive application¹⁰⁶. It should also be borne in mind that all conflict rules (the general rule or its exceptions) may themselves be waived, even retroactively, by agreement between the institutions of the national systems concerned (Regulation EC/883/2004 Article 16). In any event, such agreements must always be for the benefit of the persons involved and their consent¹⁰⁷. Despite, it must be considered soft law, it is interesting consider the interpretation and examples included in the Administrative Commission’s practical Guide on social security applicable legislation published in December 2013 which is currently under review¹⁰⁸.

¹⁰³ Regulation EC/883/2004 Art. 65. For a critical account of this provision.

¹⁰⁴ The Member State of last employment was responsible for the payment of unemployment benefits provided that the frontier worker had worked there for at least twelve months, thus eliminating cumbersome inter-institutional reimbursements.

¹⁰⁵ With a view to guaranteeing the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues his activity as an employed or self-employed person.” See recital 17 of the Regulation EC/883/2004 Preamble.

¹⁰⁶ Judgment of 6 September 2018, *Alpenrind and others*, C-527/16, EU:C:2018:669, paragraph 95.

¹⁰⁷ Judgment of 29 June 1995, *Joop Van Gestel*, C-454/93, EU:C:1995:205.

¹⁰⁸ <https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en>

EXCEPTIONS (*) a PD A1 is issued by the competent institution	CONFLICT-RULE AND NATIONAL LEGISLATION APPLICABLE
Persons receiving a short-term benefit related to employment or self-employment. However, there are some exceptions ¹⁰⁹ .	Art. 11(2) Regulation EC/883/2004 <i>Lex loci laboris</i>
(*) Temporarily posted workers to another Member State (employed or self-employed) (see section c)	Art. 12 Regulation EC/883/2004 They may temporarily (for a maximum of 24 months) maintain the application of the legislation under which they were already insured as a self-employed person or as an employee (where their employer is established) before the posting in the home Member State.
(*) Civil servants	Art. 11(3)(b) Regulation EC/883/2004 Legislation of the Member State to which the administration employing him/her is subject.
A person called up or recalled for service in the armed forces or for civilian service in a Member State	Art. 11(3)(d) Regulation EC/883/2004 Legislation of that Member State where is providing those services
(*) Auxiliary staff of the European Communities	Art. 15 Regulation EC/883/2004 They can choose once between: a) Legislation of the Member State in which they are employed, b) Legislation of the Member State to which they were last subject c) Legislation of the Member State of which they are nationals
(*) Activity as an employed or self-employed person normally pursued on board a vessel at sea flying the flag of a Member State	Art. 11(4) Regulation EC/883/2004 General rule: Legislation of the Member State of the vessel's flag. Exception: Legislation of the Member State where the employer's place of business is situated when it coincides with the employee's place of residence. (1).

¹⁰⁹ On the one hand, the persons that receive invalidity, old age or survivors' pensions, and pensions derived from accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period are out of the scope of the Regulation EC/883/2004 Art. 11(2). On the other hand, the legislation of the Member State of residence (or *lex loci domicilii*) is applicable to the workers that according to the Article 65 of Regulation EC/883/2004 receives unemployment benefits from that Member State of residence (Regulation EC/883/2004 Art. 11(3)(c)).

EXCEPTIONS (*) a PD A1 is issued by the competent institution	CONFLICT-RULE AND NATIONAL LEGISLATION APPLICABLE
(*) Activity as a flight crew or cabin crew member performing air passenger or freight services	Art. 11(5) Regulation EC/883/2004 Legislation of the Member State where the home base is established ¹¹⁰ .
(*) A person who normally pursues an activity as an employed person in two or more Member States (2)(3)	Art. 13(1) Regulation EC/883/2004. – Legislation of the Member State of residence if s/he pursues a substantial part of his/her professional activity in that Member State (+ 25% of the working time or remuneration in the State of residence) ¹¹¹ . – If s/he does not pursue a substantial part of his/her professional activity in the he Member State of residence there are different options: 1) Employed by one undertaking or employer (NO moonlighting): the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated ¹¹² . 2) Employed by two or more undertakings or employers (Moonlighting): a. The companies have their registered office or place of business in only one Member State: to the legislation of that Member State. b. The companies have their registered office or place of business in two Member States, one of which is the Member State of residence of the worker: to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated other than the Member State of residence. c. At least two of the companies have their registered office or place of business in different Member States other than the Member State of residence of the worker: Legislation of the Member State of residence.

¹¹⁰ Home base is defined as «the location, assigned by the operator to the crew member, from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal circumstances, the operator is not responsible for the accommodation of the crew member concerned» Regulation EEC/3922/1991 Annex III.

¹¹¹ Regulation EC/987/2009 Article 14(8)(a).

¹¹² However, if the company, the employer is established outside the territory of the Union, and if this person resides in a Member State without pursuing substantial activity there, he shall be subject to the legislation of the Member State of residence Regulation EC/987/2009 Article 14(11).

EXCEPTIONS (*) a PD A1 is issued by the competent institution	CONFLICT-RULE AND NATIONAL LEGISLATION APPLICABLE
(*) A person who normally pursues an activity as a self-employed person in two or more Member States (3)	Art. 13(2) Regulation EC/883/2004 (4). Firstly, the legislation of the Member State of residence if s/he pursues a substantial part of his/her activity in that Member State (overall assessment of the turnover, working time, number of services rendered and/or income) ¹¹³ . Secondly, if s/he does not reside in one of the Member States in which s/he pursues a substantial part of his/her activity: the legislation of the Member State in which the centre of interest of his/her activities is situated ¹¹⁴ .
(*) A person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States	Art. 13(3) Regulation EC/883/2004 (4). Legislation of the Member State in which s/he pursues an activity as an employed person. (*) if s/he pursues such an activity in two or more Member States, to the legislation determined in accordance with Art. 13(1) Regulation EC/883/2004.
(*) A person who is employed as a civil servant by one Member State and who pursues an activity as an employed person and/or as a self-employed person in one or more other Member States	Art. 13(4) Regulation EC/883/2004 Legislation of the Member State to which the administration employing him/her is subject (3).
Inactive persons or those who are not subject to any other conflict rule of Title II of the Basic Regulation ^{115z}	Art. 11(3)(e) Regulation EC/883/2004 Legislation of the Member State of residence (1).

¹¹³ Regulation EC/987/2009 Article 14(8)(b).

¹¹⁴ The social security institution must consider of all the aspects of that person's occupational activities, notably the place where the person's fixed and permanent place of business is located, the habitual nature or the duration of the activities pursued, the number of services rendered, and the intention of the person concerned as revealed by all the circumstances (Regulation EC/987/2009 Article 14(9)). The institutions concerned shall consider the situation projected for the following 12 calendar months (Regulation EC/987/2009 Article 14(10)).

¹¹⁵ Judgment of 8 May 2019, SF, C-631/17, EU:C:2019:381.

EXCEPTIONS (*) a PD A1 is issued by the competent institution	CONFLICT-RULE AND NATIONAL LEGISLATION APPLICABLE
(*) General exception to all Title II conflict-rules, through ad-hoc agreements between two or more social security institutions involved.	Art. 16 Regulation EC/883/2004. Always in the in the interest of certain persons or categories of persons (not companies).
(1) Residence must be identified according to the criteria established in Regulation EC/987/2009 art.11. (2) Article 13 “the multistate conflict-rule” is increasingly used as it is not subject to the constraints or requirements established for the “posting conflict-rule (ex Art.12)”. It is used for the so-called “highly mobile workers” such as truck drivers ¹¹⁶. It could also be relevant for seasonal workers, including those in the agricultural sector ¹¹⁷. (3) Marginal activities should be disregarded Regulation EC/987/2009 Article 14 (less than 5% according to the AC Guide on Applicable legislation).	

1.2 THE BINDING NATURE OF THE PD A1

In the above table of exceptions to the *lex loci laboris*, the possibility of issuing a portable document A1 (PD A1) at the request of the company or the workers, certifying that the holder is insured in the State issuing such a document, is marked with an asterisk ¹¹⁸. It would be advisable to issue the PD A1 prior to the mobility, but its retroactive issue is allowed ¹¹⁹.

¹¹⁶ “Almost two thirds of the PDs A1 under Article 13 are granted to persons in the services sector, more specifically 45.3 % of forms go to persons active in road freight transport. Especially in Croatia, Latvia Lithuania, Malta, Poland, Slovakia, and Liechtenstein, more than one third of forms are issued for activities in road freight transport. In Lithuania and Malta, the share even exceeds 50 %. Poland makes up the lion’s share in absolute terms (229 595 out of 360 424 PDs A1) in line with the importance of international road freight transport in the country’s economy” DE WISPELAERE, F.; DE SMEDT, L. and PACOLET, J. “Posting of workers. Report on A1 Portable Documents issued in 2022”. October 2023. Publications Office of the European Union.

¹¹⁷ See CARRASCOSA BERMEJO, D. and CONTRERAS HERNANDEZ, O. “Posted workers from and to Spain facts and figures” Leuven: POSTING.STAT project VS/2020/0499. P. 23 <https://hiva.kuleuven.be/en/news/docs/posted-workers-from-and-to-spain-facts-and-figures.pdf>

¹¹⁸ Regulation EC/987/2009 art. 19 and 15(1). Currently, PD A1s are also issued to seafarers and aircrew. They were explicitly included in the EC’s failed proposal to amend the coordination Regulations. Where the *lex loci laboris* applies, the PD A1 cannot be issued.

¹¹⁹ For instance, after the posting began or even when it ended. See judgments of 30 March 2000, Banks and others, C-178/97, EU:C:2000:169, paragraphs 52 to 57, and of 6 September 2018, Alpenrind and others, C-527/16, EU:C:2018:669, paragraph 70.

The binding nature of the PD A1 as proof of the applicable legislation¹²⁰, especially in the case of posting Art. 12 PD A1, has been confirmed by the ECJ case-law in the following cases¹²¹:

Firstly, it is binding to the social security institution of the host Member State¹²². The institution issuing a PD A1 should carry out an appropriate prior assessment of all the relevant elements mentioned for determining the applicable legislation¹²³. So, in the event of a disagreement between institutions, it is not possible to ignore a foreign PD A1 or to insure directly the person involved under the national social security system of the host Member State. On the contrary, it is necessary to contact, as soon as possible, the issuing social security institution and ask for an explanation or even the withdrawal of the controversial PD A1. In the AC Decision A1 is established a, non-legally binding, dialogue and a mediation procedure “not always efficient and satisfactory in practice”¹²⁴, but based on mutual trust and sincere cooperation, that can finish with a mere opinion of the AC Conciliation board¹²⁵. In the event of the failure of this dialogue and conciliation procedure, the institutions of the host Member State, in theory, could, on the one hand, challenge the foreign PDA1 before the courts of the Member State which issued it; and, on the other hand, the host Member State institution can also bring an infringement proceeding against the issuing Member State before the ECJ¹²⁶. In practice, none of these options

¹²⁰ In any case, inclusion in the subjective scope of the coordination Regulations is independent of the existence or falsity of a PD A1, see judgment 23 January 2025, EX, C-421/23 of ECLI:EU:C:2025:36 paragraph 31.

¹²¹ See Carrascosa Bermejo, D., Molina Millán, J. The binding nature of posting PDA1 issued under EU social security Coordination Regulations and the possible role of national courts. ERA Forum 24, p. 85 and 86 (2023). <https://doi.org/10.1007/s12027-023-00749-6>

¹²² Whether the social security institution of the host Member State obliged a posted worker to affiliate under its social security scheme, it would undermine the principles of unicity and exclusivity of the applicable law that provide predictability and legal certainty for companies and posted workers. See judgments of 10 February 2000, FTS, C-202/97, EU:C:2000:75, paragraph 54; 26 January 2006, Herbosch Kiere, C-2/05, EU:C:2006:69, paragraph 25; 11 July 2018, Commission v Belgium, C-356/15, EU:C:2018:555, paragraph 88; 27 April 2017, A-Rosa Flussschiff, C-620/15, EU:C:2017:309, paragraphs 41 and 42.

¹²³ The issuing institution should collect all relevant information as identified in soft law AC Recommendation A1(OJEU 29-5-2018, C-183) which contains a standardized and non-exhaustive list of questions to be answered by applicants for a PD A1 and the documentation to be provided prior to issuing the PD A1.

¹²⁴ See judgment of 11 July 2018, Commission v Belgium, C-356/15, EU:C:2018:555, paragraph 107.

¹²⁵ See AC Decision AC n° A1, based on mutual trust and cooperation between national institutions (Regulation EC/883/2004 Art.72(a) and 76; Regulation CE/987/2009 Art.5 and 6.3). See, on this procedure, judgment of 27 April 2017, A-Rosa Flussschiff, C-620/15, EU:C:2017:309. Regarding the non-binding nature of the AC Conciliation Board, see judgment of 6 September 2018, Alpenrind and others, C-527/16, EU:C:2018:669, paragraphs 62 to 64.

¹²⁶ See, mentioning both options, judgments of 27 April 2017, A-Rosa Flussschiff, C-620/15, EU:C:2017:309, paragraph 46, and of 6 September 2018, Alpenrind and others, C-527/16, EU:C:2018:669, paragraph 61.

have never been used. Secondly, the PD A1 is binding to the company calling upon the services of the posted worker¹²⁷. Thirdly, they are also binding to the courts of the host Member State that cannot “scrutinise the validity” of a PD A1¹²⁸, in the light of the factual background against which it was issued. This is the case, even if the host Member State institutions believe that the situation clearly does not fall within the material scope of the posting rule, or in the event of a manifest error¹²⁹, as “there would be a risk that the system based on the duty of cooperation in good faith between the competent institutions of the Member State would be undermined”¹³⁰. Besides, the opposite result would undermine the principle that employees must be covered by only one social security system, would make it difficult to know which scheme is applicable and would consequently impair legal certainty¹³¹. It is advisable, “defining a unique competent jurisdiction is indispensable to avoiding contradictory non-unifiable national judgments. This does not imply mistrust on the objectivity and independence of any national court, it just means that one sole court must be appointed. The competent court would have to assess the correct application of the EU conflict-rule and its requirements under issuing and withdrawal procedures defined in the national legislation of the home Member State”¹³². Finally, in a certain sense, foreign PD A1s are also bound to the legislators of the host Member State, as they cannot adopt national legislation that allows their own institutions to compulsorily subject workers to their own social security scheme ignoring a foreign PD A1¹³³.

¹²⁷ The question was raised in a case in which a posted worker was insured as self-employed in the home and provided the correspondent PDA1 but should have been insured as an employee in the host Member State. The principles of unicity and exclusivity still apply to the receiving undertaking (Judgment of 30 March 2000, *Banks and others*, C-178/97, EU:C:2000:169, paragraphs 41 and 48).

¹²⁸ Judgment of 26 January 2006, *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraphs 31 and 32.

¹²⁹ Judgments of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 51, and of 11 July 2018, *Commission v Belgium*, C-356/15, EU:C:2018:555, paragraph 93.

¹³⁰ Judgments of 26 January 2006, *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraphs 30 to 32, and of 6 September 2018, *Alpenrind and others*, C-527/16, EU:C:2018:669, paragraph 47. These principles are established under Art. 4(3) TFEU, in Art. 76(4) of Regulation (EC) 883/2004 and in Recital 2 of the Preamble and Art. 20 of Regulation (EC) 987/2009.

¹³¹ “In cases in which it was difficult to determine the scheme applicable, each of the competent institutions of the two Member States concerned would be inclined to take the view, to the detriment of the employees concerned, that their own social security scheme is applicable to them (judgments of 26 January 2006, *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraph 25, and of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 42.” See judgment of 11 July 2018, *Commission v Belgium*, C-356/15, EU:C:2018:555, paragraph 88.

¹³² CARRASCOA BERMEJO, D., MOLINA MILLÁN, J. The binding nature of posting PDA1 issued...” op.cit. p. 86 (2023). <https://doi.org/10.1007/s12027-023-00749-6>

¹³³ See judgment of 11 July 2018, *Commission v Belgium*, C-356/15, EU:C:2018:555, paragraphs 94 and 95

The binding nature of the PD A1 has an exception established by the ECJ in *Altun* judgment¹³⁴, refined by *Vueling*¹³⁵ and *Bouygues*¹³⁶ judgments¹³⁷. The ECJ held that the national courts (not the institutions) of the host Member State may disregard (not invalidate or withdraw) fraudulent PD A1s under certain conditions, in order to give a ruling on the criminal or civil liability of the companies involved in the host Member State. The first condition is that the institution of the host Member State must initiate the mentioned dialogue and cooperation procedure promptly¹³⁸ without obtaining the appropriate answer¹³⁹. This procedure should also be followed, *mutatis mutandis*, in the case of doubts as to the authenticity of the PD A1 where the alleged issuing social security body has received contributions. In my view, this last issue should also have been clarified in the context of this dialogue and conciliation procedure¹⁴⁰. If under this procedure the alleged issuing institution confirms that it did not issue them, the host Member State court may conclude that they are false documents which are not binding on it¹⁴¹. However, if the procedure had not been followed, the court could not decide unilaterally on the authenticity of PD A1 or on the fraudulent nature of the posting¹⁴². The second condition is that the host Member State courts must declare proven in the context of a fair trial,

¹³⁴ Judgment of 6 February 2018, *Altun*, C-359/16, EU:C:2018:63.

¹³⁵ Judgment of 2 April 2020, *Vueling Airlines & CRPNPAC*, C-370/17 and C-37/18, EU:C:2020:260.

¹³⁶ Judgment of 14 May 2020, *Bouygues travaux publics*, C-17/19, EU:C:2020:379.

¹³⁷ See on these judgments on fraud, PENNINGS, F. *European Social Security Law* op. cit. p. 129-135. HOUWERZIJL, M. VERSCHUEREN, P. «Chapter 4. Free movement of (posted) workers and applicable labour and social security law» /in/ JASPERS, T., PENNINGS, F. and PETERS, S. (eds.) «European Labour Law» Intersentia. 2nd ed. 2024. P. 241-245. CARRASCOSA BERMEJO, D., MOLINA MILLÁN, J. The binding nature of posting PDA 1 issued under EU social security Coordination Regulations, op. cit. p. 91-98.

¹³⁸ The home Member State must have the opportunity to review the grounds for the issue of the PD A1 in the light of the concrete evidence submitted by the institution of the host Member State. Confirmed in the judgment of 2 April 2020, *Vueling Airlines & CRPNPAC*, C-370/17 and C-37/18, EU:C:2020:260, paragraphs 71 and 77.

¹³⁹ Basically, the institution that issued the PDA 1, must not have carried out the required control within a reasonable period in view of the evidence provided by the institution that challenges its PD 1 and/or should have failed to make a decision within a reasonable time

¹⁴⁰ See judgment 23 January 2025, EX, C-421/23 of ECLI:EU:C:2025:36 paragraphs 38 to 41

¹⁴¹ See judgment 23 January 2025, EX, C-421/23 of ECLI:EU:C:2025:36 paragraphs 43 to 47. This ruling confirms that even in extreme cases of false documentation, unilateralism makes no sense in the framework of a coordination system, which can only function thanks to dialogue and cooperation, and which is based on mutual trust between institutions. CARRASCOSA BERMEJO, D. "Posting of workers in the EU and false A1 portable documents: the value of dialogue and cooperation versus unilateralism. A propósito de la sentencia del TJUE 23-1-2025, EX C-421/23", Briefs AEDTSS, number 7/2025, Asociación Española de Derecho del Trabajo y de la Seguridad Social, 2025 https://www.aedtss.com/wp-content/uploads/2025/02/7_Dolores-Carrascosa-STJUE-A1.pdf

¹⁴² See judgment 23 January 2025, EX, C-421/23 of ECLI:EU:C:2025:36 paragraphs 48 and 49

backed with a consistent body of evidence, that there is fraud of the EU coordination Regulations ¹⁴³.

Under the Altun doctrine, the applicable social security legislation established under a PD A1 would not change, as the courts of the host Member State cannot invalidate or withdraw a foreign PD A1 ¹⁴⁴. These actions remain the exclusive competence of the institutions and courts of the home Member State, and these institutions and courts are not bound by the decision of the court of the host Member State. It does not appear that this doctrine allows the simultaneous application of two social security legislations ¹⁴⁵. The principle of the uniqueness of the applicable national social security legislation has been a fundamental principle of coordinating regulations since 1958 ¹⁴⁶. It is of paramount importance in the context of insurance and payment of social security contributions as it avoids double contributions and the associated legal uncertainty.

1.3 NATIONAL LEGISLATION APPLICABLE TO POSTED WORKERS

We do not know the exact number of posted workers, but the latest estimations mention around 1.8 million in 2022, concentrated in some member states and in sectors such as construction ¹⁴⁷. The European Commission's

¹⁴³ According to judgment of 6 February 2018, Altun, C-359/16, EU:C:2018:63, paragraphs 56 to 58, fraud has an objective factor (meaning that it must be proven that the EU requirements for issuing the PDA1 are not met) and an subjective factor (the parties concerned had the intention to evade or circumvent the conditions for the issue of the PDA1, and were aiming to obtain an advantage, either by deliberate omission, such as the concealment of relevant information, or by deliberate action, such as the misrepresentation of the real situation of the worker or the undertaking). A similar definition was proposed under the failed EC proposal to amend coordination Regulations.

¹⁴⁴ See VERSCHUEREN, H.: "The ECJ's case law on the role of posting certificates: a missed opportunity to combat social dumping." Maastricht J. Eur. Comp. Law n° 27/2020 p.494. In extenso, about these judgments CARRASCOSA BERMEJO, D., MOLINA MILLÁN, J. "The binding nature of posting PDA1 issued under EU social security Coordination Regulations..." op. cit. p. 91 to 98.

¹⁴⁵ On the contrary, it has been understood that the simultaneous application of the legislation of the host Member State whose courts have disregarded the PD A1 is possible, see RENNUIY, N. "Posting of workers: Enforcement, compliance and reform." European Journal of Social Security Vol. 22(2)/2020 p. 212–234. DOI:10.1177/1388262720931658.

¹⁴⁶ See Recital 15 of the Preamble of Regulation EC/ 883/2004 "It is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom" and Art. 11(1) of the same Regulation "Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title."

¹⁴⁷ These estimations are mainly based on the PD A1 and posting notifications that companies are required to make following the transposition of the Enforcement Directive. (Directive EC /2014/67 Article 9). De Wispelaere, L. De Smedt & J. Pacolet, *Posting of workers - Report on A1 Portable Documents is-*

Posting-Stat project, which has been relaunched, continues to seek relevant data to enable informed decision-making¹⁴⁸.

The Regulations provide that, in the case of temporary assignments whose foreseeable duration does not exceed 24 months, the law of the Member State of destination where the professional activity is actually carried out may be derogated from or not applied, so that the posted person remains subject to the social security law of the place of employment of the Member State of origin where the undertaking is established¹⁴⁹. This solution favors the freedom to provide services in the internal market and simplifies the administrative complications that a change of legislation would entail for social security institutions, companies and the mobility of workers who temporarily can maintain the continuity of their insurance career in a system that they already apply¹⁵⁰. In order to prevent fraud and abuse of this posting conflict-rule, the following conditions apply¹⁵¹:

a) The posted workers must have an employment relationship of dependence with their employer, an organic employment relationship that must continue throughout the posting period¹⁵². The conflict rule on posting applies to all workers covered by the coordination Regulations, including third-country nationals (TCNs) who are legally resident in the host Member State where the posting employer is established, even if they are only staying there temporarily¹⁵³. Employers who lawfully and regularly employ TCN are not required to obtain work permits for such TCN workers from a national immigration autho-

sued in 2022... op.cit. The main receiving Member States are Germany, France, Austria, Belgium, the Netherlands, and Switzerland. The main sending Member State is Germany followed by Poland (p. 28). About the number of posted workers (p. 36). See also De Wispelaere, F. and Vukorepa, I. "Chapter 11: The EU social security rules on posting: defining problems and potential solutions" /in/ Pennigns, F. and Vonk, G. (ed) *Research Handbook on European Social Security Law*. 2023. Edwar Elgar P. 225-251. DOI: <https://doi.org/10.4337/9781800886353.00019>

¹⁴⁸ On the results of the first Posting Stat project in the 10 Member States involved see <https://hiva.kuleuven.be/en/news/newsitems/posting-stat-enhancing-collection-and-analysis-national-data-on-intra-eu-posting> On the new project Posting Stat 2.0 with 11 Member States involved, see <https://hiva.kuleuven.be/en/research/theme/welfarestate/p/POSTING-STAT20>

¹⁴⁹ This temporary derogation from the *lex loci laboris* of the Regulations is the same solution generally adopted in all international social security conventions.

¹⁵⁰ See judgment of 10 February 200, Fitzwilliams, C-202/97, EU:C:2000:75, paragraphs 28 and 29; Reiterated in judgments of 9 November 2000, Plum, C-404/98, EU:C:2000:607, paragraphs 19 and 20, and of 6 February 2018, Altun, C-359/16, EU:C:2018:63, paragraphs 32 and 33.

¹⁵¹ In extenso, CARRASCOSA BERMEJO, D., MOLINA MILLÁN, J. The binding nature... op. cit. p. 81

¹⁵² Some relevant criteria were set out in the (non-binding) AC Decision No A2 Point 1.3. relationship breaks when a so-called, "double posting" takes place.

¹⁵³ See judgment of 24 January 2019, Balandin, C-477/17, EU:C:2019:60, considering Regulation EC/1231/2010.

rity and do not have to bear the costs of doing so¹⁵⁴. However, it has recently been clarified that TCN posted workers may require a residence permit issued by the host Member State if the posting exceeds 90 days out of a period of 180 days¹⁵⁵.

b) The posted employees must have been previously subject to the social security legislation¹⁵⁶ that they intend to maintain¹⁵⁷. Recruitment for the purpose of posting is possible if the hired worker was subjected to the social security legislation of the home MS immediately before being recruited¹⁵⁸.

c) The posting undertaking must carry out significant business activities¹⁵⁹ in the home Member State, or else it will be considered a letterbox company¹⁶⁰. This requirement in respect of temporary work agencies implies that they must assign workers to a significant extent in the home Member State¹⁶¹.

d) The anticipated duration of the work cannot exceed 24 months¹⁶². If it is foreseen that is going to exceed this duration, the maintenance of the home MS legislation can only be achieved by means of specific agreements between the corresponding social security institutions¹⁶³.

¹⁵⁴ Judgment of 9 August 1994, *Vander Elst*, C-43/93, EU:C:1994:310.

¹⁵⁵ Judgment of 20 June 2024, *SN and others*, C-540/22, EU:C:2024:530.

¹⁵⁶ In AC Decision A2, Member States agreed on a minimum attachment to the social security system of origin of 1 month prior to posting, subject to exceptions. If the proposed amendment had been successful, this requirement would no longer be soft law and would be increased to 3 months (proposed amendment to Regulation EC/987/2009 Art.14.1).

¹⁵⁷ The ECJ considers that any kind of previous attachment is valid in this regard, even mere habitual residence if the person is subject to social security rules. Judgment of 25 October 2018, *Walltopia*, C-451/17, EU:C:2018:861. In the same vein see the (non-binding) AC Guide on applicable legislation, Administrative Commission

¹⁵⁸ See Art. 14(1) of Regulation (EC) 987/2009

¹⁵⁹ The mere management activities do not suffice. Art. 14(2)(3) of Regulation (EC) No 987/2009. For instance, a turnover of approximately 25% of the total turnover, is mentioned under the AC Guide on Applicable legislation. The criteria gathered in this Guide are the same provided by the ECJ in judgment of 10 February 2000, *FTS*, C-202/97, EU:C:2000:75, paragraphs 42 and 43.

¹⁶⁰ Art. 12 Regulation EC/883/2004 and Art 14 Regulation EC/987/2009 and AC Decision A2. In the same vein, judgments of 30 March 2000, *Banks and others*, C-178/97, EU:C:2000:169, and of 26 January 2006, *Herbosch Kiere*, C-2/05, EU:C:2006:69.

¹⁶¹ Judgment of 3 June 2021, *Team Power*, C-784/19, EU:C:2021:427.

¹⁶² According to AC Decision A2 point 3, on the one hand, brief interruptions, such as holidays or sickness leave, should not be considered in calculating the 24 months period. On the other hand, posting to the same Member State would be considered one posting situation, even if services are provided to two or more companies. Finally, it is considered that a new posting period begins, resetting the counter to zero, when a worker is posted to another MS or two months after the end of the previous posting. AC See Decision No A2 Point 3.

¹⁶³ See Art. 16 of Regulation EC/883/2004 and judgment of 17 May 1984, *Brusse*, C-101/83, EU:C:1984:187. These agreements are also used to extend the application of the home Member State legislation if the posting finally is going to be longer than these 24 months.

e) A posted worker cannot replace another posted employee, to avoid a rotational system of postings to the destination company¹⁶⁴. In practice, replacement is allowed when the previous posting did not exhaust the 24-month period¹⁶⁵.

There is a similar conflict rule for self-employed persons, who are much less numerous, who decide to temporarily pursue a similar professional activity in another Member State, regardless of whether they are employed or self-employed there¹⁶⁶. In this case, it is understood that they must be subject to the social security system which they wish to maintain for two months prior to the posting and that they must maintain the conditions for resuming their professional activity on their return¹⁶⁷. However, the replacement ban is not applicable in the case of self-employed persons¹⁶⁸.

1.4 NATIONAL LEGISLATION APPLICABLE TO INTRA-EU TELEWORK

The Regulations do not provide a specific rule of conflict for telework in Title II of the Regulation EC/883/2004, neither is it mentioned in the Administrative Commission's Practical Guide on the Applicable Legislation, thus there is a problem of legal uncertainty¹⁶⁹. Following the principle that "*Ubi lex non distinguit, nec nos distinguere debemus*", i.e. where the law does not make a distinction, we should not make one either, we continue to apply the common conflict rules to telework cases, both the *lex loci laboris*, and its exceptions¹⁷⁰. However, these rules were designed for the

¹⁶⁴ The focus must be on the job, because once it has been filled by a posted worker, it cannot be replaced by a new posted worker, even if he or she comes from another company or a different Member State (Judgment of 6 September 2018, Alpenrind and others, C-527/16, EU:C:2018:669).

¹⁶⁵ The failed EC 2016 the amendment of the Coordination Regulations included this provision in the Art.12(2)(a) Regulation (EC) No 883/2004.

¹⁶⁶ Regulation CE/987/2009 art.14.4 and judgment of 20 March 2000, Banks and others, C-178/97, EU:C:2000:169.

¹⁶⁷ According to the Administrative Commission Decision A2 it is required to have been subject to this legislation for at least 2 months, and for the control of the maintenance of the requirements objective criteria are requested such as: maintenance of the office or premises, payment of taxes, professional card or VAT number, registration in chambers of commerce or professional associations...

¹⁶⁸ This would have changed had the Commission's failed reform proposal preventing the substitution of both employees and self-employed workers been adopted.

¹⁶⁹ In this respect, see: Y. JORENS, J.-P. LHERNOULD, J.-C. FILLON, S. ROBERTS, B. SPIEGEL, Towards a new framework for applicable legislation, trESS, 2008 (available at http://www.tressnetwork.org/TRESS/EUROPEAN%20RESOURCES/EUROPEANREPORT/ThinkTank_Mobility.pdf). See also LHERNOULD, J.P. « Conflits de lois en matière de sécurité sociale: la *lex loci laboris* en question ». *Droit social*, No 5 (May)/2015, p. 457.

¹⁷⁰ STRBAN, G (ED); CARRASCOSA BERMEJO, D.; SCHOUKENS, P.; VUKOREPA L., *Analytical report 2018. Social Security coordination and non-standard forms of employment and self-employ-*

physical mobility of workers and are therefore not well adapted to just cross-border online telework.

Faced with the COVID 19 pandemic, the Administrative Commission (AC) has sought a consensus among the Member States and has set out some practical solutions in Guidance Notes which are not binding legal rules, but were finally been published under a recent AC Decision¹⁷¹. From July 2023¹⁷², with regard to a specific type of off-site teleworking¹⁷³ from a Member State other than the one in which the company premises are established, the following has been established by the AC last Guidance Note:

First of all, the law of the place of work, the *lex loci laboris*, could be understood as applicable, but where is the place of work of someone who teleworks from his or her home in Italy for a company in Spain? The Guidance Note does not clarify this concept. It only confirms that the social security administrations have understood, on the basis of a traditional and physical interpretation, that it is Italy from which this teleworker connects, resides and types on his computer¹⁷⁴. However, there have also been proposals from some authors that would allow the Spanish law to be applied. On the one hand, an updated interpretation of the *lex loci laboris* for virtual work has been suggested. The *lex loci laboris* could be the place where the server of the company that hired and trained the worker is located, from where the instructions for the work are given, the laptop is provided, and the salary is paid. This interpretation would ensure equal treatment between teleworkers and face-to-face workers, and is predictable and stable, among many other advantages. However, to avoid social dumping, it would be necessary for the company to have substan-

ment: *Interrelation, challenges, and prospects*. Brussels, EC, 2020. P. 44 Available in: <https://op.europa.eu/en/publication-detail/-/publication/d5ae78c2-c578-11ea-b3a4-01aa75ed71a1/language-en>

¹⁷¹ AC Decision No H14 of 21 June 2023. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32024D00594>

¹⁷² Until June 2022, always with the intention of avoiding any change in the social security legislation applicable to teleworkers, the AC ignored telework in determining the applicable social security legislation as if it did not exist, considering the COVID 19 pandemia to be a situation of force majeure. From July 2022, the AC tried to impose a flexible interpretation of certain conflict rules by extending the transitional periods several times.

¹⁷³ It is just referred to voluntarily agreed, between the employer and the employee, telework, using technology that allows the employee to remain connected to the company's work environment and to perform the same work as he/she does in the company itself.

¹⁷⁴ This interpretation is usually based on judgment of 27 September 2012, Partena, C-137/11, EU:C:2012:593, which does not relate to an international teleworking employee, and which interprets the EU concept of the workplace, taking into account its usual meaning in everyday language, the context and the purpose of the rule, as "the place where the person carries out the actions related to that activity", which has been understood as the physical location of the teleworker, although the ECJ did not say exactly that.

tial activities in the home country¹⁷⁵. On the other hand, it has also been considered that an ad hoc conflict rule could be included that would establish for teleworkers a ‘fictitious place of work’ which would be the employer’s premise¹⁷⁶.

Although in practice the AC did not raise this possibility, the law of the teleworker’s place of residence, i.e. Italy, could also have been considered applicable, if it were held that there were no rules applicable to telework¹⁷⁷. However, this solution (the *lex domicilii*), apart from its possible instability¹⁷⁸ and the difficulty of determining the place of residence under the coordination Regulations¹⁷⁹, could lead to social dumping. In fact, companies could tend to recruit teleworkers residing in Member States with the lowest contributions¹⁸⁰.

Thirdly, with regard to ad hoc or occasional transnational telework, it was agreed in the framework of the AC to apply the posting conflict-rule, irrespective of whether the telework was not for the purpose of providing any service in the State of posting and the initiative came from the worker, if there was a consensus with the company¹⁸¹.

Fourthly, so-called hybrid regular telework could be subject to the multi-state conflict rule¹⁸². Thus, that a person who teleworks two days a week from home in a Member State other than the one where the company is based, where he or she works the other three days, could be subject to the law of the place of residence if he or she carries out a substantial activity (25% or more) there¹⁸³. In view of the restrictions imposed by some companies on teleworking by persons residing in

¹⁷⁵ This interpretation preserves the objective of the conflict rules, which is none other than to provide predictability, stability and equal treatment and to facilitate control. CARRASCOSA BERMEJO, D. “Teletrabajo internacional y legislación de Seguridad Social aplicable: estado de la cuestión y perspectivas en los Reglamentos de coordinación de la UE.” *Revista Internacional y Comparada de relaciones laborales y derecho del empleo* 10, 217–249 https://ejcls.adapt.it/index.php/rldc_adapt/article/view/1153

¹⁷⁶ VERSCHUEREN, H.: The application of the conflict rules of the European social security coordination to telework during and after the Covid-19 pandemic. *Eur. J. Soc. Secur.* 24, 79–94 (2022).

¹⁷⁷ Article 11(3) (e) of Regulation EC/883/2004, as interpreted by the ECJ in judgment of 8 May 2019, SF, C-631/17, EU:C:2019:381.

¹⁷⁸ Should the applicable national social security legislation change each time the worker unilaterally decides to change his place of residence? It would not make sense, especially in cases such as that of digital nomads.

¹⁷⁹ The determination of the habitual residence under Article 11 of Regulation (EC) No 987/2009, is far from clear.

¹⁸⁰ In this sense see Y. JORENS, J.-P. LHERNOULD, J.-C. FILLON, S. ROBERTS, B. SPIEGEL, Towards a new framework for applicable legislation, *TrESS*, op. cit. p. 5.

¹⁸¹ Although this is a good solution in practice, doubts have been raised about the application of posting rules, which must be always applied restrictively as an exception to the *lex loci laboris*. See CARRASCOSA BERMEJO, D. “Teletrabajo internacional y legislación de Seguridad Social aplicable...” ... op. cit. p. 236-238.

¹⁸² Art. 13 Regulation EC/883/2004.

¹⁸³ Art. 14 Regulation EC/ 987/2009.

other Member States in order to avoid a change in social security rules in such cases¹⁸⁴, the AC promoted a framework agreement on cross-border hybrid teleworking applicable between the signatory Member States as from 1 July 2023¹⁸⁵. This agreement makes it possible to ask the institution of the State in which the company has its headquarters to apply its social security rules for a maximum of three years, renewable and always with the consent of the teleworker, who has to perform regular hybrid telework in the State of residence for a period of less than 50% but equal to or greater than 25% of his working time¹⁸⁶. The agreement allows direct derogation from the legislation of the State of residence without the need to negotiate individual Art. 16 agreements between national social security institutions, which may of course continue to apply for the benefit of teleworkers.

2. Equal treatment and non-discrimination on the grounds of nationality

Within the framework of the national social security legislation designated as applicable by the coordination Regulations, they guarantee equal treatment and non-discrimination on grounds of nationality¹⁸⁷. This means that the person concerned, without having to be a resident or a national of that Member State, may obtain the same benefits and be subject to the same obligations as are imposed by that social security legislation on its own nationals and under the same conditions; unless the Regulation itself provides otherwise¹⁸⁸. It is not a question of reciprocity on a case-by-case basis, but of generalized equality, even if it is only formal legal equality.

This right to non-discrimination on grounds of nationality of those exercising their right to free movement is also recognized in the current TFEU in

¹⁸⁴ This employer position could even constitute an obstacle to free movement.

¹⁸⁵ Applicable for a period of 5 years, renewable for a further 5 years and deposited with the Belgian Social Security Administration, where the list of the 22 signatory Member States of the framework agreement and the date from which the framework agreement applies in each of the Member States concerned can be found: <https://socialsecurity.belgium.be/en/internationally-active/cross-border-telework-eu-eea-and-switzerland>

¹⁸⁶ In extenso about the Framework agreement and the previous AC Guidance notes see DE PAUW, B., VERSCHUEREN, H. "The Framework Agreement on the applicable social security law in case of habitual cross-border telework after the pandemic." ERA Forum 24, 467–480 (2023). <https://doi.org/10.1007/s12027-023-00766-5>

¹⁸⁷ Regulation EC/883/2004 Art.4.

¹⁸⁸ Equal treatment is respected if the national applicable social security legislation "does not place that worker at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it" Judgment 30 January 1997, Hervein, C-221/95, EU:C:1997:47 paragraph 50.

favor of EU citizens. Inactive EU citizens can have access to social assistance benefits¹⁸⁹, according to the transposition of the Free Movement Directive¹⁹⁰, or entitlement to a social security benefit in accordance with the equal treatment of the coordinating Regulations, provided they fulfil the legal residence requirement that could be imposed by national rules¹⁹¹. Since the Treaty of Rome, for those EU citizens who have been in employment there is enhanced protection for the free movement of workers¹⁹². They have access to the “social advantages”¹⁹³, that must be also recognized for frontier workers¹⁹⁴. Equal treatment is also linked to the freedom of establishment and freedom to provide services for self-employed workers also covered by coordination Regulations¹⁹⁵.

Prohibited discrimination against nationals of other Member States can be both direct and indirect. The ECJ has on several occasions found indirectly discriminatory provisions in national social security legislations. This is

¹⁸⁹ TFEU Art. 18.

¹⁹⁰ For instance, Directive EC/2004/38 Art. 24(2) contains a derogation to equal treatment, that allows the host Member States to refuse to grant social assistance to the EU citizen who exercises his or her right to free movement to its territory, during the first three months of that residence (see, to that effect, judgment of 25 February 2016, *García-Nieto and Others*, C-299/14, EU:C:2016:114, paragraph 43 and the case-law cited) Judgment 1-8-2022, S, C-411/20, EU:C:2022:602, paragraphs 41-55.

¹⁹¹ “Article 4 of Regulation EC/883/2004 gives specific expression to the principle of equal treatment with regard to Union citizens who rely, in the host Member State, on the social security benefits referred to in Article 3(1) of that regulation (see, to that effect, judgment of 15 July 2021, *A (Public health care)*, C-535/19, EU:C:2021:595, paragraph 40). In accordance with Article 4, unless otherwise provided for by Regulation No 883/2004, persons to whom that regulation applies are to enjoy the same benefits and are to be subject to the same obligations under the legislation of any Member State as the nationals thereof” Judgment 1-8-2022, S, C-411/20, EU:C:2022:602, paragraphs 59-60.

¹⁹² TFEU Art. 45 that can be directly applicable.

¹⁹³ Regulation EU/492/2011 art.7.2. The social advantages of migrant workers are a macro-category, as they range from social security benefits, such as German child-raising benefits (Judgment of 12 May 1998, *Martínez Sala*, C-85/96, EU:C:1998:217, paragraph 26), to maintenance or study allowances (Judgment of 20 June 2013, *Giersch*, C-20/12, EU:C:2013:411, paragraph 35) or aid in favour of disabled workers or their families (Judgment of 8 July 1992, *Taghavi*, C-243/91, EU:C:1992:306), or mere reductions to public transport (Judgment of 30 September 1975, *Cristini*, C-32/75, EU:C:1975:120).

¹⁹⁴ After an ambivalent period (see opinion of Advocate General of 2 June 2016, *Linares Verruga*, C-238/15, EU:C:2016:389, paragraph 36). Access to the labour market of a Member State is now considered to create a sufficient link of integration into the society of that State to underpin migrants’ access to social advantages. Workers are understood to contribute to the financing of the social policies of the host Member State through their social contributions and the payment of taxes for the work they perform there (judgments of 14 December 2016, *Linares Verruga*, C-238/15, EU:C:2016:949, paragraphs 49 ff, taking up the doctrine laid down in judgments of 14 June 2012 *Commission v Netherlands*, C-542/09, EU:C:2012:346, paragraphs 65 ff, and of 20 June 2013, *Giersch*, C-20/12, EU:C:2013:411, paragraphs 63); see in the same vein, recently, judgment 16 May 2024, C-27/23, EU:C:2024:404, applying just free movement of workers EU legislation. Although it should be recalled that frontier workers can pay their taxes in the State of residence, under a bilateral tax treaty avoiding double taxation and posted workers can keep their social contribution in the State of origin and not change their tax domicile fixed in the home Member State.

¹⁹⁵ TFEU Treaty Art.49 and 56

the case, for instance, when national legislation takes into account only national work for the entitlement to a benefit¹⁹⁶, or imposes a habitual residence requirement on the migrant¹⁹⁷, or requires that the nationality of the migrant's children is the nationality of the national legislation applicable for the recognition of family benefits¹⁹⁸. In the same vein, when a Member State denies a benefit for the care of a family member on the grounds that the parent to be cared does not receive a dependency benefit of a certain amount from that State¹⁹⁹. In these cases, detrimental to migrants, the national courts have to assess if such requirements were proportional and established in the general interest and for objective reasons unrelated to the nationality of the migrant.

Equal treatment only protects, almost as if it were a positive action, those who are in a situation of transnationality, as it does not apply to sedentary citizens, who are excluded from the scope of application of the Regulations, although they are treated in a less protective way than, for example, migrant workers²⁰⁰.

From this principle of equal treatment also derives the right of any EU national to benefit from the application of bilateral conventions concluded between a Member State and a third State²⁰¹, but also from those concluded between Member States, if certain conditions are met (see *supra* section I.B), even if the person concerned does not possess the nationality of any of the signatory States.

3. Assimilation of benefits, income, facts or events

The assimilation of certain foreign conditions (benefits, income, facts or events) represents a step forward from the mere principle of formal legal

¹⁹⁶ Where part-time work prior to retirement is required to have been carried out exclusively in accordance with the national provisions of the State which recognises the benefit. The competent German institution must carry out an analysis of the foreign part-time scheme in order to determine whether the differences identified are liable to compromise the attainment of the objectives legitimately pursued under the applicable German legislation (Judgment of 18-December-2014, Larcher, C-523/13, EU:C:2014:2458).

¹⁹⁷ Judgments of 15 January 1986, Pinna, C-41/84, EU:C:1986:1, and of 27 November 1997, Meints, C-57/96, EU:C:1997:564.

¹⁹⁸ Judgment of 12 July 1979, Toia, C-237/78, EU:C:1979:197.

¹⁹⁹ Judgment of 11 April 2024, C-116/23, ECLI:EU:C:2024:292

²⁰⁰ Judgments of 13 October 1977, Mura C-22/77, EU:C:1977:154; 5 May 1983, Van der Bunt-Craig, C-238/81, EU:C:1983:124; 6 July 2000, Movrin, C-73/99, EU:C:2000:369

²⁰¹ Judgment of 15 January 2002, Gottardo, C-55/00, EU:C:2002:16. TFEU art.351; AC Recommendation H1 EDL 2013/178083, OJEU 27-9-13; also, on healthcare AC Recommendation S2, OJEU C-46, 18-2-14.

equality of treatment. The Regulation provides for its application in the following situations:

a) Where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State²⁰². As confirmed by the ECJ, this technique allows foreign benefits to be taken into account in order to allow the recognition of a benefit in the competent State²⁰³. However, this assimilation of foreign benefits could have a negative impact on the migrant's acquired rights if national legislation provides for the reduction or suspension of the national social security benefit if other equivalent foreign benefits or income are also received at the same time. Nevertheless, there are specific rules under coordination Regulations regarding overlapping of benefits that protect the migrant in such cases, that must be considered (see section E).

b) Furthermore, “where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory”²⁰⁴.

The assimilation of conditions is not a new legal technique, as it was already provided for in certain cases in the previous Regulations²⁰⁵ and was accepted by the case law of the Court of Justice, which in some cases identified the absence of assimilation as indirect discrimination²⁰⁶. Under the current Regulations, the approach is different, as assimilation is general “unless the Regulations themselves state otherwise”²⁰⁷. However, in practice, assimi-

²⁰² Regulation EC/883/2004 Art. 5(a).

²⁰³ Judgment of 5 December 2019, *Bocero Torrico*, C-398/18 and C-428/18, EU:C:2019:105.

²⁰⁴ Regulation EC/883/2004 Art. 5(b).

²⁰⁵ See, for example, the assimilation of foreign insurance or for the recognition of pensions (Regulation EC/1408/71 art 45.5).

²⁰⁶ See, for example, judgments of 9 July 1997, *d’Amico*, C-20/75, EU:C:1975:101 and of 22 February 1990, *Bronzino*, C-228/88, EU:C:1990:85, which assimilate unemployment status in other Member States for the purpose of obtaining benefits. See, for example, in relation to certain Swedish family benefits judgment of 15 December 2011, *Bergström*, C-257/10, EU:C:2011:839, on the recognition of certain Swedish family benefits and the requirement to prove certain minimum periods of work comparable to those performed in Switzerland by the claimant.

²⁰⁷ Regulation EC/883/2004 Art. 5. An example of an express exception to assimilation can be found in Annex XI Spain (point 4) of Regulation EC/883/2004 which, with the same legal value as the articles themselves, prevents the assimilation of foreign contributions to contributions made before 1-1-1967 for the calculation of (retirement) pensions.

lation of express conditions is still inconsistently found in their articles²⁰⁸. The ECJ has already recognized the effects of the assimilation of conditions in a generous way²⁰⁹ and the Preamble to the Basic Regulation clarifies the following issues²¹⁰:

1. The assimilation of conditions only comes into play once the applicable law has been identified. This technique cannot undermine the conflict rules of the Regulation by conferring jurisdiction on another Member State. At any rate, the main applicable legislation should not be confused with foreign legislation applied as a mere fact in an ‘ancillary’ manner through the assimilation of conditions²¹¹.

2. In the application of assimilation of conditions, the principle of proportionality must be considered. It is necessary ensure that any assimilation does not lead to objectively unjustified results or to the accumulation of benefits of the same type for the same period.

3. Although aggregation could be understood as an assimilation of foreign periods of insurance, residence or work, aggregation has its own regulation and must be considered apart.

The assimilation of conditions, as well as coordination itself, can only work if it is based on mutual trust between the social security institutions of the different national systems. In such a way that, unless fraud is proven, the validity and accuracy of the foreign documents proving the assimilable conditions must be accepted¹³³. Moreover, assimilation only occurs between similar or identifiable conditions because of their similarity or because they fulfil a certain similar function, without the need for them to be identical. In fact, some conditions have only been assimilated once certain concordances have been established, as is the case, for example, with the levels of invalidity in

²⁰⁸ See, for example, Regulation CE/883/2004 Art.67 which assimilates the foreign residence of family members to national residence for the purpose of recognizing family benefits. 133. See judgments of 2 May 1996, Paletta, C-206/94, EU:C:1996:182, and of 2 December 1997, Dafeki, C-336/94, EU:C:1997:579.

²⁰⁹ Judgments of 21 January 2016, Knauer, C-453/14, EU:C:2016:37, and of 18 December 2014, Larcher C-523/13, EU:C:2014:2458.

²¹⁰ See Recital 10, 11 and 12 of the Preamble of the Regulation EC/883/2004.

²¹¹ The assimilation of conditions only allows that the legislation applied as the principal legislation consider, for the fulfilment of the requirements it imposes, the legal effects deriving from the application of the legislation of other Member States, but as mere facts or conditions allowing its own application. Inextenso Carrascosa Bermejo, Dolores thesis (2003) “La coordinación comunitaria de los sistemas nacionales de seguridad social: determinación de la Ley nacional aplicable. Recognition and calculation of the right to a contributory old-age pension” specially p. 153. URI: <https://hdl.handle.net/10016/11723>

certain Member States²¹². Again, the need for some basic harmonization seems essential for coordination to work.

4. Aggregation of periods and *pro rata temporis*

To meet the requirements of the competent legislation, aggregation (or ‘totalization’) allows periods of insurance, employment, self-employment or residence completed under the legislation of another Member State to be considered as if they had been completed under the legislation which will recognize the benefit or is calculating it. Aggregation of periods, through the fiction that they have been generated under the competent legislation, allows the person concerned to fulfil, for example, the contribution period required under such legislation, protecting the ongoing social security rights of those whose insurance or residence careers have been fragmented by migration. This technique may also be relevant in the subsequent calculation of benefits²¹³.

In order to avoid controversy, the national legislation under which such periods were covered shall be the sole competent authority for their definition, admission and accreditation, and their nature cannot be questioned in the framework of the foreign legislation that aggregates or assimilates them.

In principle, aggregation applies to all coordinated benefits²¹⁴, except only for the recognition of a pre-retirement benefit²¹⁵. On the other hand, the failed proposal to amend the Regulations only allowed aggregation for the purpose of obtaining an unemployment benefit if a minimum of 3 months of contributions had been paid in the Member State where the unemployed person becomes unemployed, whereas under the current Regulations the right to aggregation arises from the first day of work²¹⁶.

²¹² See Regulation EC/883/2004 Annex VII for four of the founding states of the EEC: France, Italy, Belgium and Luxembourg.

²¹³ Where only national contributions are taken into account, gaps in contributions due to insurance in another Member State during the reference periods considered have caused serious problems in the calculation of pensions. See, for example, the Spanish system for calculating pensions (judgment of 17 December 1998, Grajera C-153/97, EU:C:1998:615; judgment of 21 February 2013, Salgado González, C-282/11, EU:C:2013:86 and ECJ 28-6-18, Crespo Rey case C-2/17, EU:C:2018:511; all these judgments without taking into account the changes in Regulation EC/883/2004 Annex XI Spain (2)(a), which do not solve all the problems). See CARRASCOSA BERMEJO, D.: «Base reguladora de la jubilación para migrantes tras el asunto Salgado González». Aranzadi Social n° 9/10, enero/febrero 2014.

²¹⁴ Regulation EC/883/2004 Art.6.

²¹⁵ Regulation EC/883/2004 Art.66.

²¹⁶ At any rate, the proposed EC amendment provided that the worker retains any entitlement that may exist under the legislation of the previous State of employment which becomes competent again if he/she does not reach such a period of three months. In short, under the current Regulations, a migrant who

a. *Pro rata temporis*

The *pro rata temporis* is a supplement to the aggregation in the procedure for calculating pensions²¹⁷, which makes it possible to adapt the amount of the pension to the specific contribution effort made in the State that calculates it. The *pro rata temporis* is simply the percentage, a fraction, resulting from dividing the specific time during which the person concerned was subject to that national legislation (numerator) by the insurance period completed in all the systems involved in his insurance career (denominator). For its application, the following issues must also be considered:

1. The calculating State is only required to take into account periods of insurance completed before the risk covered by the benefit being calculated materializes. This requirement is somewhat confusing when deciding on the computation of fictitious periods that are difficult to locate in time.
2. In the case of type B pensions (retirement or invalidity pensions calculated on the basis of the number of contributions made), the number of years of contributions associated with the payment of a full or maximum pension under each legislation must be taken into account. In effect, the totalization of foreign periods is limited until this number of periods is reached, as it is unreasonable to penalize - via *pro rata temporis* - those who worked and contributed for the longest time²¹⁸.

5. Non-accumulation of benefits and/or income

Generally speaking, anti-cumulation legislation aims to mitigate or prevent the accumulation or simultaneous recognition of several social security benefits in favor of the same beneficiary, in order to avoid overprotection. The aim is to avoid their unjust enrichment, taking into account the limited nature

has worked for one year in Member State X who migrates to State Y where he/she works for 1 month, if he/she becomes unemployed in the latter State, he/she can access unemployment benefits in State Y as if he/she had worked there for 13 months. Under the failed Reform Proposal, however, he would not get any benefits in State Y, but the competent State would be State X which would have to total the month worked in State Y. Moreover, under the Proposal, the migrant would be entitled to have his or her unemployment benefits exported in cash from State X to State Y, and would have to register with the employment services of State Y by fulfilling the obligations required of recipients of unemployment benefits under the legislation of that Member State (see the proposed Art. 64a of Regulation EC/883/2004).

²¹⁷ Unlike for the recognition and calculation of short-term benefits (such as unemployment, sickness benefits in cash, etc.), where only one legislation applies, for the calculation of pensions, all the legislations under which the migrant was insured for a period of more than one year are competent and apply.

²¹⁸ Regulation EC/883/2004 Art.56(1)(a).

of public available resources and the need to achieve an equitable in their distribution. The mere existence of anti-cumulation rules in the Regulations is controversial, as there is not a supranational EU social security system with its own internal logic. Thus, the necessarily negative impact on the coverage of the migrant can only be possible on the benefits that were obtained precisely thanks to the application of the coordinating Regulations, for example, thanks to aggregation. It is therefore impossible for the coordinating Regulations, because of their purely protective nature, to lead to the reduction or suppression of a benefit recognized exclusively under the national social security legislation, as the Court of Justice itself has reiterated²¹⁹. Whether a national legislator adopts national anti-cumulation provisions they must also be coordinated:

1. The basic anti-cumulation rule stipulates that the right to receive several benefits of the same nature relating to the same period of compulsory insurance cannot be conferred or maintained - a derived right and an original right never have the same right - (Regulation EC/883/2004 art.10). The practical application of this principle would start with the prevention of the very accumulation of benefits through the mandatory application of a single national rule competent for the recognition of a benefit²²⁰.

2. In the chapter on pensions (old-age and survivors' pensions, but also invalidity pensions), alongside the ad hoc pension calculation system based on aggregation and *pro rata temporis* established under Regulations, there are specific anti-cumulation rules. Their aim is to coordinate the possible simultaneous application of national anti-cumulation rules that reduce, suspend or suppress their own pension when they detect cumulation with pensions and/or income paid in other Member States. In short, the Regulations seek to limit the negative effects of an uncoordinated application of such national anti-cumulation clauses on the pension rights of migrants²²¹. With this aim in mind, firstly, the following

²¹⁹ There is no Community anti-cumulation rule in the field of pensions, as the Court of Justice recognised very early on that the Regulation cannot reduce the amount of a pension acquired exclusively under national legislation by cumulating it with two or more pensions recognised in other Member States (Judgment of 21 October 1975, Petroni, C-24/75, EU:C:1975:129). See also Recitals 29 to 31 of the Explanatory Memorandum to Regulation EC/883/2004.

²²⁰ See, for example, Regulation EC/883/2004 art.68.1, choosing between the concurrent ones in relation to family benefits. Moreover, in cases where more than one national rule finally applies, techniques are put in place to prevent overprotection. See, for example, the secondary role of the national law that recognizes a differential supplement on the full family benefit recognized in another Member State Regulation EC/883/2004 art.68.2) or the aforementioned *pro rata temporis* in the case of pensions. On the need for dialogue between administrations to achieve a fair distribution of family benefits, see judgement of 25 April 2024 C-36/23, ECLI:EU:C:2024:355.

²²¹ See Regulation EC/883/2004 Art.53, 54 and 55 This regulation was laid down in Regulation EC/1248/1992.

general limitations apply to all types of overlapping, i.e. irrespective of whether the overlapping is between pensions of the same or different nature²²²:

a) A national institution may reduce, suspend or discontinue its pensions on the basis of accumulation with foreign income or benefits, “only where the legislation it applies provides that foreign-acquired earnings or benefits are taken into account”. Therefore, the national provisions must be ‘external’ (explicitly referring to the foreign origin of the overlapping income or benefits) in order to be applicable.

b) National anti-cumulation rules, as a general rule, shall apply on gross amounts “before deduction of taxes and contributions”.

c) The prohibited overlapping may not relate to benefits obtained in another Member State “on the basis of voluntary or optional insurance”.

d) Where only one State applies its anti-cumulation rules for simultaneous receipt of foreign benefits or income, you may only reduce your pension up to the amount received in those States.

Secondly, in the specific context of an accumulation of benefits of the same nature, it is established that a national anti-cumulation rule cannot be applied to a pension calculated on a *pro rata temporis* basis and, therefore, as a result of aggregation²²³. It can only be applied to an independent national pension (neither totalized nor *pro rata*) in certain cases: on the one hand, when it is a type A pension (of an amount independent of the contribution effort) or, on the other hand, when it is a type B+A pension (its amount is determined on the basis of a fictitious period considered to have been completed between the date of the materialization of the risk and a later date). In the latter case, it is also required that the accumulation be with another type B+A or type A pension. Furthermore, it is a prerequisite for the application of an anti-cumulation rule for Type A and Type B+A pensions that these are expressly mentioned in Annex IX of Regulation EC/883/2004. Precisely the failure to comply with the latter requirement of inclusion in the relevant Annex prevented the application of an anti-cumulation rule on a national pension considering its accumulation with another foreign retirement pension of the same nature²²⁴.

²²² Regulation EC/883/2004 Art.53(3). Pensions are of the same nature if they have been calculated or awarded on the basis of the periods of insurance or residence completed by the same person. There is an accumulation of pensions of different nature when the above requirement is not fulfilled. Thus old-age pensions are of the same type and an old-age pension and a widow’s or widower’s pension are of different types.

²²³ Regulation EC/883/2004 Art.54(2).

²²⁴ Judgment of 15 March 2018, Blanco Marqués, C-431/16, EU:C:2018:189.

Finally, with regard to the cumulation of pensions with benefits of a different nature²²⁵, the application of the national anti-cumulation rules on either separate or pro-rata pensions or both is allowed. In the first case, the amount of the reduction, suspension or withdrawal of the national pension itself has to be divided by the number of benefits received. In the second case, pro rata temporis is applied to the negative consequences provided for by the national rules in order to avoid excessively detrimental consequences for the interests of migrants.

6. Exportability of benefits

The exportability of benefits, within the framework of the territorial application of the Regulations, prevents the change of residence of the beneficiary to a Member State other than that of the debtor of such benefits from entailing the forfeiture or suspension of such rights, or the modification, reduction or confiscation of their amount²²⁶. This mechanism for preserving acquired rights makes it possible to export benefits that have not been recognized under the coordinating Regulations. This principle protects not only the migrants but also the sedentary worker who has never exercised his/her freedom of movement from an professional point of view and, once retired, decides to change his/her place of residence to another Member State and export his/her national pension there.

In principle, all cash benefits are exportable, the main exception being the special non-contributory “SNCB” benefits mentioned in Annex X of Regulation EC/883/2004 (see section II.C.b). These subsistence benefits are extremely linked to the economic situation of the beneficiary in the Member State where he/she resides and which pays them. For this reason, their exportability to another Member State may lead to a perversion of their purpose and could prevent the state of need that motivated them from being checked.

There is also reluctance on the part of national schemes to fully export unemployment benefits to beneficiaries who wish to seek employment in another Member State²²⁷. The difference in living standards may discourage a beneficiary

²²⁵ Regulation EC/883/2004 Art.55.

²²⁶ Regulation EC/883/2004 Art. 7 “Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated.”

²²⁷ Partial or temporary unemployment benefits, when the employment relationship has not ended, are not exportable. See AC Decision n° U3 12/6/2009.

receiving a high benefit from actively seeking employment if the Member State of destination is one with a lower standard of living. In addition, the debtor social security institution will want to be able to apply all active employment policies to its beneficiary in order to enable him to return to the labour market as soon as possible. It should also be emphasized that it will be able to exercise greater control over possible fraud on its own territory. These reasons led to the creation of a special exportability regime (Regulation EC/883/2004 art.64) which allows export only between two periods of employment, and not before the unemployed person is at the disposal of the employment services of the Member State which owes him/her the benefit and which intends to relocate him/her for a minimum period of 4 weeks. At the end of this period, the unemployed person may be exported for a period of 3 months after leaving the employment services of the State of origin, which may be extended by the debtor institution for a further 3 months without specifying the conditions to be met²²⁸. The unemployed person must register, within 7 days, as a jobseeker with the services of the Member State of destination of the export and submit to the control procedure organized there, as well as comply with the conditions laid down by the legislation of that Member State. If the jobseeker returns to the Member State of origin before the expiry of these time limits, he will continue to receive the benefit to which he is entitled, but if he returns after the expiry of the time limit, he may lose all his entitlements.

The underuse of this exportability channel²²⁹ and the desire to facilitate the mobility of jobseekers led the failed 2016 Commission Proposal to extend the export period to 6 months.

7. Administrative collaboration

This principle is essential for coordination, the proper functioning of which requires the various Member States to exchange information, cooperate and provide mutual assistance in accordance with the common procedural

²²⁸ It has been held to be in conformity with EU law for the Dutch administration to refuse in principle, albeit with reasons, any request for extension, and to accept it only when the person concerned is included in a selection procedure with a chance of getting a job or when he submits a declaration of intent from an employer offering him real prospects of employment in the State of export to be extended (Judgment of 21 March 2018, Schiphorst, C-551/16, EU:C:2018:200). On the reluctance of some States to such an extension see CARRASCOSA BERMEJO, D. "Chapter 19. The Legal Status of EU National Jobseekers: op. cit. p. 381-382

²²⁹ DE WISPELAERE, F., DE SMEDT, L., & PACOLET, J. (2022). Export of unemployment benefits. Report on U2 portable documents. Reference year 2020. Publications Office of the European Union. <https://doi.org/10.2767/327721>.

channels laid down in the Implementing Regulation (Regulation EC/987/2009 art.76). The mutual trust can only be maintained if fraud situations are effectively combated with the help of the ELA. A concept of fraud, which had been advanced in an AC Decision and by the ECJ case-law, was included in the failed Proposal for amendment of the coordination Regulations²³⁰.

Relations between social security institutions are handled through electronic documents thanks to EESSI (Electronic Exchange of Social Security Information) which, after many delays, became operational in 2019.

From an institutional point of view, administrative collaboration is promoted by the Administrative Commission for the Co-ordination of Social Security Systems or AC, which is composed of one government representative from the 27 Member States, assisted, where necessary, by technical advisors. This body adopts interpretative (non-legally binding) Decisions and Recommendations or certain guidance notes on telework, already mentioned in this paper (see section III.A.d). The AC is also in charge of setting the administrative procedures related to the application of the Regulations, encourages the exchange of good practices, promotes the use of new technologies for the application of the coordination or submits to the Commission proposals to improve and update the coordination Regulations.

There is also an Advisory Committee for the Coordination of Social Security Systems, composed of a representative of the governments of the Member States, a representative of the trade unions and a representative of the employers' organizations. At the request of the Commission, the AC or on its own initiative, it may examine problems arising from the application of the coordination regulations and may deliver opinions on the subject to the AC or make proposals for the revision of certain provisions.

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CHAPTER 14

SUBSTANTIVE PROTECTION OF TEMPORARILY POSTED WORKERS IN THE FRAMEWORK OF TRANSNATIONAL PROVISION OF SERVICES

JAVIER GÁRATE CASTRO

INDEX: I. Regulatory rules. II. A reference to the position of the undertaking or entity receiving the transnational provision of services. III. Obligations borne by the undertaking of the posted worker: The guarantee of the application of certain terms and conditions of employment in accordance with the host State legislation. 1. General. 2. Terms and conditions of employment whose application is guaranteed. 2.1 The «maximum work periods» and «minimum rest periods», as well as the '«minimum paid annual holidays» [Art. 3(1)(a) and (b) Directive 96/71/EC]. 2.2 The «remuneration» [Art. 3(1)(c) Directive 96/71/EC]. 2.3 «The conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings» [Art. 3(1)(d) Directive 96/71/EC]. 2.4 The «health, safety and hygiene at work» [Art. 3(1)(e) Directive 96/71/EC]. 2.5 The «protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people» [Art. 3(1)(f) Directive 96/71/EC]. 2.6 «Equality of treatment between men and women and other provisions on non-discrimination» [Art. 3(1)(g) Directive 96/71/EC]. 2.7 «The conditions of workers' accommodation» and the «allowances or reimbursement of expenditure to cover travel, board and lodging expenses» [Art. 3(1)(h) and (i), respectively, Directive 96/71/EC]. 3. Three reinforced protections, two mandatory and one optional. 3.1 Terms and conditions of employment guaranteed to workers subject to long duration postings. 3.2 Terms and conditions of employment guaranteed to posted workers by reason of their assignment at a user undertaking: general. 3.3 Terms and conditions of employment guaranteed to posted workers by reason of their assignment at a user undertaking: workers subject to transnational temporary postings plural or in chain, successive to their assignment at user undertaking on the State of establishment. 3.4 The extension of protection to other terms and conditions of employment established by national provisions of public policy. 4. Does Directive 96/71/EC rec-

ognise the protection of respect for privacy, due regard for dignity and of the rights to strike and to trade union freedom? 5. Reductions, some of them mandatory, in the terms and conditions of work and employment covered by protection. 6. Regulatory sources of the terms and conditions of employment.

Although the types of postings here considered have legal effects both on employment and Social Security relationships of posted workers¹, the analysis that follows² only refers to the first ones. More precisely, it is limited to the analysis of the obligations which in the field of the substantive labour protection of posted workers must be assumed by the concerned undertakings and, mainly, by the employers of those. In accordance with the applicable rules, in charge of such second type of undertakings are both the fulfillment of a main obligation regarding the terms and conditions of employment of the worker during the period of his/her posting, and the fulfilment of instrumental obligations, aimed at ensuring the aforementioned main obligation. This main obligation and these instrumental obligations present particularities in the transnational temporary postings of drivers in the road transport sector of good or passengers. The existence of these particularities is recorded here and the regulatory provisions that deal with them will be mentioned; however, their examination and commentary will be left for another occasion, as will the examination and commentary of the aforementioned instrumental obligations or, if preferred, special and specific administrative and jurisdictional measures to be adopted by the States involved in the posting in order to remove the obstacles to the effectiveness of substantive protection created by the fact that the posting is to a State other than the one in which the posted worker's employer is established.

I. REGULATORY RULES

In EU law, the regulation of general aspects regarding employment relations or posted workers and, therefore, their protection, is found in Directive 96/71/EC of the European Parliament and of the Council of 16 December

¹ The duration of a posting may condition its subjection to social security legislation of the host State, in the terms established by Art. 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

² Part of the results of the research project PDI2021-122254OB-100, *The Impact of European Union Law on Future Labour Reforms* financed by the MCIN and ERDF *A way of doing Europe*.

1996³ and in Directive 2014/67/EU of the European Parliament and of the Council of 15 Mai 2014⁴. The content of both directives reflects the influence of criteria upheld by the ECJ when assessing the compatibility with European Union law (hereinafter EU law) of decisions by Member States subjecting the postings in question to certain requirements⁵. The first of such Directives was affected by relevant amendments by Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018, after a long and difficult process and with a very different content from that which appeared in the proposal drawn up by the Commission. Such Directive, against which Hungary and Poland filed actions for annulment, fortunately dismissed⁶, fixed July 30th, 2020 as the end of the period available to Member States to proceed with its transposition; until that moment, the regulation contained in the previous version of the ammended Directive⁷ was applicable.

To the above regulation, which can be described as general, we must add the particular or specific regulation to which are subject the transnational temporary postings in the road transport sector of goods or passengers. Such regulation is included in Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020⁸, which deals with the problems and difficulties presented by the application of the protection and the administrative requirements and controls established by Directive 96/71/EC and Directive 2014/67/EU regarding postings of drivers.

The already referred amendments introduced in Directive 96/71/EC act in the three following directions:

1) It is determined with greater accuracy the transnational provision of services covered by temporary agency workers that falls within the scope of the Directive. That is achieved adding to its Art. 1(3) a second subparagraph which removes any possible doubt about the inclusion in this area of the plural

³ Concerning the posting of workers in the framework of the provision of services.

⁴ On the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System («the IMI Regulation»).

⁵ So in the case of Directive 96/71/EC, it may be noted the influence of judgment of 27 March 1990 (*Rush Portuguesa*, Case C-113/89); in the case of Directive 2014/67/EU, it is also clear, for example, the influence of judgment of 23 November 1999 (*Arblade*, Joined Cases C-369/96 and C-376/96).

⁶ In both judgments of the Court of Justice of 8 December 2020 (*Hungary v. European Parliament*, Case C-620/18, y *Republic of Poland v. European Parliament*, Case C-626/18).

⁷ So ordered by art. 3(1) of the Directive of amendment («Until that date, Directive 96/71/EC shall remain applicable in its wording prior to the amendments introduced by this Directive»).

⁸ Laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012.

transnational posting of temporary agency workers or, rather, successive to their assignment at a user undertaking in the State of establishment. I refer to this type of posting *infra*, in the sections 3.3.2 and 3.3.3 of this chapter.

2) In accordance with the provisions of Directive 2014/67/EU on the same points, the surveillance and control to be exercised by the State of origin and the host State in relation with the fulfillment by the undertakings of the obligations established by this last Directive and by Directive 96/71/EC⁹ itself. Likewise, to improve their efficiency in the fight against cases of fraud or non-compliance related to the postings, the reciprocal coordination and cooperation that must exist between the competent authorities and bodies of the Member States and of the Union is specified in more detail¹⁰. In relation to the above, it should be remembered that Member States must ensure that the undertaking of the posted worker communicates to the worker, in documentary form, the specific information determined by Art. 7 of the Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

3) The substantive protection granted to posted workers has been significantly improved, resulting in a more balanced solution to the conflict between the interests to which such protection responds and the demands of the freedom to provide services¹¹.

⁹ The indicated clarification stated in the new wording of Art. 5 of Directive 96/71/EC. To the brief terms of the previous drafting («Member States shall take appropriate measures in the event of failure to comply with this Directive» and «they shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive») it has been added: 1) that «The Member State to whose territory the worker is posted and the Member State from which the worker is posted shall be responsible for the monitoring, control and enforcement of the obligations laid down in this Directive and in Directive 2014/67/EU and shall take appropriate measures in the event of failure to comply with this Directive»; 2) that «Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented»; 3) that «The penalties provided for shall be effective, proportionate and dissuasive» [regarding these conditions for penalties see judgment of Court of Justice of 12 September 2019 (*Zoran Maksimovic*, Joined Cases C-64/18, C-140/18, C-146/18 y C-148/18)]; 4) that «Where, following an overall assessment made pursuant to Article 4 of Directive 2014/67/EU by a Member State, it is established that an undertaking is improperly or fraudulently creating the impression that the situation of a worker falls within the scope of this Directive, that Member State shall ensure that the worker benefits from relevant law and practice»; and 5) that «Member States shall ensure that this Article does not lead to the worker concerned being subject to less favourable conditions than those applicable to posted workers».

¹⁰ In the new wording of first paragraph of the Art. 4(2) of the Directive. The European Labour Authority, established by Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019, has been given important powers in relation to the coordination and cooperation mentioned above. Both Directive 96/71/EC and Directive 2014/67/EU are among the Union acts to whose effective implementation and enforcement the European Labour Authority must contribute [Art. 1(4) of Regulation cit.].

¹¹ See *infra*, section 3.1 of this chapter.

The protection afforded to posted workers by Directive 96/71/EC and Directive 2015/67/EU applies regardless of the nationality of the posted worker¹² and requires that the posting:

- 1) Be limited in time¹³.
- 2) Takes place within an employment relationship with the undertaking of origin or, rather, with the undertaking falling within the scope of the aforementioned Directives¹⁴. The fulfilment of the requirement must be assessed in accordance with the legislation of the host State¹⁵.
- 3) Takes place in the territory of a State other than the one in which the undertaking has its genuine establishment¹⁶.

¹² Although the nationality of the posted worker does not influence the application of Directive 96/71/EC, it can condition, just like the State of establishment of his undertaking, the entry, residence and access to employment in the host Member State. If the posted worker is a third-country national, does not fulfil the conditions that make him or her eligible for assimilation to Union workers and his or her undertaking is established in a Member State or signatory to the EEA Agreement, the interpretation consistent with EU law is to consider, in the absence of treatment of the case by national law of the host State, that the situation is equivalent to that of Union workers or assimilated workers, starting, needless to say, that the aforementioned posted worker will have entered, will reside and will work in the State of establishment, for the undertaking that is going to post him/her, subject to the legislation on foreign nationals of that State (cf. whereas 20 of 96/71/EC). Although the law of the host State may opt for a specific treatment of the case, the establishment by that law of additional entry, residence and work requirements (or, if you prefer, of a work permit) presents, in view of the position taken in this respect by the Court of Justice, the problem of their possible consideration as a disproportionate restriction on the freedom to provide services guaranteed by EU law. The position of the Court of Justice is fully reflected in its judgments of 9 August 1994 (*Vander Elst*, Case C-43/93), 21 October 2004 (*Commission v. Grand Duchy of Luxembourg*, Case C-445/03), 19 June 2006 (*Commission v. Federal Republic of Germany*, Case C-244/04), 21 September of the same year (*Commission v. Republic of Austria*, Case C-168/04) and 14 November 2018 [*Danieli*, Case C-18/17: «Articles 56 and 57 TFEU must be interpreted as meaning that a Member State is not entitled to require that third-country nationals, who are hired out by an undertaking established in another Member State to an undertaking also established in that Member State with a view to the provision of services in the first Member State, have work permits» (paragraph 53 and ruling (2))]. According to the last four judgements, it does not constitute a disproportionate restriction for the host State to ask the undertaking of the posted worker for a prior declaration on the regular situation of that worker in accordance with the legislation on foreign nationals of the State in which the undertaking is established. The same compatibility can be appreciated with respect to the requirement that the aforementioned undertaking provide, if necessary, the documentation that accredits compliance with the aforementioned legislation. The specific treatment of the case by legislation of a Member State may go further and require, with the objective of protecting public policy (to be credited in case of dispute), that the undertaking established in another Member State obtain a residence permit for each third-country worker which it intends to post to the territory of that Member State. In this sense, judgment of 20 June 2024 [*SN and Others*, Case C-540/22, paragraphs 102, 103 and 122 and ruling (2) and (3)].

¹³ Cfr. Arts. 2(1) and 3(1a) (3.1 bis in the official version in other languages) of Directive 96/71/EC, the second added by Directive (EU) 2018/957 and relating to the distinction between postings of up to twelve or, where appropriate, eighteen months and postings of longer duration [of «long duration», in terms of whereas 9 of Directive (EU) 2018/957 itself].

¹⁴ Art. 1(3)(a), b) and (c) of Directive 96/71/EC.

¹⁵ Art. 2(2) of Directive 96/71/EC: «For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted».

¹⁶ After drawing attention, in its whereas 8, to the need for the establishment to be genuine, the Directive 2014/67/EU makes the requirement, in its Art. 4(2), to the development, in the State in question, of 'genuinely

4) It constitutes the object (ancillary or proper) of a service to be provided in the aforementioned territory for an undertaking or person established or exercising its activity therein. Specifically, it must serve one of the following transnational operations or activities:

a) To the fulfilment of a contract that the undertaking of the posted worker had entered into with the aforementioned undertaking or person¹⁷.

b) To the provision of work by the posted worker in another undertaking owned by the group which the undertaking that has decided the posting it forms part of¹⁸.

c) To the transfer of the posted worker by a temporary employment undertaking or placement agency to a user undertaking established or which renders its activity in the host State¹⁹. The definition of the factual scenario has been affected, for the better, by the amendments introduced by Directive (EU) 2018/957. With such amendments, Directive 96/71/EC goes on to determine more precisely what transnational provision of services covered by temporary agency workers are included in its scope of application. This is achieved by adding to the paragraph 3 of Art. 1 a second subparagraph which removes any possible doubt about the inclusion, in that area, of the situation described in that new paragraph 3, consistent in the provision of posted workers in a State that may or may not coincide with the State of establishment of the temporary employment undertaking or placement agency (it may therefore be another Member State and already involve, a transnational posting) followed by the decision of the user undertaking of sending to such other State, in an establish-

performs substantial activities, other than purely internal management and/or administrative activities', and offers in this respect a series of factual elements to be considered by the competent authorities in case of doubt about the realisation of the aforementioned activities and to be evaluated globally and with prudence.

¹⁷ Art. 1(3)(a) of Directive 96/71/EC. On this matter, it is of interest the judgment of Court of Justice of 19 December 2019 (*Michael Dobersherger*, Case C-16/18), according to which the referred precept «must be interpreted as meaning that it does not cover the provision, under a contract concluded by an undertaking established in a Member State and an undertaking established in another Member State, must which is contractually linked to a railway undertaking established in that same Member State, of on-board services, cleaning or food and drink services for passengers carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first Member State, on international trains crossing the second Member State, *where those workers carry out a significant part of the work inherent in those services in the territory of the first Member State and where they begin or end their shifts there*» (paragraph 35 and ruling; italics are ours).

¹⁸ Art. 1(3)(b) of Directive 96/71/EC. As the judgment of the Court of Justice of 10 February 2011 (*Vicoplus case*, Joined Cases C-307/09, C-308/09 and C-309/09, paragraph 39) points out, the precept refers to posting for the purpose of the supply of labour between undertakings of a group. The posting constitutes, then, in the words of the Court of Justice, 'the very purpose of a transnational provision of services' [*ibidem*, paragraph 46 and ruling (2)].

¹⁹ First paragraph of Art. 1(3)(c) of Directive 96/71/EC. The posting constitutes here, again, «the very purpose of the provision of services effected by the undertaking providing the services» [judgment *Vicoplus*, cit., paragraph 51 and ruling (2)].

ment or in an undertaking owned by the group or in the execution of a works or service contract (not of a manpower supply contract) that it must fulfil in the territory of that State for any person or entity established or operating there.

The terms of the referred new paragraph are the following: «Where a worker who has been hired out by a temporary employment undertaking or placement agency to a user undertaking as referred to in point (c) is to carry out work in the framework of the transnational provision of services within the meaning of point (a), (b) or (c) by the user undertaking in the territory of a Member State other than where the worker normally works for the temporary employment undertaking or placement agency, or for the user undertaking, *the worker shall be considered to be posted to the territory of that Member State by the temporary employment undertaking or placement agency with which the worker is in an employment relationship*²⁰. The temporary employment undertaking or placement agency shall be considered to be an undertaking as referred to in paragraph 1 and shall fully comply with the relevant provisions of this Directive and Directive 2014/67/EU of the European Parliament and of the Council». The terms used include, in addition to cases of a single transnational posting (the user undertaking established in the same Member State which the temporary employment undertaking decides to employ in another Member State the worker to be received in the first Member State), cases of transnational plural or in chain postings, as it happens, for example, when the user undertaking receives the worker in a Member State different from the one in which the temporary employment undertaking had hired him and employs him in one or more executions of transnational services to be rendered in another Member State different from both already mentioned.

Even though Directive 96/71/EC and Directive 2014/67/EU declare that its respective recipients are Members States²¹ and the first of those refers its application to causes in which the undertakings established in a Member State post workers to the territory of another Member State²², the truth is that they are also the recipients of those the signatory states of the Agreement on the European Economic Area (hereforth, AEEA), where it is applicable, just like in the Members States, additionally to the freedom of movement for workers, the freedom to provide services and the freedom of establishment. The application of both directives will also, therefore, be observed, when the State of establishment of the undertaking that decides the posting or the host State be

²⁰ Italics are ours.

²¹ So in Art. 9 of Directive 96/71/EC and Art. 26 of Directive 2014/67/EU.

²² Art. 1(1).

a signatory of the AEEA²³. This said, I don't think it's debatable that such observance is also projected onto the postings carried out by undertakings established in States neither belonging to the EU nor signatories of the AEEA, when such undertakings may render services in any of those which belong to the UE or had signed the AEEA. The inclusion of such postings is an adequate way to comply with the instruction of Directive 96/71/EC, according to which «Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State».

Directive 96/71/EC excludes from its scope of application, in Art. 1(2), with absolute character, that is to say, from all the contents of its regulation and even if the workers concerned may find themselves in a situation of posting in the sense of such Directive, the «seagoing personnel» of the merchant navy undertakings²⁴. This contrasts with what happens in relation to the mobile workers of the road transport sector of good or passengers, or flight personnel serving air transport companies, whose posting in the already mentioned conditions is included in the Directive²⁵.

²³ Any reference made in this chapter to the Member States should be understood to also include this second group of States.

²⁴ In the case of seagoing personnel engaged in the provision of maritime transport falling within the scope of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), the decision to post taken by a Community shipowner when exercising the aforementioned modality of freedom to provide services may imply for those affected, in the cases determined by Art. 3 of the Regulation, that «all matters» relating to them (therefore, also labour matters) are resolved in accordance with the host State legislation.

²⁵ They refer to the inclusion, in one way or another, in the postings to manage the rendering of a road transport service of good or passengers, of Directive 2014/67/EU [art.9(1)(b)], the Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market, in relation with cabotage operations, and the Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006 (see whereas 17 of the first Regulation and 11 of the second). They categorically confirm the inclusion the judgments of Court of Justice of 1 December 2020 (*Federatie Nederlandse Vakbeweging*, Case C-815/18: «Article 1(2) of Directive 96/71 excludes from the scope of that directive only the provision of services involving merchant navy seagoing personnel»; «with the exception of the latter provision of services, the directive applies, as a rule, to any transnational provision of services involving the posting of workers, irrespective of the economic sector to which that provision of services relates, including, therefore, in the road transport sector»; «the fact that Directive 96/71 is based on provisions of the EC Treaty relating to the freedom to provide services without its legal basis including, in addition, provisions relating to transport cannot exclude from its scope the transnational provision of services in the sector of road transport activities, in particular, goods transport»; the cited Directive «must be interpreted as applying to the transnational provision of services in the road transport sector» (paragraphs 32, 33, 40 and 41 and ruling (1)) and 8 July 2021 (*OL, PM y RO v. Rapidspeed*, Case C-428/19: the «Directive 96/71 must be interpreted as applying to the transnational provision of services in the road transport sector» [paragraph 36 and ruling (1)]. Inclusion entails the application of the amendments introduced by Directive (EU) 2018/957, including, therefore, the equality of remuneration. This application has been made effective with the approval of Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020, which constitutes the legislative act to which Art. 3(3) of Directive (EU) 2018/957 subordinated it.

II. A REFERENCE TO THE POSITION OF THE UNDERTAKING OR ENTITY RECIPIENT OF THE PROVISION OF SERVICES

Notwithstanding the protection of the posted worker by his undertaking, the one which receives the service has or may have, due to the host state legislation, certain obligations or responsibilities, some of them associated with non-compliance of the terms and conditions of employment, the object of which constitutes the principal obligation of the employer who decides the posting (for example, the payment of the remuneration in an inferior amount to the applicable one due to the labour legislation of that State), all of which are justified, at least, by the profit obtained from the work of posted workers employed in the transnational provision of the contracted service.

The referred possibility about which Directive 96/71/EC remains silent is anticipated, in relation with subcontracting chains, in Art. 12 of Directive 2014/67/EU, which invites Member States («may») to adopt «additional measures» to those which may already exist, with the goal that «in subcontracting chains the contractor of which the employer (service provider) covered by Article 1(3) of Directive 96/71/EC is a direct subcontractor can, in addition [joint liability] to or in place [subsidiary liability] of the employer, be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum rates of pay [currently, due to the amendment of Art. 3(1)(c) of Directive 96/71/EC by the Directive (EU) 2018/957, with a reference limited to remuneration] and/or contributions due to common funds or institutions of social partners in so far as covered by Article 3 of Directive 96/71/EC»²⁶. The invitation becomes an obligation («Member States shall provide for measures ensuring») in the case of subcontracting chains in which construction activities mentioned in Annex I of, once more, the Directive 96/71/EC; to be more exact, it becomes an obligation to choose between adopting the indicated measures of communication of responsibility or that of «other appropriate enforcement measures [...] which enable, in a direct subcontracting relationship, effective and proportionate sanctions against the contractor, to tackle fraud and abuse in situations when workers have difficulties in obtaining their rights».

²⁶ On the compatibility of establishing the type of responsibilities contemplated with the freedom to provide services see, confirming that, judgment of Court of Justice of 12 October 2004 (*Wolff & Müller*, Case C-60/03, paragraph 45 and ruling).

III. OBLIGATIONS TO BE BORNE BY THE UNDERTAKING OF THE POSTED WORKER: THE GUARANTEE RELATING TO THE APPLICATION OF CERTAIN TERMS AND CONDITIONS OF EMPLOYMENT IN ACCORDANCE WITH THE HOST STATE LEGISLATION

These obligations and the protection they represent for the posted worker are activated by the presence of one of the aforementioned postings included in the scope of application of Directive 96/71/EC.

1. General

Starting from the premise that the freedom to provide services is not absolute, on the road to a definitive solution, difficult, that harmonizes the demands of that freedom with the rest of the interests and assets at stake, of which the protection of posted workers forms a part, the Directive 96/71/EC requires Member States to ensure that the undertaking of this guarantees, for the duration of the posting and in relation to certain terms and conditions of employment²⁷, the enjoyment of any of them in the form established by the host State legislation, provided that it is more favourable for the worker than the provisions on the same condition by the contract and the law under which it was concluded²⁸. In other words, for it to be given effect, «whatever the law applicable to the employment relationship»²⁹ or «irrespective of which law applies to the employment relationship»³⁰, to the provisions of the host Member State governing one of the conditions which are being referred, it is necessary that the contract and the law governing it do not imply a higher, equal or, at least equivalent or «comparable» protection for the same condition³¹ to the one enjoyed by

²⁷ Those stated in the new paragraphs 1(1a) (*1bis* in the other language versions) and (1b) (*1 ter* in the other language versions) of Art. 3 of Directive 96/71/EC. The second applies to long duration postings (those longer than twelve or, where appropriate, eighteen months); the last, to postings decided by temporary employment undertakings.

²⁸ As referred in Art. 3(7) of Directive 96/71/EC. On this particular see, among other judgments of the Court of Justice, those of 18 December 2007 (*Laval un Partneri*, Case C-341/05, paragraphs 77, 79 and 81) and 3 April 2008 (*Rüffert*, Case C-346/06).

²⁹ Art. 3(1) of original version of Directive 96/71/EC.

³⁰ Art. 3(1) of version amended of Directive 96/71/EC.

³¹ Expression used by the Court of Justice, for example in its judgments of 21 October 2004 (*Commission v. Grand Duchy of Luxembourg*, cit., paragraph 29), 18 July 2007 (*Commission v. Federal Republic of Germany*, Case C-490/04, paragraph 54) and 19 June 2008 (*Commission v. Grand Duchy of Luxem-*

the host State workers due to those regulatory provisions, which include, if at all, the collective agreements and arbitration awards which have been declared universally applicable³². The determination of whether this is the case cannot be made globally, for all the conditions covered by the guarantee; it must be carried out in relation to each one. Depending on the content of the specific condition of employment being evaluated, the operation can be relatively easy or simple, as seems to be the case, for example, with regard to the regulation of minimum paid annual leave, or it can be extremely complex, as is the case with regard to the amount of remuneration, as shown by the jurisprudence of the European Court of Justice³³. Furthermore, it should be borne in mind that the abundant and important social policy directives harmonizing national legislations relating to the matters covered by the guaranteed conditions of employment may favour, in the postings decided by undertakings established in other Member States or signatories of the EEA, the assessment that the conditions contained in its normative provisions that have transposed those directives are equivalent to those of the host State.

Although the conditions covered by the guarantee are some of the most important, they are not all³⁴. If this were the case, the host State law would come to govern the employment contract in its entirety, replacing the law under which it had been signed. It is accepted that in each possible host State there may be workers subject to some inferior conditions, because they are not included in the list of those guaranteed to those employed in the same task.

The higher guaranteed protection regulated by Art. 3 of Directive 96/71/EC is that included in the normative provisions of the host State related to matters which I'll examine in the next sections of this chapter.

bourg, Case C-319/06, paragraph 42). On other occasions the expression used is «essentially similar protection» [judgments of 23 November 1999, *Arblade*, cit. (paragraph 51), and 25 October 2001, *Finalarte*, Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, ruling (1)].

³² Otherwise (the home State labour legislation provides the aforementioned protection) the application of the regulation contained in the host State labour legislation would have to be ruled out, as the objective of the latter of guaranteeing the posted workers «the same level of welfare protection for the employees of such service providers as that applicable in its territory to workers in the same sector» has been achieved [judgment of Court of Justice of 15 March 2001 (*Mazzoleni*, Case C-165/98, paragraph 35)].

³³ In relation with the guarantee of «the minimum rates of pay» referred to by the initial version of Art. 3(1)(c) of Directive 96/71/EC. See, for example, judgments of 12 February 2015 (*Sähköalojen ammattiliitto*, Case C-396/13), 14 April 2005 (*Commission v. Federal Republic of Germany*, Case C-341/02) and 15 March 2001 (*Mazzoleni*), this last one already cited.

³⁴ Not even with the application of the national measures of transposition of Directive (EU) 2018/957, when the posting deserves to be classified as long duration (lasting more than twelve or, where appropriate, eighteen months; cf. paragraph (1b) (1 *bis* in the version in other languages) added to Art. 3 of Directive 96/71/EC).

Of course, the paragraphs (1), (1b) and (1c) of Art. 3 of the Directive are the main pieces on which the protection or guarantee is built. However, in order to fully understand its scope, it is also necessary to consider other paragraphs of the same article that give the aforementioned protection a certain elasticity, by allowing Member States the possibility of introducing extensions and reductions of the terms and conditions of employment that define its general or ordinary scope.

In short, the substantive protection or guarantee in question has been significantly strengthened by the amendments introduced by Directive (EU) 2018/957. With them, it achieves a more balanced position with respect to the freedom to provide services. EU law continues to be based on respect for the diversity of the national labour regulations of the home State and host State; however, the space in which such diversity remained immune to protection is reduced and the so-called «nucleus of mandatory rules for minimum protection to be observed in the host country»³⁵ by the employers who temporarily post workers to their territory to cover with them the provision of services justifying the posting is increased. If one prefers, we are witnessing a very significant advance towards equality of treatment between the posted workers and the local workers or those hired in accordance with the host state legislation. This situation of a decrease in one thing and a simultaneous increase in the other and, ultimately, of greater coordination of labour laws of the Member States with an increase in the host State's normative provisions to be given effect with regard to the posted worker's employment contract, occurs at two levels:

1) The list of the terms and conditions of employment subject to the law under which the employment contract was concluded by the posted worker and his undertaking is reduced. It is reduced in general and, in particular, both in what can be called, in the expression used by Directive (EU) 2018/957³⁶, «long duration» postings (from twelve or, where appropriate, eighteen months) as in the postings of workers provided by temporary employment undertakings, where the application of certain terms and conditions of employment in accordance with the normative provisions of the host State no longer depends on what the latter may provide and is instead imposed by Directive 96/71/EC itself.

2) The obligatory consideration of the collective agreement and the arbitration award as regulatory sources of the terms and conditions of employment subject to substantive protection is becoming widespread.

³⁵ Whereas 13 of Directive 96/71/EC.

³⁶ See whereas 9 of its explanatory memorandum.

The end result is a decrease in the attractiveness of arranging the provision of services with undertakings established in states whose labour legislation is less advantageous for workers. The attractiveness of a lower price for subcontracting or for covering the service by means of cheaper labour is significantly reduced. While the initial version of Directive 96/71/EC favoured the arrangement of transnational provision of services based on the lower price derived from a labour force subject to less demanding terms and conditions of employment than those that governed in the host State, the amendments introduced by Directive (EU) 2018/957 help to favour the transnational provision of services that require high levels of qualification and specialisation. The aforementioned amendments benefit national undertakings providing services that require lower levels of qualification and specialization from the moment it is less attractive for them to contract their coverage with companies from other Member States.

2. **Terms and conditions of employment which applicability is guaranteed**

2.1 THE «MAXIMUM WORK PERIODS» AND «MINIMUM REST PERIODS», AS WELL AS THE «MINIMUM PAID ANNUAL HOLIDAYS» [ART. 3(1)(A) AND (B) DIRECTIVE 96/71/EC]

It should be made clear from the outset that the terms used in Art. 3(1) of Directive 96/71/EC to refer to these conditions of employment remain the same after the amendments made to the precept with Directive (EU) 2018/957. It doesn't seem arguable that the «maximum work periods» and «minimum rest periods» include aspects such as the maximum daily or weekly working time, the daily rest, the breaks within the working day, the limitation of overtime, the working day limits for night workers, the weekly rest period and the rest on public holidays. In accordance with the Court of Justice³⁷, in order not to contradict the Directive, the national transpositions must include, in addition to the minimum weekly rest period, the minimum daily rest period. In must also, of course, include the rest period during the work day.

The applicability of the more favourable host State rules about the period of annual leave is not precluded by the fact that such regulation exceeds

³⁷ See judgment of 19 June 2008 (*Commission v. Grand Duchy of Luxembourg*), cit., paragraphs 8 and 70 and following.

the one established by the EU law³⁸ [four weeks; Art. 7(1) of the Directive 2003/88/EC].

2.2 THE «REMUNERATION» [ART. 3(1)(C) DIRECTIVE 96/71/EC]

The elimination of the wage gap between posted workers and workers hired in the host State (local workers) employed in a job with the same characteristics and, incidentally, the introduction of greater certainty about the guaranteed wage amount for the former is sought by the Directive (EU) 2018/957 through the amendment of former point (c) of the first paragraph of Art. 3(1) of the Directive 96/71/EC. In the new point (c), the expression «the minimum rates of pay» which appeared in the previous one is replaced by the broader and more precise «remuneration». The posted worker is now guaranteed to receive the higher amount that would correspond to a local worker as «remuneration, including overtime rates». The precision that «this point does not apply to supplementary occupational retirement pension schemes»³⁹ remains.

As with the concept that is replaced, the determination of the remuneration to be taken into consideration in accordance with the new point (c) or, in other words, the method of calculation of said remuneration, corresponds to the host State⁴⁰. This is expressly stated in the third paragraph of the new Art. 3(1) of the amended Directive⁴¹, which also limits the margin of manoeuvre of that State by providing, in the same paragraph, that the determination shall include all items that the national provisions attribute the nature of remuneration (or, if preferred, salary)⁴². This manoeuvring margin is also limited by a criterion followed by the Court of Justice in relation to the former point (c); according to this criterion, which has not been

³⁸ So, judgment of the Court of Justice *Finalarte*, cit., paragraphs 54 and following and ruling (1).

³⁹ Another thing is whether the continuity of contributions should be guaranteed during the posting, when this occurs from one Member State to another. See Art. 6 of the Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community.

⁴⁰ This does not exempt from taking into account the definition of remuneration in the law governing the contract or the national provisions of the home State. To determine whether the protection in accordance with the national provisions of the host State is superior to that granted by the home State or State of origin and, therefore, the former should be applied, it is necessary to compare the gross amount of the remuneration according to the definition in the first State with that of the same gross amount of remuneration according to the definition in the second State.

⁴¹ «Or the purposes of this Directive, the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted».

⁴² «Means all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable or otherwise apply in accordance with paragraph 8».

overturned, the determination resulting from the national provisions or their interpretation by the national courts is admissible. «but only in so far as that [...] does not have the effect of impeding the free movement of services between Member States»⁴³. Furthermore, again according to the aforementioned Art. 3(1) (fourth, fifth and sixth paragraphs), accurate and up-to-date information on the aforementioned items, as well as on the remaining terms and conditions of employment subject to the application of the national provisions, must be published by the Members States, «without undue delay and in a transparent manner», in the «single official national website» referred by Art. 5 of the Directive 2014/67/EU; if such website did not provide the referred information, such circumstance «shall be taken into account [...] in determining penalties» applicable for violation of the terms and conditions of employment to be guaranteed to posted workers, «to the extent necessary to ensure the proportionality thereof»⁴⁴. The terms used to de-

⁴³ Judgment of 7 November 2012 (*Isbir*, Case C-522/12), paragraph 37, with wording that reproduces the judgment *Sähköalojen ammattiliitto*, cit., paragraph 34. The determination made by the host State labour regulations or their interpretation cannot imply that the comparison between the former and the home State, on which the application of the examined wage guarantee depends, is carried out, thus forcing said application, disregarding any concepts or salary supplements paid to the postings workers in accordance with the labour regulations of the second of those States and which do not modify to the detriment of the worker, when making that comparison, the one identified as normal or habitual «relationship between the service provided by a worker and the consideration which that worker receives in return» [judgment of the Court of Justice of 14 April 2005, *Commission v. Federal Republic of Germany*, cit., paragraph 43; the same concept is also mentioned in paragraphs 30, 38 and 39 and ruling 1)]. Because of the condition just referred to, the comparison between the legislations in question cannot ignore the amount of the extraordinary payments made by the undertaking of the posted worker (see judgment *Commission v. Federal Republic of Germany* recently cit., paragraphs 31 and 41); for lack of it, it cannot include the contribution to the capital formation provided for by the legislation of the home State and subsidised by it in order to fulfil an objective of social policy (judgment *Isbir*, cit., paragraphs 43 and 44).

⁴⁴ Please note that, as provided in Art. 7(2) of the Directive (EU) 2019/1152 of the European Parliament and the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, the Members States are obliged to ensure that the undertaking of the posted worker provides the latter, in writing, with information on the remuneration to which they are entitled in accordance with the national provisions of the host State. Unless the Member States provide otherwise, such information shall not be required in the event that the duration of the posting does not exceed four consecutive weeks (paragraph 4 of the same article). In my opinion, apart from the problem posed by the fact that it has not been established how to act in the case of postings that are divided into different periods, each of which does not exceed four weeks, the unenforceability of the aforementioned information is justified, reasonable or can be explained if it is related to the cases in which the Directive 96/71/EC subjects the guarantee of equal pay to a mandatory exception [in certain postings lasting no more than eight days; art. 3(2)] and authorises the Member States to establish other exceptions to the same guarantee in view of the short duration (not exceeding one month) or limited importance of the posting and the transnational provision of services for which it serves [Art. 3, paragraphs (3), (4) and (5)]. Logically, if the indicated guarantee does not apply, it makes no sense to demand that information be provided about a payment to which one is not entitled. However, from the moment that it is obligatory to apply such a guarantee to a posting lasting no more than four consecutive weeks because it does not fall under the exception imposed or under any of the exceptions authorised by Directive 96/71/EC, there is no reason not to make the information in question compulsory. Likewise, it is not acceptable to leave it up to the Member States to decide, in such cases, whether or not to make that information compulsory. This is not the case, for example, of postings carried out by tempo-

scribe the stated obligation to provide information are influenced by the position held by the Court of Justice regarding the rules on the method of calculating remuneration established by the normative provisions of the host State, which «must be binding and must meet the requirements of transparency, which means, in particular, that they must be accessible and clear»⁴⁵.

To determine whether the amount of the remuneration of a posted worker should be that derived from the law applicable to the employment contract or that resulting from compliance with host State regulations, it will be necessary to proceed as indicated in the second paragraph of Art. 3(7) of Directive 96/71/EC: to integrate the supplements or payments that do not correspond to expenses incurred by the posted worker (for travel, accommodation or subsistence) into the items whose amount is computable⁴⁶. For example, the add-ons or payments that appear linked to the disadvantages of being posted (personal isolation, being far from family and one's usual environment, the amount of time spent travelling to and from work, higher cost of living, etc.)⁴⁷ In order to eliminate uncertainty about the part of any by-posted supplement that corresponds to the reimbursement of expenses incurred by it and, therefore, is not computable⁴⁸, it is established [last paragraph of Art. 3(7) of Directive] that «the entire allowance shall be considered to be paid in reimbursement of expenditure»; the rule is mandatory unless determined by the law applicable to the employment contract which portion is due to such reimbursement and which is part of the remuneration. On this point I refer to what is indicated below, in the section 3.1.2.7 of this same chapter.

2.3 «THE CONDITIONS OF HIRING-OUT OF WORKERS, IN PARTICULAR THE SUPPLY OF WORKERS BY TEMPORARY EMPLOYMENT UNDERTAKINGS» [ART. 3(1)(D) DIRECTIVE 96/71/EC]

Directive (EU) 2018/957 does not introduce any change in relation to the identification of the conditions now contemplated that appeared in point

rary employment undertakings, where the salary guarantee applies regardless of the duration of the posting and, therefore, even if it is for a short period of time. In short, a precept that, like paragraph (4) of Art. 7 of Directive (EU) 2019/1152, seems to ignore the situations described does not seem satisfactory.

⁴⁵ Judgment *Sähköalojen ammattiliitto*, cit., paragraphs 40, 44 and 45 and ruling (2). Cfr. whereas 21 of Directive (EU) 2018/947.

⁴⁶ Among such expenses and, therefore, are not computable, the coverage of the cost of accommodation and meal vouchers [judgment *Sähköalojen ammattiliitto*, cit., paragraphs 58 to 63, both included, and ruling (2)].

⁴⁷ See, in relation with the inclusion of the amount of a daily allowance and compensation for daily travelling time, judgment *Sähköalojen ammattiliitto*, cit., paragraphs 46 to 57, both included, and ruling (2).

⁴⁸ See whereas 20 of Directive (EU) 2018/957.

(d) of Art. 3(1) of the initial version of Directive 96/71/EC. Such conditions are not those of working and employment of the worker involved in an employment supply operation, but those established by the national normative provisions of each Member State so that temporary employment undertakings established in other Member States or signatories of the AEEA can operate or develop their activities in the first and, therefore, enter into assignment contracts with the user undertakings to be carried out using posted workers. Among the conditions mentioned would be, for example, the need for the assignment contract to include the total remuneration that the collective agreement in the user undertaking indicates for the job to be filled and that would correspond to the assigned worker if he had been hired directly by the user undertaking. There is also the need for the aforementioned job to have the mandatory evaluation of risks to the safety and health of workers.

The obligation of the temporary employment undertaking to grant the assigned worker, for the duration of his assignment and posting, the enjoyment of certain working and employment conditions as if he had been directly contracted by the user undertaking to occupy the same job and, of course, provided that such enjoyment is more advantageous for him than that which he would have in application of his employment contract and the law by which it is governed, does not respond to Art. 3(1)(b) of the Directive 96/71/EC. If, prior to the amendment, this was supported by the power conferred on the Member States by the initial version of Art. 3(9)⁴⁹, today it finds support both in the new wording of this precept and in what has come to be imperatively provided for in paragraph (1b) added to the same article by Directive (EU) 2018/957. It is true that such equalization of conditions is now mandatory for all Member States under the terms of Art. 5 of the Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work; however, its transposition to national law may differ from one Member State to another and, therefore, its imposition in the most advantageous or broadest form of host State legislation for the assigned workers by temporary employment undertakings established in that State continues to fall, for the time being, under what it can do in the use of the power granted by the aforementioned Art. 3(9) of the Directive 96/71/EC⁵⁰.

⁴⁹ «Member States *may* provide that the undertakings referred to in Article 1 (1) must guarantee workers referred to in Article 1 (3) (c) the terms and conditions which apply to temporary workers in the Member State where the work is carried out» (the italics are ours).

⁵⁰ I insist that, with regard to the envisaged levelling of the playing field, the power becomes an obligation in the new paragraph 1(b) of the same article; an obligation in relation to the working and employment conditions that apply in transposition of Art. 5 of the Directive 2008/104/EC, not other conditions.

2.4 THE «HEALTH, SAFETY AND HYGIENE AT WORK» [ART. 3(1)(E)
DIRECTIVE 96/71/EC]

The terms used in Art. 3(1) of Directive 96/71/EC to refer to these conditions of employment have not been affected by the amendments made to the precept by Directive (EU) 2018/957. Although such terms serve to consider included in the guarantee, without forcing the issue, the conditions relating to the maternity and young people protection contained in the normative provisions of the Members States that respond to the transposition of the Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, and Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, the truth is that the aforementioned conditions are the subject of specific attention in point (f) of the precept.

2.5 THE «PROTECTIVE MEASURES WITH REGARD TO THE TERMS AND
CONDITIONS OF EMPLOYMENT OF PREGNANT WOMEN OR WOMEN WHO
HAVE RECENTLY GIVEN BIRTH, OF CHILDREN AND OF YOUNG PEOPLE»
[ART. 3(1)(F) DIRECTIVE 96/71/EC]

The recipients of the protective measures linked to the terms and conditions of employment mentioned in Art. 3(1)(f) of Directive 96/71/EC are the same as those that appeared in the initial version of the precept. As regards the matters covered by such terms and conditions of employment, they would be those other than those covered by other terms and conditions of employment including, with the broadest subjective scope, the groups of workers mentioned in point (f) of Art. 3(1), in other points of the same article and paragraph. If this is accepted, the following would be excluded from the provisions of the aforementioned point (f): the protective measures in the areas of health, safety and hygiene at work and health and working time, which are dealt with in points (a), (b) and (e). This is a minor issue, which affects the location, within the Directive, of the protective measures examined, not their scope, which requires a full understanding of the provisions of Directive 94/33/EC and Directive 92/85/EEC in relation, respectively, to young people and pregnant workers, women who have recently given birth or are breastfeeding.

2.6 «EQUALITY OF TREATMENT BETWEEN MEN AND WOMEN AND OTHER PROVISIONS ON EQUALITY» [ART. 3(1)(G) DIRECTIVE 96/71/EC]

Directive (EU) 2018/957 did not introduce any amendments here either. The equality of treatment and non-discrimination referred to in the Directive 96/71/EC must be understood in the manner provided for in the Union rules, including those belonging to primary law [Arts. 153(1)(i) and 157 of TFEU], which deal specifically with the matter. The undertaking of the posted worker must guarantee the higher protection that applies in the host State in relation to the measures transposing EU law on the aforementioned matter⁵¹. The envisaged equality of treatment undoubtedly extends to equal pay on grounds of sex and to non-discrimination against fixed-term and part-time workers.

The scope for the application of the national legislation on the matter, which can be broad in the case of postings made by undertakings not belonging to Member States or to the EEA, is scarce or non-existent in the postings decided by undertakings established in those States, given the important actions of unification and harmonization undertaken in the field of equality of treatment and non-discrimination by the Union Social Law. Such actions can make it particularly difficult or controversial here to determine whether the normative provisions of the home Member State are less advantageous or do not confer equivalent protection.

2.7 «THE CONDITIONS OF WORKERS' 'ACCOMMODATION' AND THE 'ALLOWANCES OR REIMBURSEMENT OF EXPENDITURE TO COVER TRAVEL, BOARD AND LODGING EXPENSES'» [ART. 3(1)(H) E (I), RESPECTIVELY, DIRECTIVE 96/71/EC]

Both conditions were introduced during the discussion in the European Parliament of the proposal for a Directive amending Directive 96/71/EC. According to the wording of the new points (h) and (i) of the Art. 3(1) of the latter, if the allowances or reimbursement guaranteed for expenditures of travel, board and lodging are those provided «for workers away from home for pro-

⁵¹ The Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, cit. Also, the Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP and the Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

fessional reasons», the guarantee of the conditions of accommodation refers to the cases in which these are «provided by the employer to workers away from their regular place of work». In my opinion, these conditions of accommodation include, for example, the type of accommodation (in a hotel, in a boarding house or residence, in a rented apartment or one owned by the undertaking of the posted worker, in a module set up for this purpose in the workplace itself) and its characteristics [distance from the workplace, category (one, two, three or more star hotel), surface area, conditioning, complementary facilities, such as availability of swimming pool, gym or car park, furniture, heating or air conditioning, etc.].

As with the rest of the conditions to which the guarantee or protection object of the Directive 96/71/EC are extended, it would be necessary to consider that both the provision of the conditions of accommodation and the amount of the allowances or reimbursement for expenditures of travel, board and lodging [those included in the aforementioned point (i), not other possible ones] become subject to the provisions of the host State national provisions, when these are more advantageous than those of the home State⁵². These are two conditions that until now were excluded from the protection or guarantee offered by EU law⁵³ which, having now opted for their inclusion, considers necessary to make clarifications regarding the second of them. Such clarifications, which the doctrine tends to pass through uncritically and without the slightest analysis, are the result of amendments made during the processing of Directive (EU) 2018/957, as well as the agreement reached by the European Parliament and the Council in the final stage of the aforementioned processing. Aware that they are formulated in terms that do not always facilitate the exact and certain determination of what is intended, I will now set out, even at the risk of being wrong, my opinion and doubts in this regard.

The first of these clarifications appears in the same paragraph 1 of Art. 3 of Directive 96/71/EC, in its second subparagraph. According to this, the possible subjection to the host State's legislation of the reimbursement of the expenses described in point (i) of the first paragraph refers «exclusively to travel, board and lodging expenditure incurred by posted workers where they are required to travel to and from their regular place of work» located in that State, «or where they are temporarily sent by their employer from that regular place of work to another place of work». So:

⁵² Cfr. first paragraph of Art. 3(7) of Directive 96/71/EC.

⁵³ As confirmed by the Court of Justice. So, in relation with the amount of an daily allowance and compensation for daily travelling time, judgment of February 2015 (*Sähköalojen ammattiliitto*), cit., paragraphs 58 to 63, both included, and ruling (2).

1) The indication that the reimbursement refers «exclusively» to expenses «incurred by posted workers» closes any possibility of applying the host State's labour legislation to expenses that the employer must bear directly. There is a correspondence between this indication and the warning with which the whereas 8 of Directive (EU) 2018/957 concludes, relating to the fact that «double payment of travel, board and lodging expenses should be avoided».

2) If the first part of the aforementioned paragraph makes point (i) applicable to the expenses to be borne by the workers when having to travel from the State of origin to the host State and vice versa, the second part, referring to the expenses incurred by the posted workers «where they are temporarily sent by their employer from that regular place of work [in the host State] to another place of work», does the same in relation to the expenditures of travel, board and lodging corresponding to the temporary geographical mobility of the worker to carry out their work in the framework of the transnational provision of services that would have justified their posting from the home State. This interpretation is also in line with whereas 8 of Directive (EU) 2018/957 and, specifically, with the statement with which it begins, according to which «posted workers who are temporarily sent from their regular place of work in the host Member State to another place of work, should receive at least the same allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons that apply to local workers in that Member State».

The other two clarifications are integrated into the content of the second part of the second subparagraph and in the third subparagraph of the new wording of paragraph 7 of Art. 3 of Directive 96/71/EC. According to that second part of the second subparagraph, «the employer shall, without prejudice to point (h) of the first subparagraph of paragraph 1, reimburse the posted worker» the expenditures actually incurred because of the posting (that is, the expenditures of travel, board and lodging) «in accordance with the national law and/or practice applicable to the employment relationship»; that is, the law governing the contract⁵⁴ (not the law of the place where the work is provided as a consequence of posting or, if you like, the host State's law). To understand the meaning of this confusing rule, which seems to contradict what results

⁵⁴ Specified by the statement of the Commission included as Annex to the European Parliament legislative resolution of 29 May 2018 on the proposal for a directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [P8_TA(2018)0213], that «the Commission understands that the “national law and/or practice applicable to the employment relationship” is in principle the national law and /or practice of the home Member State, unless otherwise determined in accordance with EU rules on private international law».

from point (i) of the first subparagraph and second subparagraph, both of paragraph 1 of Art. 3 of Directive 96/71/EC, it is not worth referring to its official version in other languages, as they all indicate the same thing. That being the case, it can be considered that the statement that the employer will reimburse such expenses in accordance with the law governing the contract would be referring to the fact that it is this law, and not that of the place where the work is temporarily being carried out, that is applicable for determining the modalities or the form and the moment of the reimbursement, the justification of the expenses covered or, in short, the subjection or not to taxation of the corresponding payments. In short, a complementary relationship would be established between the law of the contract and the law of the host State. The possible application of the latter, according to point (i) of the first subparagraph of paragraph 1 of Art. 3(1) of Directive 96/71/EC would be for the determination of the amount of expenses. This is consistent with the origin of the aforementioned point (i), which is found in an amendment accepted during the discussion in the European Parliament of the proposal for a Directive amending Directive 96/71/EC⁵⁵, in which it was advocated the incorporation of an point (gb) [g] *ter* in the version in other languages] to the first paragraph of Art. 3.1, relating to «allowance *rates of pay* to cover travel, board and lodging expenses for workers away from their habitual place of work» (emphasis added). The purpose of the second part of the second subparagraph of paragraph 7 of Art. 3 would therefore be to prevent everything concerning the reimbursement of travel, accommodation and subsistence expenses from being subject to the application of the national provisions of the host State; if preferred, the shielding of the application of the law governing the contract in relation to certain aspects of reimbursement.

As far as the meaning of the third subparagraph of paragraph 7 is concerned, it does not seem to offer any further doubt. The rule incorporated in the precept deals with the problem of resolving when an allowance specific to the posting is considered, in whole or in part, as remuneration and, therefore, to what extent its amount will constitute one of the items of the total gross amount of remuneration paid to the posted worker to be compared with the total gross amount of remuneration that would correspond to the same worker in accordance with the national provisions of the host State. The application of these national provisions is subject to the comparison revealing that the first gross

⁵⁵ See draft European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (Ordinary legislative procedure: first reading), of 19 October 2017 (A8-0319/2017).

amount is less than the second⁵⁶. It is incumbent upon the law governing the contract to determine whether or not a supplement such as the one in question is paid as remuneration⁵⁷ and, in the first case, whether the payment in this respect is total or partial. The silence of the law in this respect or the failure to clarify which items of allowance are unrelated to remuneration leads to the understanding that the whole of this is due to reimbursement of expenditure (of travel, board and lodging) incurred by the posting. In terms of the rule referred to: 'where the terms and conditions of employment applicable to the employment relationship [*rectius*, the legislation or national practices applicable to said relationship; that is, the law governing the contract] do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure'.

I note that Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union affects the subject matter of this section by obliging Member States to ensure that the undertaking of posted workers informs them, in documentary form, «where applicable, any allowances specific to posting and any arrangements for reimbursing expenditure on travel, board and lodging» [Art. 7(2)(b)]. However, unless they provide otherwise, the imposition of the duty to inform does not apply in the case of postings lasting no more than four consecutive weeks [Art. 7(4)].

⁵⁶ Such a comparison, taking the gross amount of remuneration as a reference, and assessing the tax and social security burdens, is in line with the criterion of the Court of Justice [assumed by Directive (EU) 2018/957 (see *whereas*18)], expressed in the judgment of 15 March 2001 (*Mazzoleni*), cit.

⁵⁷ The first criterion, for example, as indicated above, in section 3.1.2.2 of this chapter, for compensating the greater inconveniences inherent to posting (personal isolation, being far from family and usual environment or the greater time to be invested to cover the journey to or from work) or the greater cost of living in the host State. On the inclusion within the remuneration of the amount of a daily allowance and a compensation for daily travelling time, judgment of 12 February 2015 (*Sähköalojen ammattiliitto*) cit., paragraphs 46 to 57, both included, and ruling (2); on the same inclusion of a lump-sum allowance that differs depending on whether the posting lasts «three, four or five weeks, or even more», judgment of 8 July 2021 (*Rapidsped*), cit. [«the lump-sum and progressive nature of that allowance, seems to indicate that the purpose of that daily allowance is not so much to cover the costs incurred abroad by the workers» and pursues, rather, the «compensation for the disadvantages entailed by the posting, as a result of the workers being removed from their usual environment» (paragraph 50); «a daily allowance, the amount of which varies according to the duration of the worker's posting, constitutes an allowance specific to the posting and is part of the minimum wage, unless it is paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board or lodging, or unless it corresponds to an allowance which alters the relationship between the service provided by the worker, on the one hand, and the consideration which he or she receives in return, on the other» [paragraph 54 and ruling (3)]. The scope of this last indication must be reviewed, in my opinion, with the third subparagraph of paragraph 7 of Art. 3 of Directive 96/71/EC.

3. Three reinforced protections, two mandatory and one optional

3.1 TERMS AND CONDITIONS OF EMPLOYMENT GUARANTEED TO WORKERS SUBJECT OF LONG DURATION POSTINGS

Among the important changes brought about by the amendment of Directive 96/71/EC is the shift to a greater or longer duration of temporary posting to oblige the undertaking to guarantee the workers concerned terms and conditions of employment additional to those that make up what can be called the ordinary or general scope of protection, to which reference has been made until now. This is done by paragraph 1a (*1bis*) of Art. 3, added by Directive (EU) 2018/957. Unlike the transposition of other amendments introduced by the latter, the amendment affecting this paragraph is more delicate or demanding, especially regarding the task of delimiting the postings included in the provision or, in other words, determining the moment from which the temporary posting ceases to be ordinary and should be classified as long duration. The indications made below, regarding the treatment that moment receives in the aforementioned paragraph 1a, may serve to illustrate the above.

In the proposal for a Directive amending Directive 96/71/EC⁵⁸, it was the posting of «anticipated or the effective duration» exceeding twenty-four months that deserved specific or particular attention, materialized in the consideration of the Member State to whose territory the worker has been posted as the country where the work is habitually carried out⁵⁹ and, therefore, as stated in point 7(1) of the explanatory memorandum of the proposal itself, as the State whose law could govern the employment contract or, where appropriate, be applicable in those of its provisions that do not allow for exclusion by agreement of the parties (public order provisions), all in accordance with the Regulation (EC) No 593/2008 (Rome I)⁶⁰. The amendment introduced by Directive (EU) 2018/957 is quite different both in terms of the duration of posting taken as a reference and the effect of that duration on the application of the

⁵⁸ COM(2016) 128 final-2016/0070 (COD).

⁵⁹ It was so declared in which intended to be Art. 2(a) (2 *bis*) of Directive 96/71/EC.

⁶⁰ With its Art. 8; specifically, in paragraphs 2 («To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country») and 1 («An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article»), respectively.

regulatory provisions of the host State. This effect means that the temporarily posted worker is granted much higher protection than the general or ordinary protection; however, although it comes remarkably close to this, it does not make the law of the host State become governing law of the contract.

Reinforced protection is reserved for temporary postings whose effective duration -not the foreseeable duration- is greater than twelve months, extendable to eighteen months. Until the end of the twelve months or the extension of these months as permitted by the Directive, the protection is the general or ordinary. Reinforced protection is only applicable from that end date (therefore, if there is no extension, from the beginning of the thirteenth month). The extension is subject to the service provider undertaking stating the reasons justifying it or, as indicated in the second subparagraph of the aforementioned paragraph 1a, to that undertaking presenting «a motivated notification». Such notification constitutes a requirement that should not be confused with the need to request and obtain an administrative authorisation; in no way is the possibility of subjecting the extension to obtaining the aforementioned authorisation being conferred on the Member States. Of course, this does not mean that the lack of a motivated notification, its late submission or an insufficient statement of the reasons for the extension of the period of posting cannot and should not have consequences. The silence of the Directive on this matter does not prevent the national provisions of transposition from establishing measures to react to the lack of notification or its defective realisation. Provided that they are duly proportionate, the aforementioned measures would not be contrary to the freedom to provide services.

To prevent the substitution of one posted worker for another from serving to circumvent the application of reinforced protection, it is ordered that, when the second goes on to perform «the same task at the same place», the calculation of the months of posting from which such protection is applicable shall be carried out according to «the cumulative duration of the posting periods of the individual posted workers concerned» (third subparagraph of paragraph 1a). For the purposes of determining whether the substitute worker is employed in the same task and the same place, account shall be taken, «inter alia, of the nature of the service to be provided, the work to be performed and the address(es) of the workplace» (fourth subparagraph of paragraph 1a). All of the above suggests that:

1) In the absence of any substitution, the additional protection to which the posted worker is entitled shall apply, regardless of whether or not he or she continues to be employed in the same task at the same place, from the moment

his or her posting exceeds twelve months or, where appropriate, the duly notified longer duration, which shall never exceed eighteen months.

2) When assigned to the same task at the same place, the additional protection benefits the posted worker to replace another from the moment when the sum of the time the posted worker has been posted and the time of the posting the replaced worker exceeds twelve or, where applicable and at most, eighteen months. The fact that the final duration of posting of the former is far from reaching the indicated time threshold does not affect the above.

3) When assigned to another task in another place, the posted worker replacing another will not benefit from the additional protection until their activity in the territory of the host State exceeds twelve or, where appropriate and at most, eighteen months. The same will apply when assigned to the same task in another place or to a different task in the same place.

4) Since long duration postings entail a greater burden for the undertaking providing the service, paragraph 1a of Art. 3 of Directive 96/71/EC must be subject to a restrictive interpretation, which prevents this greater burden from ending up, contrary to the intention of the precept, in a disproportionate limitation of the freedom to provide services. The requirement on which the accumulation of the duration of the periods of postings of successively posted workers -performance of the same task at the same place- depends does not constitute an exception to the need for the aforementioned interpretation. A transposition of paragraph 1a that states that it is sufficient, for the purposes of the aforementioned accumulation, with the assignment to the same task or with the performance of the task in the same place, even if that task is different, would break the balance that EU law understands corresponds to the requirements of the protection of posted workers and freedom to provide services; it would be difficult to consider it compatible with the freedom to provide services.

Provided that their temporary posting is to be considered, as indicated above, of a long duration, the posted worker is guaranteed (first subparagraph of paragraph 1a), «on the basis of equality of treatment», which also applies in the case of general or ordinary protection, «in addition to the terms and conditions of employment» referred to in paragraph 1 of the same Art. 3 of Directive, «all the applicable terms and conditions of employment» on a mandatory basis to local workers in the host Member State, whether established by state provisions or by collective agreements or arbitration awards of the kind identified in paragraph 8 of the Article and, even if not stated, provided that they are more advantageous than those provided for by the labour legislation of the State of establishment or origin. In any case, as has already been noted, the law of the host State

does not become the governing law of contract, as the provision itself stipulates that parity between posted workers and local workers does not extend to certain terms and conditions of employment; specifically, those relating to the «procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses», the «non-competition clauses» and the «supplementary occupational retirement pension schemes». Unfortunately, the necessary temporary nature of the posting now contemplated is not subject to any specific term, so that the specific protection in question is maintained as long as there are no circumstances that allow for the assessment that the temporary nature has lapsed or has reached a duration that allows for the law applicable to the employment contract to be determined in accordance with Art. 8 of Regulation (EC) No 593/2008 (Rome I).

3.2 TERMS AND CONDITIONS OF EMPLOYMENT GUARANTEED TO POSTED WORKERS DUE TO THEIR ASSIGNMENT AT A USER UNDERTAKING: GENERAL

It should be made clear that if the posting of the workers on mission or made available to a user undertaking is of long duration (more than twelve or, where applicable, eighteen months), the temporary employment undertaking will have to guarantee to the posted the terms and additional conditions of employment protection not covered by the special or enhanced protection under this section. As already indicated (*supra*, section 3.1.2.3 of this chapter), this latter protection depended, until the moment when the amendments introduced by Directive (EU) 2018/957 (until 30 July 2020) began to apply, on its being granted by the Member States. The corresponding power was conferred on them by the previous paragraph 9 of Art. 3 of the Directive 96/71/EC, according to which any of them could impose on temporary employment undertakings established in another Member State the guarantee to the workers placed at the disposal and posted to the territory of the former «the terms and conditions which apply to temporary workers in the Member State where the work is carried out», terms which included, among others, the conditions applicable in compliance with Art. 5 of the Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work. However, the amendments made by Directive (EU) 2018/957 reduce the room for manoeuvre of the national provisions. This is done by the new paragraph 1b (1 *ter* in the version in other languages) which is added to Art. 3 of Directive 96/71/EC, under which each of the Member States is obliged to order that those same temporary employment undertakings guarantee to the

aforementioned posted workers in their territory «the terms and conditions [basic] of employment which apply pursuant to Article 5 of Directive 2008/104/EC of the European Parliament and of the Council to temporary agency workers hired-out by temporary-work agencies established in the Member State where the work is carried out». The power of the Member States is now limited, in the last subparagraph of the new wording of paragraph 9 of Art. 3, to establish that posted workers on mission are also guaranteed «other terms and conditions that apply to temporary agency workers in the Member State where the work is carried out».

Although Article 5 of Directive 2008/104/EC states that «the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job», this mandate of equalization of conditions is completed with the admission of certain exceptions by the national provisions, for example, in relation to remuneration («pay») or the equality of treatment. Such possible exceptions mean that the transposition of that mandate may differ from one Member State to another and, therefore, that the terms and conditions of employment that the new paragraph 1b of Art. 3 of Directive 96/71/EC obliges to guarantee to the posted worker on mission are not the same in all cases and depend on the way in which the host State has carried out the aforementioned transposition. It is also possible that the legislation of said State improves the provisions of Art. 5 of the Directive 2008/104/EC⁶¹ and adds to the basic working and employment guarantees to workers on mission others that lack such nature. This is where the content of the aforementioned subparagraph of paragraph 9 of Art. 3 of Directive 96/71/EC makes sense.

Paragraph 1b concludes by imposing a burden on the user undertaking that the national transposition provisions should not be silent about. Using more comprehensible terms than those that appear in the Official English version of the paragraph, the user undertaking «shall inform» the temporary employment undertaking «of the terms and conditions of employment that it applies» to their workers and that appear in the list that in the national regulation that has transposed in the host State the Directive 2008/104/EC corresponds to what is established in Art. 5 of this. The obligation to inform does not, therefore, extend to the terms and conditions of employment that do not appear on the aforementioned list, which obviously do not form part of the enhanced protection in question. Nor is it limited to remuneration.

⁶¹ Cfr. Art. 9(1) of the same Directive.

3.3 TERMS AND CONDITIONS OF EMPLOYMENT GUARANTEED TO POSTED WORKERS DUE TO THEIR ASSIGNMENT AT A USER UNDERTAKING: WORKERS SUBJECT TO TRANSNATIONAL TEMPORARY POSTINGS PLURAL OR IN CHAIN, SUCCESSIVE TO THEIR ASSIGNMENT AT USER UNDERTAKING ON THE STATE OF ESTABLISHMENT

Remember that the host State is, here, the one to which the workers subject to the type of posting now envisaged have been sent by their temporary employment undertaking, either to work on the execution of a transnational provision of services to which the user undertaking established in another State (the home State or a State other than the host State) has committed itself, or to work in an establishment that the user undertaking has in said destination State or in another undertaking owned by the group to which it belongs. In the situation indicated, the Directive establishes, in the two new paragraphs of its Art. 3(1)(c):

1) That the workers shall be considered to have been posted transnationally by the temporary employment undertaking with which they have the employment relationship.

2) That said temporary employment undertaking, to the extent that it has the status of a posting undertaking, «shall fully comply with the relevant provisions of this Directive and Directive 2014/67/EU»; among them, therefore, those that define the substantive protection to which the workers affected by the postings that are the subject of both Directives are entitled.

3) That the user undertaking shall inform the temporary employment undertaking of the posting to another State of the worker that it has assigned to it and that such information shall be provided, «in due time», before the said worker commences work in that State.

3.4 THE EXTENSION OF PROTECTION TO OTHER TERMS AND CONDITIONS OF EMPLOYMENT ESTABLISHED BY NATIONAL PROVISIONS OF PUBLIC POLICY

Article 3(10) of the current version of Directive 96/71/EC continues to allow the transposition provisions to choose to extend the terms and conditions of employment guaranteed in paragraph 1 of the same Article by including others that refer to different matters, provided that they form part of national provisions of public policy and are imposed, on an equal basis («on the basis of equality of treatment»), on national undertakings and on the undertakings of

other Member States. The possibility of such inclusion shall be determined taking into account:

1) That «the public policy exception is a derogation from the fundamental principle of freedom to provide services», and therefore «must be interpreted strictly».

2) That the scope of this reservation «cannot be determined unilaterally by the Member States»⁶². The provisions that the legislation of a Member State classifies as public policy or public order do not necessarily have to be so for the purposes of EU law⁶³. In other words, it is necessary that the interests covered by these provisions are also worthy of protection from the point of view of EU law; furthermore, the measures incorporating them must be necessary and proportionate in relation to the objective of safeguarding public order⁶⁴.

3) That the determination and imposition of the provisions of public policy in accordance with the above guidelines is the responsibility of the host State itself and is not a matter open to collective bargaining⁶⁵.

In view of the way in which the Court of Justice conceives the reservation of public order and, in particular, its refusal to admit it to cover the type of national interventions judged in some of its decisions⁶⁶, it can be understood that it does not allow the transposition provisions of the Directive 96/71/EC to extend

⁶² Judgment of the Court of Justice of 19 June 2008 (*Commission c. Grand Duchy of Luxembourg*), cit., paragraph 30 (see as well paragraph 50). The restrictive interpretation affects all Art. 3(10) of the Directive (*ibidem*, paragraph 31).

⁶³ As warned by the Court of Justice (judgment *Arblade*, cit., paragraph 30; its terms reproduced by judgment *Commission c. Grand Duchy of Luxembourg* of 19 June 2008, also cit., paragraph 29), so that the national provisions may be reputed as public policy in accordance with EU law it is required that its observance reveals itself as «crucial for the protection of the political, social or economic order in the Member State concerned», up to the being of becoming obligatory to «all persons present on the national territory of that Member State and all legal relationships within that State». The EU law may only accept the motives of the national legislation to include a rule in the category of provision public policy «only in terms of the exceptions to Community freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest» (again, judgment *Arblade*, paragraph 31).

⁶⁴ Judgment of Court of Justice of 19 June 2008 (*Commission c. Grand Duchy of Luxembourg*), cit., paragraphs 51 et seq. See, equally, judgment of 20 June 2024 (*SN and Others*, Case C-540/22), paragraphs 77 et seq.

⁶⁵ In this sense, Judgment of Court of Justice of 18 December 2007 (*Laval un Partneri*), cit., paragraph 84: the management and labour do not constitute «bodies governed by public law» and, therefore, «they cannot avail» of Art. 3(10) of the Directive to argue that there are «grounds of public policy in order to maintain that collective action such as that at issue in the main proceedings complies with Community» [tending to obtain that the undertaking of the posted workers agree to adhere to a collective agreement of the host State whose clauses refer to matters that are not specifically contemplated in the Art. 3(1), points (a) to (g), of the Directive 96/71/EC; today they would be points (a) to (i)].

⁶⁶ *Commission c. Grand Duchy of Luxembourg*, recently cit.

the scope of the guarantee or protection to include other terms and conditions of employment that have been the subject of harmonization provisions by the European Union. The existence of this type of provision on conditions of employment not included in the list in Art. 3(1) of the Directive would prevent a State from considering that the content of their transposition provisions is a matter of public policy and, therefore, that they should apply to the posted worker in substitution for the provisions of the regulations dealing with said transposition in the State where their undertaking is established. Such a substitution would only be possible in relation to those national rules that are a transposition of harmonizing normative provisions that affect terms and conditions of employment that appear in the aforementioned Art. 3(1) of the Directive; it would obviously be a substitution limited to those aspects in which it is appreciated that the rules of the host State involve real advantages for the posted worker.

It is contrary to Directive 96/71/EC and Art. 56 of the TFEU for state regulation to allow or imply that the protection examined includes terms and conditions of employment not included in the list of matters in Art. 3(1) thereof or not covered by the provisions of other paragraphs of the same article; specifically, 8, 9 and 10⁶⁷. Moreover, according to the Court of Justice, collective bargaining and recourse to collective actions, including strikes, cannot be used to circumvent the rejection of EU law to an intervention of state regulation in the sense that I have just indicated. The protection that the legislation of the host State provides for the exercise of the collective rights of workers in its territory does not allow its use to extend the protection of posted workers beyond what is authorized by the Directive and, ultimately, to the detriment of the freedom to provide services⁶⁸. Pending the doubtful softening of the situation that may result from the application of the new Art. 1(1a) of Directive 96/71/EC and always according to the expressed position of the Court of Justice, the possible collision between that protection and the freedom to provide services is generally settled, for now, in favour of the latter⁶⁹.

⁶⁷ *Ibidem*, paragraphs 34 *et seq.*

⁶⁸ On the matter, extensively, judgment *Laval un Partneri*, cit. The Court of Justice warns, in addition to what has already been indicated *above*, footnote 65, that the Directive does not protect a Member State from imposing on the posted workers' undertakings, in the absence of state regulations and collective agreements declared universally applicable, determining the rates (then minimum) of pay, the opening of a negotiation in this regard «at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees» (paragraph 71). Also contrary to EU law is the collective action (blocking of activities) adopted by a trade union of a host State in order to force a service provider established in another Member State to enter into the aforementioned negotiation with it and to sign a collective agreement in that host State which includes clauses on matters not covered in Art. 3(1) of the Directive [paragraph 111 and ruling(1)].

⁶⁹ On this matter I refer to what is stated in the following section.

4. Does Directive 96/71/EC protect respect for privacy, due consideration for dignity and the rights to strike and to trade union freedom?

Although the guarantee that Directive 96/71/EC grants to the posted worker does not expressly include the aspects indicated in the title of this section, it should not be overlooked:

1) That there are behaviours contrary to the dignity of workers (harassment on grounds of sex, sexual harassment and harassment on the grounds of religion or belief, disability, age or sexual orientation and racial or ethnic origin) that EU law itself includes in the concept of discrimination⁷⁰; from there, the possible application to posted workers of the measures that in the host State protect against such behaviours is supported by the obligation that Art. 3(1)(g) of the Directive imposes on each Member State the obligation to ensure that posted workers in its territory enjoy the most advantageous protection contained in «other provisions on non-discrimination».

2) That the application of the host State's legislation on the protection of privacy and those facets of dignity not susceptible of inclusion in the concept of discrimination is covered by the provisions of Arts. 6 and 7 of Rome Convention 1980, in the Arts. 8 and 9 of Regulation (EC) No 593/2008 (Rome I) and, finally, in the Art. 3(10) of Directive 96/71/EC. Due to its purpose, the relevance of the rights on which it is based⁷¹ and the consequences that its general non-application would have for posted workers who do not have equivalent protection in the State of establishment of their undertaking, the aforementioned regulation enters, without forcing things, into that which the national legislation can declare to be public order and the Member States can decide to apply, equally, to national undertakings and undertakings from other States, as the Commission itself has had the opportunity to point out⁷².

3) That the same Art. 3(10) of Directive 96/71/EC also serves as support for imposing, always on the basis of equality of treatment between national undertakings and undertakings from other Member States, the application of the most ad-

⁷⁰ So, paragraph 3 of Art. 2 of Directive 2000/43/EC, paragraph 3 of Art. 2 of Directive 2000/78/EC and paragraphs 1 and 2 of Art. 2 of Directive 2006/54/EC.

⁷¹ These are fundamental rights recognised, in addition to by the Members States, both internationally and by the European Union. Respecting them also forms part of international public order and within the meaning of EU law, as guaranteed by Arts. 2 to 6 of TFEU.

⁷² In its Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on *The implementation of Directive 96/71/EC in the Member States* [COM (2003) 0458 final], of 25 July 2003, paragraph 4.1.2.2.

vantageous hosted State rules on the aspects concerning the employment contract or the individual employment relationship including on the right to trade union freedom⁷³. Of course, the recognition in the host State of the fundamental right nature of the right to trade union freedom, in accordance with the provisions of international rules and EU law, serves to ensure that the observance of that right deserves to be considered as a matter of public order at each of these three levels.

4) That the eventual application of national legislation on the also fundamental right to strike is particularly complex. By virtue of what has been indicated with regard to the right to trade union freedom, insofar as that application is projected onto the individual faculties of the right to strike, it would also come to count on coverage in Art. 3(10) of the Directive. The problem arises in relation to the host State regulations regarding collective faculties (calling and communication of the strike, choice of its modality, organization of its development, etc.). This is a question to be resolved, at present, taking into account the provisions of paragraph 1a (1 *bis* in the version in other languages) of Art. 1 of Directive 96/71/EC, added by Directive (EU) 2018/957, according to which: «This Directive shall not in any way affect the exercise of fundamental rights as recognized in the Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, to conclude and enforce collective agreements, or to take collective action in accordance with national law and/or practice». The new precept has an impact on the way in which the aforementioned rights and the freedom to provide services interact in situations of transnational postings of workers. However, the statement it makes is not at all novel. Its terms coincide with those of Art. 1(2) of Directive 2014/67/EU and with those of Art. 1(2) of the aborted proposal of 21 March 2012 of Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (Monti II)⁷⁴. In turn, this proposal took as a model, on this point, what was established in the Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States (Monti I)⁷⁵.

⁷³ On the inclusion of the host State's provisions on the right to trade union freedom within the concept of public policy provisions within the meaning of Art. 3(10) of the Directive, see Communication from the Commission cit. in the previous footnote.

⁷⁴ COM(2012) 130 final; 2012/0064(APP).

⁷⁵ The referred proposal followed the steps of Art. 2 of Regulation, in the following terms: «This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States».

Although the aforementioned paragraph 1a, like the Art. 1(2) of Directive 2014/67/EU, from whose terms it does not differ, entails an improvement in the protection of the posted workers, it is risky to think that there has been a qualitative change by virtue of which the recognition in the host State of the exercise of collective autonomy and the use of collective actions, including the strike, rises above of the freedom to provide services and becomes a proper instrument to achieve that the protection of the posted worker may go beyond the terms established by (the Directive 96/71/EC) and national regulations, in their transpositions. If this were the case, there is no doubt that we would be witnessing a significant improvement in protection. It would lead to the recognition of the right to take collective action and to collective bargaining in the host State, in accordance with their legislation, in order to extend protection to the application to posted worker of any terms and conditions of employment that are more advantageous under the regulations of that State and are not among those contemplated in Art. 3 of Directive 96/71/EC; in short, compliance with all these conditions achieved in the host Member State through the exercise of collective actions and collective autonomy would be enforceable by the posted worker. If you prefer, it would be abrogating the doctrine followed by the Court of Justice in judgements such as *Rüffert*⁷⁶, *Laval*⁷⁷ or, in the case of the freedom of establishment, *Viking Line*⁷⁸.

In my opinion, the precept does not involve a qualitative improvement such as the one indicated. There seems to be no basis for attributing it the former the virtue of placing above the freedom to provide services the right of trade union freedom, the right of adoption collective action, including, in particular, the right to strike, and the right to negotiate and conclude collective bargaining agreements⁷⁹. There is no doubt that during the period of posting the trade unions may try in the host State, using, if necessary, collective actions, that the employer of posted workers participates in that State, in accordance with the law and national practice, in a collective bargaining that allows agreements on the most effective application of the protection afforded to such workers by Directive 96/71/EC and by the national rules transposing that Directive. Nor is there any doubt that the aforementioned employer, who can always unilaterally decide to improve the protection applicable under the Direc-

⁷⁶ Of 3 April 2008 (case C-346/06), cit.

⁷⁷ Of 18 December 2007 (case C-341/05), cit. See, in particular, paragraphs 71, 84 and 111, as well as ruling (1).

⁷⁸ Of 11 December 2007 (case C-438/05).

⁷⁹ That is not the case was clear in the whereas 6, 7 and 13 of the explanatory memorandum of the cited proposal of Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (Monti II).

tive⁸⁰ and its transposition in the host Member State in question, will respond affirmatively in this, even though nothing obliges him to do so (without being bound, therefore, by a duty to negotiate), to the proposal to negotiate a collective pact or collective agreement on that improvement, making it bilateral. Likewise, the collective actions carried out in the host State, including the strike, serve, before and now, in the way they appear regulated in the corresponding national legislation, to demand and achieve exact compliance or, if preferred, to combat non-compliance with the measures that in the aforementioned State are a transposition of the provisions of EU law (by Directive 96/71/EC) in relation to the postings affected and the terms and conditions of employment that must be guaranteed to posted workers, in accordance with the aforementioned law (specifically, with Article 3 of Directive 96/71/EC).

In the above type of spaces it develops its scope and force the new paragraph 1a of Art. 1 of Directive 96/71/EC. The precept does not serve to give coverage, in the host State, to collective actions, including the strike, with the aim of achieving, without incurring injury of the freedom to provide services, the reinforcement of the protection of the posted worker beyond what the EU law (the Directive 96/71/EC) authorizes to the state regulation that intends to constitute transposition appropriate of such law. In short, we must expect that will continue to be considered harmful to the freedom to provide services the collective action (which could be a strike) adopted in the host State with the aim of pressuring the undertaking of the posted worker to agree not to apply to him, during his posting, the legislation of the home State relating to those conditions that are less advantageous than those enjoyed in the first State by the local workers and that are not covered by the material or substantive scope of the protection defined in Art. 3 of Directive 96/71/EC. The protection that the host State legislation provides for the exercise of the collective rights of workers in its territory is not able to extend the protection of the posted workers beyond what is authorized by the aforementioned precept of the Directive and, in the end, to the detriment of the freedom to provide services.

The primacy of EU law and the impossibility of requesting from its imperative rules what we would not think of requesting from national regulatory provisions of the same nature leads to the above interpretation. In the same way that the exercise of the rights to strike, to take other collective action and to negotiate collective agreements is conditioned by the national

⁸⁰ This is emphasised by the Court of Justice, in its judgment of 3 April 2008 (*Rüffert*), cit., in which it refers «to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable» (paragraph 34).

mandatory or public policy rules, it is also conditioned by the mandatory rules of EU law, as long as both maintain the aforementioned mandatory nature. If a strike or other collective action that leads to the introduction of clauses in a collective agreement that are contrary to a state regulation does not serve to avoid the challenge and judicial declaration of the nullity of such clauses on the grounds of illegality, the result should not be different when a strike or other collective action exercised in the host State leads to the introduction of content contrary to a provision of EU law in a collective agreement concluded in it. The remedy for a situation such as the one indicated involves changing the type of relationship between that provision of EU law and collective autonomy and, in short, introducing rules with dispositive content for the second or susceptible of being improved by it, using, if necessary, the recourse, in the host Member State, to collective actions. Neither of the two brings about the amendment of Directive 96/71/EC.

5. Reductions, some of them mandatory, in the terms and conditions of work and employment covered by protection

Directive 96/71/EC, both in the past and the present, recognizes the short or brief duration of the postings or their limited importance as circumstances that allow Member States to reduce or authorize the reduction of the general or ordinary scope of the protection of the posted workers. These are postings in which the Directive diminishes or allows the diminution of the nucleus of mandatory rules for minimum protection to be respected in the host State by the worker's undertaking. The regime of such postings, defining a reduced special protection and contained in paragraphs 2, 3, 4 and 5 of Art. 3 of the Directive, remains unchanged. Specifically, it:

- 1) It provides, imperatively, in its Art. 3(2), without allowing, therefore, that the state transposition provisions dispense with the reduction, that the protection does not reach to the conditions relative to minimum paid annual leave and «remuneration, including overtime rates», in certain short-term postings, not exceeding eight days, decided con the intention to carry out tasks of «initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking». Even if the posting is motivated by any of the above tasks, the reduction examined will not be applied, as indicated in the second

paragraph of the precept, when it takes place in ‘activities in the field of building work listed in the Annex’ of Directive 96/71/EC itself⁸¹. However, it seems that the aforementioned non-application is no longer mandatory, so that the Member States could finally introduce, by means of what is authorized by Art. 3(5), a partial or total exception to it⁸².

2) It allows, in the aforementioned Art. 3(5), that the Member States may establish exceptions to the protection including those same terms and conditions of employment in the cases of postings produced in the framework of an international contract or subcontract or within the undertaking or a group of undertakings, when the work to be performed shall be considered as «non-significant»⁸³.

3) It allows the Member States to agree, also in relation to postings produced in the framework of an international contract or subcontract or within the undertaking or a group of undertakings, «where the length of the posting does not exceed one month», that the guarantee does not apply to remuneration, or that such non-application may be introduced «by means of collective agreements» of universally application or may be subject to exceptions in them, if provided for in state regulation [Art. 3(4)].

The durations considered here, of no more than eight days or one month, shall be calculated «on the basis of a reference period of one year» computed «from the beginning of the posting’ and including ‘previous periods for which the post has been filled» by another posted worker being replaced [Art. 3(6)]. This prevents circumvention of the limit represented by the indicated durations through the replacement of each of the posted workers before they elapse.

The Directive opposes any transposition that introduces reductions that do not conform to the provisions of Article 3 and omits, for example, respect for the duration of the minimum daily rest⁸⁴.

⁸¹ That is, in «all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular» in the works of: excavation, earthmoving, actual building work, assembly and dismantling of prefabricated elements, fitting out or installation, alterations, renovation, repairs; dismantling, demolition, maintenance, upkeep, painting and cleaning work and improvements.

⁸² See following footnote.

⁸³ The aforementioned provision specifies, in its second subparagraph, that «Member States availing themselves of the option referred to in the first subparagraph shall lay down the criteria which the work to be performed must meet in order to be considered as “non-significant”». Under the aforementioned power granted in the first subparagraph, it seems that the Member States could decide that it is «non-significant» and, therefore, that the conditions referred to (relative to minimum paid annual leave and remuneration) will not apply to it, the posting of a duration not exceeding eight days produced in the activities in the field of building work that Directive 96/71/EC itself mentions in its Annex.

⁸⁴ See judgment of Court of Justice cit. footnote 38.

6. Regulatory sources of the terms and conditions of employment

With the amendment carried out by the Directive (EU) 2018/957, Art. 3 of Directive 96/71/EC now establishes, in paragraph 1, that the terms and conditions of employment included in the protection will be recognized in the form established in the host State, in addition to by its laws, regulations or administrative provisions, by «collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8». This reference to universally applicable is used, in addition to in paragraph 1, that is, in the determination of the regulatory sources of terms and conditions of employment pertaining to general or ordinary protection, in paragraph 1a (1 *bis* in the version in other languages), that is, in the determination of the regulatory sources of the special reinforced protection corresponding to the long duration postings. A reading of paragraph 8, in its previous and new versions, shows that it was intended that the undertaking collective bargaining agreement cannot be taken as a regulatory source of the terms and conditions of employment guaranteed ⁸⁵. In my opinion, the above has an exception to which I will refer at the end of this section.

Much more important is the change in the treatment of the obligatory recourse to those collective agreements or arbitration awards of universally application as regulatory sources of the terms and conditions of employment included both in the general or ordinary protection and in the special and reinforced protection of the long durations postings.

⁸⁵ The aforementioned paragraph 8, in its first subparagraph, the wording of which has not been affected by the amendments introduced by the Directive (EU) 2018/957, states that «'collective agreements or arbitration awards which have been declared universally applicable' means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned». In the absence or as a complement of a system that allows for the determination of which collective agreements or arbitration awards are universally applicable within the indicated meaning, the same paragraph, in its second subparagraph, provides that the Member States (where appropriate, their Courts) «may» take into consideration, «if they so decide» (they are therefore under no obligation to do so), the following two groups of collective agreements (one or both): 1) the «collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned» and 2) the «collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory». The aforementioned possibility of any Member State is subject to its decision to apply these types of collective agreements to the undertakings established in another Member State which post workers to their territory for the transnational provision of services «ensures the equality of treatment on matters listed in the first subparagraph of paragraph 1» of Art. 3 and also, when appropriate, of the new paragraph 1a of the same article «between those undertakings» and the national undertakings «which are in a similar position». On when there will be equality of treatment, see footnote 86 and concordance text; on the collective agreement susceptible of being qualified as universally applicable according to Art. 3(8) of the Directive, see judgment of Court of Justice of 3 April 2008, *Rüffert*, cit., paragraphs 26 et seq.

In the previous version of Directive 96/71/EC, the recognition of the right of the posted worker to enjoy the aforementioned conditions in the most advantageous way resulting from compliance with the aforementioned collective agreements and arbitration awards was only obligatory in relation to the activities in the field of building work listed in the Annex and depended, for any other activities, on the Member States providing for it, under the power attributed to them in this respect in paragraph 10 of Article 3, according to which the States could impose on national undertakings and on the undertakings of other States, «on a basis of equality of treatment [...] terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex». This power has been eliminated. In the current version of the Directive, the collective agreement and the arbitration award of universal application form part of the regulatory sources of the above-mentioned conditions, whatever the activity corresponding to their functional scope.

Then and now, the subjection of the undertakings providing transnational services to the recognition of the guaranteed conditions as regulated by collective agreement or arbitration award of the type indicated must take place, so as not to lead to unequal treatment contrary to the freedom to provide services, in the same way as for undertakings established in the host State. If the latter can be exempted from the collective agreement or arbitration award in certain circumstances, the former must also be able to achieve the same. This is the result of the aforementioned paragraph 8 of Art. 3, which emphasizes the essential nature of this «equality of treatment» in relation to the recognition, in accordance with the collective agreement or arbitration award, of the terms and conditions of employment listed in paragraphs 1 (general or ordinary protection) and 1a (protection in the long durations postings) of Art. 3. Also according to paragraph 8 (third subparagraph), the aforementioned equality of treatment shall be understood to exist when the undertakings of the host Member State that are in a similar position ‘are subject, in the place in question or in the sector concerned’ and as regards the two groups of conditions just mentioned, «to the same obligations» as the undertakings established in the home Member State and are required «to fulfil such obligations with the same effects»⁸⁶.

⁸⁶ Regarding the aforementioned necessary equality of treatment, it is worth mentioning the warnings made by the Court of Justice in its judgments of 25 October 2001 (*Finalarte* case), cit. [paragraphs 81, 82 and 83 and ruling (3)] and 24 January 2002 (*Portugaia Construções, Lda.*, case C-164/99), the latter considering as constituting unequal treatment and unjustified restriction on the freedom to provide services, contrary to Art. 59 of the EC Treaty (which later became, with the amendment of Treaty, Art. 49

As an exception to the already examined general rule of Directive 96/71/EC, of application of the most advantageous terms and conditions of employment contained in the collective agreements and arbitration awards of universal application, in the case of the postings of workers of temporary employment undertakings, it may become obligatory for these to guarantee conditions contained in the collective bargaining agreement of undertaking, group of undertakings or network undertakings of application in the user undertaking. The observance of this regulation would occur in compliance with the right of the assigned workers, while their posting lasts, to the enjoyment of the basic working and employment conditions as if they had been recruited directly by the user undertaking to occupy the same job [see *supra*, section 3.1.2.3 of this chapter)]. The aforementioned observance will occur when the host State rules do not limit the enjoyment of the aforementioned conditions to those established in the sectorial collective bargaining agreement⁸⁷. State rules such as those indicated do not conflict with the provisions of paragraph 8 of Art. 3 of Directive 96/71/EC. The systematic interpretation of the paragraph, in its previous and new versions, prevents it from being understood that the postings just referred cannot constitute a possible exception to the rule of the guarantee of the terms and conditions of employment established by the collective agreement or arbitration award of universal application. In such postings, the taking into consideration of the collective bargaining agreement of undertaking, group of undertakings or network undertakings of application in the user undertaking was based, until the entry into force of the amendments introduced by Directive (EU) 2018/957, on the relationship between paragraph 8 and paragraph 9 of the same article; with the amendment of this article, it is now based on paragraph 1b and the new wording of paragraph 9.

Noting the difficulties in knowing exactly both the working and employment conditions to be guaranteed and their sources of regulation in the host State, especially collective agreements of inexcusable observance because they deal with those conditions, Directive 2014/67/EU provides that the Member States shall adopt «the necessary measures to make generally available on the single official national website and by other suitable means information on which collective agreements are applicable and to whom they are applicable, and which terms and conditions of employment are to be applied by service

EC), the possibility that the undertakings established in the Federal Republic of Germany could, by concluding a collective agreement specific to one undertaking, pay a lower minimum wage than that established in another collective agreement declared universally applicable [see paragraphs 34 and 35, as well as ruling (2)].

⁸⁷ Cfr. Art. 3(1), point (f), in connection with Art. 9(1) of Directive 2008/104/EC.

providers from other Member States in accordance with Directive 96/71/EC, including where possible, links to existing websites and other contact points, in particular the relevant social partners» [Art. 5(2)(b)]. The last three paragraphs of the new wording of Art. 3(1) of Directive 96/71/EC with Directive (EU) 2018/957 agree with and complement the aforementioned indications of Directive 2014/67/EU.

CHAPTER 15

INTERNATIONAL ASSIGNMENTS FROM THIRD COUNTRIES TO THE EUROPEAN UNION

JUAN BONILLA BLASCO

INDEX: I. Application of European Union Directives to Third-country Nationals. 1. Free Movement of Workers. 2. Health and Safety at Work. 3. Working Conditions in General. 4. Working Conditions for Specific Sectors. 5. Participation of Employees. 6. Discrimination. II. Working Conditions in cases of International Assignment of Third-country Nationals. 1. Temporary Assignment (within the framework of a transnational provision of services) of a Third-country National to a Member State of the European Union. 2. Temporary Assignment (within the framework of a transnational provision of services) of a Third-country National to several Member States of the European Union. 3. Local Hiring of a Third-country National in a single Member State. 4. Local Hiring of a Third-country National with subsequent assignment to another Member State. 5. Hiring of Highly Qualified Professionals. III. Social Security. IV. Immigration. V. International Jurisdiction and Governing Law.

The application of European Social Law to nationals of third countries who are assigned to provide services in the territory of the European Union raises a series of legal issues not only of a labour and employment nature but also of social security, tax, and immigration. The purpose of this chapter is to analyze the application of European Social Law to the labour and employment aspects connected to the geographical mobility of workers assigned to the various Member States of the European Union. Additionally, some aspects related to the social security regime and the work permit system within the European Union will also be discussed.

The tax treatment of the income obtained by third party nationals who come to provide services in any country of the European Union will be excluded from the analysis under this Chapter.

I. APPLICATION OF EUROPEAN UNION DIRECTIVES TO THIRD-COUNTRY NATIONALS

In the first place, this section will analyze the scope of application of the various European Union Directives. In particular, it will analyse if the Directives actually apply to third country nationals who provide services, either temporarily or permanently, in a Member State of the European Union.

1. Free Movement of Workers

Article 2 of Directive 2014/54/EU, on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, does not expressly refer to workers from third countries. Consequently, on a general basis, third-country nationals would be excluded from the right to free movement, without prejudice to the possibility of applying for work permits, that would allow them to move within the territory of the European Union.

The Directive on free movement of workers only makes express reference to nationals of third countries who are spouses or family members of European Union citizens, who can benefit from the right to free movement¹. Based on this, to the extent that the third country national is a spouse or family member of a Union citizen, they will be able to exercise the right to free movement of workers.

2. Health and Safety at Work

The Directives on health and safety at work² provide for an objective scope of application, which includes any worker hired with an employment relationship who renders services with the European Union.

¹ Dir 2014/54/EU Recitals 7 and 28.

² Dir 1989/391/EEC, on the introduction of measures to encourage improvements in the safety and health of workers at work, and Dir 1991/383/EEC, supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-term duration employment relationship or

The Directives on health and safety do not have a personal scope of application. It is our opinion that, to the extent that third country nationals actually provide employment-related services in the territory of the European Union, the rules on health and safety at work established within the framework of the European Union will apply.

This will be irrespective on whether the third country nationals have an employment relationship at their home country or at the host country. In particular, if the third country national is hired with an employment contract registered within a country of the European Union, the application of the Directives on health and safety will be direct. In addition, if the national of a third country who temporarily provides services in the European Union has an employment contract governed by the laws of a non-EU country, the application of the Directives on health and safety at work will be indirect, and will be limited to the time the third country nationals render employment-related services within the territory of the European Union. The same conclusion is reached under is the interpretation of the minimum working conditions under Article 3 of Directive 1996/71/EC, on the posting of workers in the framework of the provision of services.

3. Working Conditions in General

Most of the Directives on working conditions³ apply to employees, regardless of nationality, with an employment contract, whether of indefinite or temporary duration, or with a labour relationship as defined by the legislation of a Member State. Therefore, they apply to nationals of third countries who have signed a local labour contract in one of the European Union countries. Their practical application in cases of international assignments will depend on each specific case, as will be explained later in this chapter.

a temporary employment relationship. Dir 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work.

³ Dir 1994/33/EC, on the protection of young people at work; Dir 1997/81/EC, concerning the Framework Agreement on part-time work concluded by UNICE, CEEP, and ETUC; Dir 98/59/EC, on the approximation of the laws of the Member States relating to collective redundancies; Dir 1999/70/EC, concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE, and CEEP; Dir 2001/23/EC, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of undertakings or businesses; Dir 2003/88/EC, concerning certain aspects of the organization of working time; Dir 2008/94/EC, concerning the protection of employees in the event of the insolvency of their employer; Dir 2008/104/EC, on temporary agency work; Dir 2014/67/EU, on the enforcement of Directive 1996/71/EC; Dir EU 2019/1937, on the protection of persons who report breaches of Union law; Dir EU 2019/1152, on transparent and predictable working conditions in the European Union; Dir EU 2022/2041, on adequate minimum wages in the European Union.

Special mention should be made of Directive 2014/66/EU, on the conditions of entry and residence of third country nationals in the framework of an intra-corporate transfer. This Directive is especially aimed at, and applicable to, nationals of third countries who reside outside the territory of a Member State, and who apply for admission or have been admitted to the territory of a Member State in the framework of an intra-corporate transfer. It applies to an executive, specialist, or trainee worker.

Third country nationals can also be subject to Directive 2011/98/EU, which establishes a single application procedure for a single permit that authorizes nationals of third countries to reside and work in the territory of a Member State and establishes a common set of rights for third-country workers who legally reside in a Member State ('the Single Permit Directive'). This Directive applies to (i) nationals of third countries who apply for residence in a Member State for the purpose of working, (ii) nationals of third countries who have been admitted to a Member State for purposes other than work and are authorized to work and hold a residence permit, and (iii) third-country workers who have been admitted to a Member State for the purpose of working in accordance with Union or national law.⁴

Finally, worthy of special mention is the Directive 1996/71/EC, concerning the posting of workers in the framework of the provision of services, which applies to companies established in a Member State that post or second workers to the territory of another Member State. In this regard, a third-country national worker locally hired by a company to provide services in a Member State, who is posted by their company to the territory of another Member State, will be bound by the provisions of the Posting of Workers Directive within the European Union, without prejudice to the need to comply with the various national laws on conditions of entry, residence, and access to employment for third-country nationals. Directive 1996/71/EC was amended by Directive (EU) 2018/957, introducing the criteria of equal pay between local and posted workers within the European Union, as will be detailed further in Chapter 21.⁵

4. Working Conditions for Specific Sectors

The various Directives on working conditions by sectors⁶ do not differentiate, within their scope of application, between nationals of European Un-

⁴ Article 3(2) of Directive 2011/98 specifies those third-country nationals excluded.

⁵ Dir 1996/71/EC Recital 20.

⁶ Dir 1999/63/EC, concerning the Agreement on the organization of working time of seafarers concluded by ECSA and FST; Dir 2000/79/EC, concerning the European Agreement on the organization of working time of civil aviation; Dir 2002/15/EC, on the organization of the working time of

ion Member States and third countries, so they would also apply to third-country nationals who are locally hired in any of the European Union countries.

Particularly relevant is Directive 2002/15/EC, on the organization of the working time of persons performing mobile road transport activities, which applies to mobile workers employed by companies established in a Member State and engaged in road transport activities. Article 12 of the said Directive establishes the commitment to negotiate with third countries to extend the protection of the Directive to mobile workers employed by companies established in a third country.

5. Participation of Employees

The various Directives on worker participation⁷ do not explicitly refer to third-country nationals. In principle, and unless otherwise provided by labour legislation in the destination country, they will apply to third-country nationals who are locally hired in any of the European Union countries, without applying to third-country nationals who temporarily provide services in the territory of any of the Member States without a local contract.

6. Discrimination

Particularly relevant for their application to third-country nationals are the Directives on discrimination. Specifically, Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation, establishes nationality as a potential ground for discrimination. Therefore, we can conclude that third-country nationals can apply this Directive,

persons performing mobile road transport activities; Dir 2005/47/EC, on the agreement between CER and ETF on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector; Dir 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers; Dir 2015/1794/EU, amending Directives 2008/94/EC (LCEur 2008\1740), 2009/38/EC (LCEur 2009\666), and 2002/14/EC (LCEur 2002\802) of the European Parliament and of the Council, and Directives 98/59/EC (LCEur 1998\2531) and 2001/23/EC (LCEur 2001\1026) of the Council, as regards seafarers; Dir 2022/993, concerning the minimum level of training of seafarers.

⁷ Dir 1998/59/EC, on the approximation of the laws of the Member States relating to collective redundancies; Dir 2001/86/EC, supplementing the Statute for a European company with regard to the involvement of employees; Dir 2002/14/EC, establishing a general framework for informing and consulting employees in the European Community; Dir 2003/72/EC, supplementing the Statute for a European Cooperative Society with regard to the involvement of employees; Dir 2009/38/EC, on the establishment of a European Works Council or a procedure for informing and consulting employees in Community-scale undertakings and Community-scale groups of undertakings.

except for the provisions regarding entry and residence requirements, as well as access to employment.⁸

The other Directives on equal opportunities and prohibition of discrimination⁹ do not refer to third-country nationals. However, we consider, based on the application of the framework Directive (Directive 2000/78/EC), that they will also apply to third-country nationals who provide services in the territory of the European Union.

II. WORKING CONDITIONS IN CASES OF INTERNATIONAL ASSIGNMENTS OF THIRD-COUNTRY NATIONALS

In this chapter, we will analyze the regulation of working and employment conditions of employment contracts for third-country nationals who provide services, either temporarily or permanently, in the territory of the European Union. To this end, we will differentiate between the temporary and permanent posting of a third-country national, and we will also differentiate the posting for the provision of services in a single Member State of the European Union, or in several Member States.

We will therefore examine (A) the terms and conditions stipulated by Directive 2014/66/EU, concerning intra-corporate transfers; (B) as well as by Directive 1996/71/EC, regarding the posting of workers in the framework of a transnational provision of services. We will also analyze the local hiring of third-country nationals (C) to provide services in a single Member State; (D) in several Member States; and (E) who are highly qualified (Directive 2021/1883).

Prior to the approval and entry into force of these Directives, the provisions of the Treaty of the Union concerning the free movement of workers and the freedom of establishment applied, and were interpreted, at the time, by the Court of Justice of the European Union. Currently, the working conditions in cases of posting of third-country national workers are determined, as we will see below, by the provisions of Directives 2014/66/EU and 1996/71/EC.^{10 11}

⁸ Dir 2000/78/EC Article 3 and Recital 12.

⁹ Dir 2006/54/EC, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Dir 2010/41/EU, on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity; Dir 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

¹⁰ Craig, P., and De Burca, G.: *EU LAW. Text, Cases, and Materials* (7th ed.). Oxford: Oxford University Press, 2020.

¹¹ Among others, ECJ 27-3-90, *Rush Portuguesa/Office national d'immigration* C-113/89; 9-8-94, *Vander Elst/Office des migrations internationales* C-43/93; 21-10-03, *Abatay and others* C-317/01 and

1. **Temporary Assignment (within the framework of a transnational provision of services) of a Third-country National to a Member State of the European Union**

The temporary assignment of a third-country national to a Member State of the European Union, when framed within a transnational provision of services, is regulated by Directive 2014/66/EU of the European Parliament and of the Council of 15 March, concerning the conditions of entry and residence of third-country nationals in the framework of intra-corporate transfers.¹²

The Directive considers a temporary posting as an assignment which does not exceed a maximum period of three years for managerial and specialist workers and one year for trainee workers^{13 14}. During the temporary posting period, working and employment conditions will be regulated by the labour regulations of the country of origin. Once the maximum period stipulated for the posting has ended, it can be understood that the posting is now permanent, and the local regulations of the destination or host country will apply.

However, despite the application of the labour regulations of the country of origin during the posting, the minimum mandatory provisions in the host country must be respected during the posting. This will include not only aspects related to remuneration but also the minimum working and employment conditions established in Article 3 of Directive 1996/71/EC in the Member State where the actual provision of services takes place.^{15 16}

Directive 2014/66/EU does not expressly establish the application of the same criteria in cases where the posting is not carried out within an intra-corporate transfer. In this regard, it is increasingly common in practice for the posting to take place between the service provider entity and the client entity, without the service provider entity and the client entity being part of the same corporate group.

Sahin C-369/01; 21-10-04, Commission/Luxembourg C-445/03; 19-1-06, Commission/Germany C-244/04; 21-9-06 Commission/Austria C-168/04; 1-10-09, Commission/Belgium C-219/08; 11-9-14, Essent Energie Productie C-91/13.

¹² The approval of the aforementioned Directive is justified by the globalization of business, the expansion of trade and growth, and the proliferation of multinational groups, which have led to a significant increase in the international movement of executives, specialists, and trainees, from branches and subsidiaries of multinationals temporarily assigned on short-term missions to other units of the company. It was transposed into Spanish law by Law 14/2013, of September 27, on support for entrepreneurs and their internationalization, as amended by Act 11/2023, of May 8.

¹³ Dir 2014/66/EU Article 12.

¹⁴ Dir 2014/66/EU Article 5.1.

¹⁵ Dir 2014/66/EU Article 5.4 b).

¹⁶ Dir 2014/66/EU Article 18.1.

Although the Directive does not expressly regulate this scenario, under Spanish law, it is allowed for a worker from a third country posted to provide services in a client company in Spain to apply for a work permit within the framework of a transnational provision of services. We understand that the same criteria – application of the labour regulations of the country of origin with a maximum period of three years, respecting the minimum mandatory provisions in the country of destination – will equally apply.¹⁷

2. Temporary Assignment (within the framework of a transnational provision of services) of a Third-country National to several Member States of the European Union

In the case of the temporary assignment of a third-country national to several Member States of the European Union, carried out within the framework of a transnational provision of services, Directives 2014/66/EU and 1996/71/EC, as amended by Directive (EU) 2018/957, which introduced the criterion of equal pay between local and posted workers within the European Union, will equally apply.

During the maximum posting period – three years for managerial and specialist workers, and one year for trainees – the labour regulations of the home country will apply. However, as minimum conditions, the working and employment conditions according to Article 3 of Directive 1996/71/EC in the Member State where the work is carried out at any given time will apply. These are as follows:

- the maximum working periods, as well as the minimum rest periods;
- the minimum duration of paid annual leave;
- the amounts of minimum wage, including those increased for overtime; this provision will not apply to supplementary occupational retirement pension schemes;
- the conditions for the supply of labour, particularly by temporary employment agencies;
- health, safety, and hygiene at work;
- the protective measures applicable to the working and employment conditions of pregnant women or those who have recently given birth, as well as children and young people;
- equal treatment between men and women and other provisions on non-discrimination.

¹⁷ LO 4/2000 Article 43 and RD 557/2011 Article 110.

Directive 1996/71/EC sets out the general reference period, regarding the applicable regulations, for long-term postings as those exceeding 12 months. In such cases, the terms and conditions of employment established at the place of service provision will apply.

Furthermore, Directive 2018/957, which amends Directive 1996/71/EC, introduced the principle of equal pay by more broadly defining the labour rights of posted personnel (Article 3) and establishing that posted personnel must receive the same ‘remuneration’ as locally hired personnel.

The application of the principle of equality, in terms of remuneration, which apply to third-country nationals providing services in the European Union through a transnational provision of services, by application of Directive 2014/66/EU, will be developed in Chapter 21 of this work.

3. Local Hiring of a Third-country National in a single Member State

The international geographical mobility of third-country nationals can be permanent or indefinite. In this case, the hiring of the third-country national must be carried out by signing an employment contract in the host Member State, with the labour conditions of the destination country fully applying, regardless of the worker’s nationality. Of course, prior to the employment contract taking effect, the worker must have valid entry, residence, and work permits for providing services in the destination country.

In application of the anti-discrimination Directives¹⁸, a third-country national hired in a Member State with a local employment contract, and who has valid entry, residence, and work authorizations, cannot be discriminated against in their working and employment conditions compared to workers who are nationals of European Union Member States.

4. Local Hiring of a Third-country National with subsequent assignment to another Member State

This scenario involves the permanent or indefinite hiring of a third-country national to provide services, either at the same time or successively, in different Member States.

¹⁸ Dir 2000/78/EC, Dir 2006/54/EC, and Dir 2010/41/EU.

This situation will initially require the signing of an employment contract in the host country where the services are initially provided – in case of successive secondments over time – or in the host country where the employee usually provide their services – in case of indistinct service provision in several Member States at a time. The working conditions will be, in all respects, those regulated by the local contract in the destination country, whether it is the initial one or the one of habitual service provision. Likewise, in this case, the prohibition of discrimination based on nationality will apply.

Furthermore, regarding the provision of services in other Member States different from the country where the employment contract was entered into—whether it is the country where the services are initially done or the country where the employee usually provide their services— Directive 1996/71/EC will apply. In particular, the minimum working and employment conditions according to Article 3 of the Directive will be applicable. In addition, and according to Dir (EU) 2018/957, the principle of equal pay, especially concerning the concept of ‘remuneration’, will also apply, as set out under Article 3 of the Directive.

5. Hiring of Highly Qualified Professionals

Directive 2021/1883, concerning the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, aims to attract and retain highly qualified workers and promote their mobility into the European Union. Under this Directive, these highly qualified professionals will be able to receive the so-called ‘blue card’ for entry and residence for more than three months in a Member State. This card allows free movement within the Member States.

This permit not only implies that the worker can enter and reside not only in the Member State issuing their permit but also on any other in the European Union. It also allows family reunification.

It applies to people considered highly qualified employees, for which it is required to work in a technical position that requires work experience and meets or exceeds the salary threshold designated by each Member State.

III. SOCIAL SECURITY

The international assignment of third-country nationals has, undoubtedly, a very significant connection with aspects related to affiliation and contribution to social security bodies.

In this regard, we must indicate that European Social Security regulations apply to the following subjects:¹⁹

- to nationals of the EU, Iceland, Liechtenstein, Norway, or Switzerland who are or have been insured in one of those countries and to their family members;
- to stateless persons or refugees residing in the EU, Iceland, Liechtenstein, Norway, or Switzerland who are or have been insured in one of those countries and to their family members;
- to nationals of non-EU countries who legally reside in the territory of the EU and who have moved between its Member States and to their family members.

Therefore, as a general rule, third-country national workers hired through an employment contract in one of the Member States of the European Union must be registered with the governing bodies of Social Security in the destination or host country. Once registered, they can access the mechanisms of modernized coordination established in European Social Security regulations. This has been stipulated by the decisions of the Court of Justice of the European Union and the Spanish Supreme Court of Justice.^{20 21}

In connection with this, we must indicate that Regulation EU/1231/2010²² extended the rules of modernized coordination to nationals of non-EU countries who legally reside in the European Union and are in a cross-border situation. Their family members and survivors can also benefit from these rules if they are in the European Union. Regulation EU/1231/2010 will also be a source of rights in the case of a third-country national who moves from one European Union country to another to provide temporary services, but whose children remain in the first country.

In the case of the temporary secondment of third-country national workers to provide services in the territory of the European Union, the ap-

¹⁹ Regulation EC/987/2009 of the European Parliament and of the Council, of 16-9-2009, laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (text relevant for the EEA and Switzerland); Regulation EC/883/2004 of the European Parliament and of the Council, of 29-4-2004, on the coordination of social security systems (text relevant for the EEA and Switzerland); Regulation EU/1231/2010 of the European Parliament and of the Council, of 24-11-2010, extending the application of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

²⁰ Among others, ECJ 28-4-04, Öztürk C-373/02; 18-11-10, Xhymshiti C-247/09; 26-5-11, Akdas and others C-485/07; 5-11-14, Tümer C-311/13; 14-1-15, Demirci and others C-171/13; 21-6-17, Martinez Silva C-449/16.

²¹ Among others, SC 1-4-98, Rec 588/97; 30-3-99, Rec 2410/98; 28-10-99, Rec 4458/98.

²² Regulation EU/1231/2010 is not applicable in Denmark.

plication of the Social Security regime of the country of origin or the destination country will depend on the application of the international Social Security agreements that the destination country may have signed.

Although the general rule is to contribute to the Social Security system in the destination country, Member States have signed Social Security agreements that allow the third-country national worker to continue contributing in their home country outside the European Union for a maximum period – usually limited to a maximum duration of two years – being exempt from paying Social Security contributions in the destination country. In this case, the European Union Social Security Regulations will not apply.

IV. IMMIGRATION

The assignment of third-country nationals to provide services in one or more countries of the European Union requires the application for entry, stay, and work authorizations in the destination country. Although the immigration perspective exceeds the scope of this work, in this chapter we will analyze the European regulations concerning the application and obtaining of work permits for third-country nationals. Additionally, we will analyze whether the grant of a work permit by one of the Member States entitles the third-country national worker to provide services in another Member State.

Regarding the European regulations applicable to the granting of entry, residence, and work permits, the main piece of legislation is the Directive 2014/66/EU, on the conditions of entry and residence of third-country nationals in the context of intra-corporate transfers. As we previously mentioned in relation to the analysis of the working and employment conditions of third-country nationals who are transferred within the same international corporate group, Directive 2014/66/EU regulates the conditions and the application procedure for work permits in cases of an international assignment within an international group of companies.

Actually, Directive 2014/66/EU sets forth the conditions and the procedure for applying for an inter-company transfer (ICT) work permit. Under an ICT, a third-country national who has been hired and has provided services in another entity of the group abroad can apply for an inter-company transfer work permit, provided that the worker in question holds the position of manager, specialist, or trainee. In particular, and concerning the application of local regulations, the Directive establishes a simplified pro-

cedure that allows for the streamlining of the work permit application process.^{23 24 25 26}

As an example, Directive 2014/66/EU has been transposed into Spanish law through Law 14/2013, on support for entrepreneurs and their internationalization, which provides, among other mechanisms, the possibility to apply for work permits for qualified personnel before the Large Companies Unit (UGE). This process allows for the streamlining of the procedures associated with the work permit application.

We must also mention the necessary harmonization of the conditions for applying for work permits under Directive 2011/98/EU, of December 13, 2011, which establishes a single application procedure for a single permit that authorizes third-country nationals to reside and work in the territory of a Member State and establishes a common set of rights for third-country workers who legally reside in a Member State ('the Single Permit Directive').

The governing bodies of the European Union have also published a Proposal for a Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State²⁷, which would eventually modify the Single Permit Directive. Further development is expected in due course.

In both cases, both Directive 2014/66/EU and Directive 2011/98/EU provide for the conditions of authorization to work in a single Member State.

However, as we also previously mentioned in section II of this chapter, in business practice, it is relatively common for a third-country national to be

²³ It is necessary to prove employment within the same company or group of companies for a period of at least three to twelve uninterrupted months immediately prior to the date of transfer, with respect to executives and specialists, and at least three to six uninterrupted months, with respect to trainees (Dir 2014/66/EU art.5.1.b).

²⁴ A 'Manager' is understood to be a person holding a senior position, who primarily directs the management of the host entity, receiving general supervision or guidance principally from the board of directors or shareholders of the business or equivalent; that position shall include: directing the host entity or a department or subdivision of the host entity; supervising and controlling work of the other supervisory, professional or managerial employees; having the authority to recommend hiring, dismissing or other personnel action (Dir 2014/66/EU art.3.e).

²⁵ A 'Specialist' is understood to be a person working within the group of undertakings possessing specialised knowledge essential to the host entity's areas of activity, techniques or management. In assessing such knowledge, account shall be taken not only of knowledge specific to the host entity, but also of whether the person has a high level of qualification including adequate professional experience referring to a type of work or activity requiring specific technical knowledge, including possible membership of an accredited profession (Dir 2014/66/EU art.3.f).

²⁶ A 'Trainee' is understood to be a person with a university degree who is transferred to a host entity for career development purposes or in order to obtain training in business techniques or methods, and is paid during the transfer (Dir 2014/66/EU art.3.g).

²⁷ COM(2022) 655 Final 2022/0131 (COD).

transferred to the European Union to provide services in several Member States, either simultaneously or successively over time. For example, we can highlight the case of a third-country national financial director who is transferred to the European Union to oversee the various financial functions of the group in several countries at once. Or the case of a third-country national worker hired by a subcontracted company by a company of a UE Member State to provide services on a project in the territory of another Member State.

In these cases of successive or simultaneous provision of services in several Member States, a question raises as to whether the grant of a work permit by one Member State authorizes and allows the third-country national to provide services throughout the territory of the European Union. Or whether, on the contrary, each entity and immigration authority in each Member State maintains its sovereignty and competencies.

In this regard, Directive 2014/66/EU establishes, as a general criterion, that the grant of an inter-company transfer work permit by the governmental authority of a Member State authorizes the third-country national to reside and work in the territory of that Member State. However, the Directive itself provides for the possibility for the third-country national to move to the territory of another and other Member States, under the conditions stipulated in the Directive.^{28 29}

Specifically, Article 21 of the Directive, which regulates short-term mobility, provides that third-country nationals who hold a valid intra-corporate transfer permit issued by the first Member State shall have the right to reside in any second Member State and work in a company that belongs to the same company or group of companies, for a maximum period of 90 days within any 180-day period per Member State, subject to the communication mechanism between the first and second Member State regulated in paragraph 2 of Article 21. In practice, this communication mechanism partially replaces the application for the so-called ‘Vander Elst visa,’ which allows a third-country national to provide temporary services in another Member State by only processing the residence and stay authorization.³⁰

The cases of long-term mobility, understood as transfers of more than 90 days, are regulated in Article 22 of the Directive. Unlike short-term mobility, in transfers to a second Member State for more than 90 days, the second Member State can decide between accepting the inter-company transfer work per-

²⁸ Dir 2014/66/EU art.18.

²⁹ Dir 2014/66/EU art.20, 21, and 22.

³⁰ ECJ 9-8-94, *Vander Elst v Office des Migrations Internationales* C-43/93.

mit granted by the first Member State or requiring a granted work permit. Consequently, under European social regulations, the grant of an inter-company transfer permit by a Member State would not automatically authorize the third-country national to provide long-term services in the territory of other Member States. The grant of a new work permit by the new host Member State would likely be required.

Finally, concerning highly qualified professionals, Directive 2021/1883, on the conditions of entry and stay of third-country nationals for the purposes of highly qualified employment, regulates the grant of the ‘blue card’ for the entry and stay of these professionals in a Member State for more than three months, allowing free movement within the Member States.

As we have mentioned, this ‘blue card’ not only implies that the worker can enter and reside in the State issuing the work permit or any other in the European Union, but it also allows for family reunification.

It applies to individuals considered highly qualified workers. To qualify as a highly qualified worker, it is required to work in a technical position that requires work experience and meets or exceeds the salary threshold chosen by each Member State. Higher professional qualifications are considered to be those of higher education (of at least 3 years duration) and higher professional skills, for example, the knowledge, skills, and competencies endorsed by a minimum of 5 years of professional experience at a level comparable to higher education qualifications and relevant to the profession or sector specified in the employment contract or firm job offer.

V. INTERNATIONAL JURISDICTION AND GOVERNING LAW

Regarding the determination of the competent jurisdiction bodies to resolve any dispute arising from the geographical mobility of third country nationals, we refer to Chapter on ‘International Jurisdiction’. Mutual Recognition’. In addition, in those aspects related to the determination of the governing law, based on the application of the rules on Private International Law, we refer to Chapter on ‘Private International Law and Governing Law’.

CHAPTER 16

FREEDOM OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES AND SOCIAL RIGHTS

SALVADOR DEL REY GUANTER AND ANTONIO JOSÉ VALVERDE ASENSIO

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I. THE CONCEPTION OF FREEDOM OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES AND THEIR RELATIONSHIP WITH SOCIAL RIGHTS

In accordance with the provisions of Art. 3.3 of the Treaty on European Union, the Union will form an internal market, which, according to the Treaty on the Functioning of the European Union, is conceived as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties” (Art. 26.2 TFEU), which implies that, together with the freedom of movement of persons and capital, the freedom of establishment and the freedom to provide services are constituted as fundamental principles, the effectiveness of which is guaranteed by the Treaty on European Union which implies that, together with the freedom of movement of persons and capital, the freedom of establishment and the freedom to provide services constitute fundamental principles of the Union, the effectiveness of which is guaranteed by the founding texts themselves.

Freedom of establishment includes (Art. 49 TFEU) the right “for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union (...) to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency” under the same conditions as those laid down for nationals of the host State. According to the ECJ, its objective is “to allow nationals of a Member State or legal persons established in that Member State to set up a secondary establishment in another Member State in order to carry on their business there and thus to promote economic and social interpenetration within the European Union in the sphere of economic activity other than as an employee”, thus implying the possibility “to participate, on a stable and continuing basis, in the economic life of a Member State other than their State of origin and to profit therefrom by actually pursuing, in the host Member State, an economic activity through a fixed establishment for an indefinite period”¹. In general, restrictions to this basic fundamental freedom are prohibited, including those that affect “the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State” (Art. 49 TFEU, first paragraph).

¹ ECJ (Grand Chamber) of 21 December 2016 (Case C-201/15, AGET Iraklis), at paragraph 50. It cites, in the same vein, the judgment of 23 February 2016, Case C-179/14, *Commission v. Hungary*, paragraph 148 of which effectively reiterates the same argument. For the ECJ, “...the concept of establishment presupposes a real establishment of the company concerned in that State and the exercise of an effective economic activity there” (ECJ Iraklis case and the judgment of 12 July 2012, Case C-378/10 *Vale*, cited therein).

Limitations may only be admitted if they derive from “the exercise of activities connected, even occasionally, with the exercise of official authority” (Art. 51) or from provisions which are justified “on grounds of public policy, public security or public health” (Art. 52).

The freedom to provide services (Art. 56 et seq. TFEU), for its part, implies the possibility for any economic operator to “temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals” (Art. 57), and includes “a) activities of an industrial character; b) activities of a commercial character; c) activities of craftsmen; d) activities of the professions” (Art. 57 paragraph 2). As the ECJ itself states, the freedom to provide services recognized by Article 56 TFEU covers all services which are not provided on a stable and continuous basis from a place of business in the Member State of destination, considering as services for these purposes services normally provided for remuneration, which include in particular activities of a commercial character². This freedom to provide services confers rights not only on the service provider himself, but also on the recipient of those services³. Restrictions on the freedom to provide services are also prohibited (Art. 56), the first defining aspect of the very recognition of the right in question in the Treaty, which extends to all measures which prohibit, hinder or render less attractive the exercise of this freedom⁴. The limitations accepted will be limited to the cases contemplated in the Directive regulating the freedoms in question.

Indeed, both with regard to freedom of establishment and freedom to provide services, the TFEU provides for regulation by means of a directive in order, respectively, to achieve the coordination of national provisions and “to achieve the liberalisation of a specific service” (article 59).

The objective of Directive 2006/123 is to respond to the need to harmonize national legislation in order to remove obstacles or barriers that weaken “the worldwide competitiveness of European Union providers” (in the words of its own explanatory memorandum). Three aspects are recurrent in the ra-

² For all, in the judgment of 23 February 2016, Case C-179/14, *Commission v. Hungary* (paragraphs 150 and 151)

³ As is the receipt of services: ECJ of 3 December 2014 (Case C-315/13, *De Clercq*), paragraph 52. In identical terms, ECJ of 13 November 2018 (Case C-33/17, *Cepelnik*) paragraph 38.

⁴ ECJ of 13 November 2018 (Case C-33/17, *Cepelnik*), paragraph 37. It cites, in the same vein, the judgment of 4 May 2017 (Case C-339/15, *Vanderborght*). More recently, the ECJ judgment of 21 December 2023, Grand Chamber (Case C-333/21 *European Superleague Company*), states that “Article 56 TFEU, which establishes the freedom to provide services for the benefit of both providers and recipients of those services, precludes any measure which, although indistinctly applicable, may hinder the exercise of that freedom by prohibiting, hindering or rendering less attractive the activity of those providers in Member States other than those in which they are established

tionale: ensuring competitiveness within the Union; guaranteeing the freedom of movement of workers; and, finally, the defense of its economy, particularly SMEs, in an attempt to justify the defense of the weakest economic operators⁵. In addition, the declared intention is to provide greater security to service providers and consumers and users. As stated in paragraph 5 of the aforementioned explanatory text, the aim is to remove the obstacles to these freedoms in order to “guarantee recipients and providers the legal certainty necessary for the effective exercise of those two fundamental freedoms of the Treaty”.

The timeliness of the Directive lies precisely, as it states, in the need to establish a system of administrative cooperation that helps to eliminate obstacles in each Member State. It is not possible, it states, to remove them only through the direct application of the Treaties, as admitted by the doctrine of the European Court in rulings such as the *Rush Portuguesa*⁶, among other reasons because it would be complicated to open infringement proceedings against non-compliant countries. This justifies the need and opportunity for a rule of secondary legislation that seeks the coordination and convergence of the internal regulations of each Member State.

But together with the consideration of the aforementioned basic freedoms of establishment and provision of services as fundamental rights, the Union includes, among others, within its objectives (also in art. 3 of the TEU), the promotion of “social justice and protection”, equality, and “economic, social and territorial cohesion, and solidarity among Member States”. According to Art. 9 TFEU, “in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”. And as determined by art. 151 of the same, in its first indent, “The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 Oc-

⁵ On the economic impact of the single market for services, see the European Parliament report “Contribution to growth: the single market for services. Delivering economic benefits for citizens and business”. IMCO committee. February 2019. Available at:

[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631054/IPOL_STU\(2019\)631054_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631054/IPOL_STU(2019)631054_EN.pdf).

According to it, “the value of the benefits generated by the legislation adopted by the Parliament in the area of free movement of services, including professional qualifications and retail trade, amounts to EUR 284 billion per year in the area covered by the Services Directive, EUR 8.8 billion per year in the area of professional services, and EUR 20 billion per year in the area of services relating to public procurement”.

⁶ Judgment of the Court of Justice (Sixth Chamber) of 27 March 1990 (Case C-113/89). Previously, the Judgment of 22 May 1985 (Case 13/83) had raised the need to regulate and admit free movement in the field of transport and was considered a breach of the EEC Treaty.

tober 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions so as to make possible their harmonization while the improvement is being maintained, proper social protection, social dialogue, dialogue between management and labour, the development of human resources with a view to lasting high level of employment and the combating of exclusion". This aim, without prejudice to "the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy", is understood to "result not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action".

However, the concurrence of economic freedoms with what have come to be generically called social rights has not been peaceful. It is true that these freedoms of establishment or provision of services are not absolute. There are limits to them, as provided for both in the Treaties and in secondary legislation. But these social rights -and mainly collective rights- have not been considered as absolute exceptions to the application of these rights either, despite the provisions of the Community rules.

For example, Directive 2006/123 states that it "does not affect terms and conditions of employment", nor "relations between social partners, including the right to negotiate and conclude collective agreements, the right to strike and to take industrial action in accordance with national law and practices which respect Community law, nor does it apply to services provided by temporary work relations"; nor does it apply to social security legislation (paragraph 14 of the Explanatory Memorandum). However, despite this formal declaration, it has become clear that the freedom of establishment and the freedom to provide services collide with actions that could be associated with employees' rights or forms of determination or imposition of certain working conditions

The initial doctrine of the European Court of Justice is based initially on the prevalence of freedom of establishment and freedom to provide services over social rights, both at national and Community level, which clearly conditions the effectiveness of the latter⁷. Directive 2006/123 itself (art. 16.3) pro-

⁷ Valdés Dal-Ré in "Presentation" of the monograph "New perspectives of the case law of the Court of Justice of the European Communities" states: "be that as it may, the primacy of Art. 49 ECT over the right to adopt collective conflict measures is clear or, in other words, the greater protection that the freedom to provide services enjoys, at the Community level, from the point of view of the company as opposed to the legal-labour status of posted workers". In any case, the author herself admits the need to analyze on

vides that the provisions contemplated therein - in relation, for example, to the prohibition of requirements on the freedom to provide services - “shall not prevent the Member State to which the provider moves from imposing, in respect of the provision of a service activity, requirements which are justified on grounds of public policy, public security, public health or the protection of the environment...”. “Nor shall they prevent the Member State from applying, in conformity with Community law, its provisions on employment conditions, including those laid down by collective agreements”. Even the establishment of restrictions by the private sphere is admitted⁸. But, as we have said, social rights are not considered as absolute exceptions to the application and effectiveness of those rights. The delimitation, with a certain degree of precision, of the doctrine of the ECJ in this respect, and its own evolution, shows the different nuances raised by the conception of rights, intended or potentially recognized to workers, as limits that can be framed within the general interest that allows the restriction of the freedoms of establishment and movement in a weighing judgment that requires the assessment of each case in accordance with the provision contained in the Directive itself.⁹

In addition to Directive 2006/123, the previous Directive 96/71 of 16 December on the posting of workers in the framework of the transnational provision of services is a key reference point, at least in terms of freedom of movement¹⁰. It is understood that the posting of workers is the basis for its regulation, which has two main aspects. Firstly, the guarantee of minimum working conditions, but at the same time, and of a structural and essential nature, the removal of any real obstacle to free competition and competition between companies within the Union, avoiding, as far as possible, situations of *social dumping*. It is not intended to harmonize working conditions, nor does

a case-by-case basis “any case of opposition between the Community freedom to provide services and the fundamental right to adopt collective (or any other) conflict measures”.

⁸ It is possible to admit measures of non-State origin, even if they impede the freedom of movement enshrined in the Treaty on European Union, if it is shown, first, that their adoption is justified by a legitimate objective of general interest which is not of a purely economic nature and, second, that they comply with the principle of proportionality, which means that they are suitable for securing the attainment of that objective and do not go beyond what is necessary to attain it” (judgment of the ECJ - Grand Chamber), that they comply with the principle of proportionality, which implies that they are suitable for securing the attainment of that objective and that they do not go beyond what is necessary to attain it” (judgment of the ECJ - Grand Chamber - of 21 December 2023, case c-333/21 European Superleague Company).

⁹ In particular, on the reference to “public order” in relation to social provisions as a criterion justifying national action as opposed to the freedom to provide services, mind the criticism by Rodríguez-Piñero Bravo-Ferrer of the ECJ of June 19, 2008 (Case C-319/06, Commission v. Luxembourg).

¹⁰ Obviously, not in relation to the freedom of establishment, given the permanent nature of the object of the same, as opposed to the necessary temporary nature of the movements linked to the freedom to provide services.

Directive 2006/123. This is recognized by the ECJ's own doctrine with respect to Directive 2018/957, which amends Directive 96/71. The Court states, in terms that are undoubtedly applicable to both directives, that their content is limited to making certain rules of the host Member State mandatory in the event that companies established in another Member State post workers to the first, while respecting the diversity of national industrial relations systems. But its aim is precisely to promote the freedom to provide services, preventing "inequality in the working conditions of the workers concerned, given the disparities between the labour laws of the Member States (...) from undermining free competition between service-providing companies and leading to major differences in protection for workers".

The premise of Directive 96/71 (and, by extension, of the Directives that affect it, either as a guarantee of compliance with its provisions -Directive 2004/67-, or as an amendment of the same -Directive 2018/957 and, in relation to the establishment of specific rules for its application to the field of road transport -Directive 2020/1057-) is not, therefore, to alter the criteria of the applicable rule, neither in contractual matters nor in Social Security matters. But obviously they do have an impact on the determination of the legal regime applicable in the case of transnational provision of services, establishing minimum working conditions under the assumptions contained in the same.¹¹

This relationship between the freedom to provide services and the obligatory determination of a series of minimum working conditions established by secondary legislation is reflected in the doctrine of the European Court when it examines the consideration of social rights as limits or restrictions to this freedom and analyzes their possible justification. The judgment of the application of the aforementioned Directive, considering its premises as indispensable elements for admitting the application of the aforementioned minimum working conditions; the analysis of the aspects that determine this obligation; and, its understanding as restrictions - admissible or not, depending on the case - of the basic freedoms referred to, becomes a reference in the preparation of a doctrine, certainly evolving, and largely in line with the successive reforms of the Union's body of law, on the limits of freedom of movement in the European sphere.

In this sense, the first interpretation considered by the ECJ has not exactly been extensive in favor of hypothetical workers' rights. The doctrine contained in judgments such as *Viking*, *Laval* and *Rüffert*¹² (especially the last

¹¹ On this subject, it may be interesting to refer to the STCE of February 3, 1982 (*Seco* cases C-62 and 63/81). See *infra* note.

¹² SSTCE of December 11 (Case C-438/05) and December 18, 2007 (Case C-341/05) and April 3, 2008 (Case C-346/06) respectively.

two) is based precisely, albeit in different cases, on whether or not Directive 96/71 is applicable in the cases in question. Their analysis takes as a starting point whether the conditions for the application of the Directive are met and whether the conditions on which the imposition of certain essential working conditions (mainly wages) are based are met. And, in general, the perception is that we are faced with truly restrictive criteria on the part of the ECJ. This aspect, moreover, does not stop only at the finding or not of the factual assumptions that would allow the application of the Directive, but goes beyond the issue. Thus, on the one hand, it will affect the very understanding of the systems of labour relations, despite the fact that it initially declares itself against such an aspect¹³; and, on the other hand, it will affect the very objective of the Directive to avoid situations of *social dumping*.¹⁴

However, regulatory developments in this respect have modulated this initial restrictive understanding of the impact of labour rights as limits to the freedom of establishment and movement. With the various directives supplementing or amending the original Directive 96/71 and others (such as Directive 2004/18, of March 31, repealing Directives 92/50 and 93/37 on public procurement and public works contracts, which in turn has been replaced by Directive 2014/24, of February 26), the understanding of the relationship between workers' rights and the economic freedoms of movement has been enhanced and the protection of the more social aspect of the aforementioned Directives has been strengthened to a large extent.

As stated, for example, in the explanatory memorandum to Directive 2018/957, the rationale for the Directive derives from a necessary evaluation of Directive 96/71 to see whether, "more than twenty years after its adoption", it still strikes "the right balance between the need to promote the freedom to provide services and ensure fair conditions of competition, on the one hand, and, on the other, the need to protect the rights of posted workers"¹⁵. The stated aim at this point is "to ensure uniform application of the rules and to achieve genuine social convergence"¹⁶, which, in addition to the prefixed objective of prioritizing the application of Directive 2014/67, relating to ensuring compliance with Directive 96/71, will entail a significant modulation of the ECJ's initial doctrine, which will be reflected mainly in the judgments of 8 December 2020 (Poland *vs* Parliament and Hungary *vs* Parliament)

¹³ For example, in paragraph 24 of the Explanatory Memorandum to Directive 2018/957, taken over by the ECJ doctrine. Vid. *supra* note.

¹⁴ With clarity, Rodríguez-Piñero Bravo-Ferrer; *op. loc. cit.*

¹⁵ Paragraph 4 of the Explanatory Memorandum.

¹⁶ *Idem*.

Thus, the amendments to Directive 96/71 accept a new conception of freedom of movement, where social rights are integrated, to a large extent, as a way of guaranteeing the provision of services under equal conditions. As stated in paragraph 10 of the Explanatory Memorandum to the aforementioned 2018 Directive, it is necessary to ensure greater protection for workers in order to safeguard the freedom to provide services under fair conditions in both the short and the long term, in particular by preventing the rights guaranteed by the Treaties from being infringed; or, as the ECJ itself explains in its most recent doctrine¹⁷, within a regulatory framework which ensures that competition is not based on the application, in the same Member State, of terms and conditions of employment of a substantially different level depending on whether or not the employer is established in that Member State, while offering greater protection to posted workers. This is the main objective of this Directive and, consequently, of the Union's regulatory framework on the subject. Its rationale is thus to reinforce the freedom to provide services on the basis of a fairness-based approach. Again in the words of the ECJ, in so far as it ensures that the working and employment conditions of posted workers are as similar as possible to those of workers employed by undertakings established in the host Member State, while recognizing that such workers will enjoy in that Member State more protective conditions of time and employment than those provided for by Directive 96/71¹⁸. The rules must also be clear¹⁹ and it is considered necessary to strengthen coordination and cooperation between States, particularly in the fight against fraud²⁰, precisely an aspect that was relativized in the Viking and Laval decisions. The very extension of the application of the Directive to road transport (despite the exclusion of this activity from Article 56 of the TFEU and from the scope of Directive 2006/123, due to its special treatment) has a significance, related to the very position of the ECJ and to the Union's option to extend to the sector the demands for adequate working conditions and social protection for drivers, appropriate conditions for companies and fair competition between carriers²¹.

In another sense, but with important transcendence to the effect, given the cases in which the application of enforceable minimum working conditions

¹⁷ Judgment of 8 December 2020 (Case C-620/18, Hungary v. Parliament), also, in the same terms, judgment of the same date (Case 626/2020, Poland v. Parliament), paragraphs 51 and 56 respectively.

¹⁸ In the aforementioned ECJ of 8 December 2020 (Case C-620/18).

¹⁹ "The constituent elements of pay and other working conditions under national law or the agreements referred to in this Directive must be clear and transparent to all undertakings and posted workers" (paragraph 21).

²⁰ Paragraph 26.

²¹ Paragraph 1 of the Explanatory Memorandum to Directive 2020/1057.

itself has arisen - above all due to the possible imposition of so-called social clauses in public procurement procedures - Directive 2004/18, as stated in its Explanatory Memorandum, clarifies the possibilities available to contracting authorities to meet the needs of the citizens concerned, without excluding the environmental or social field, provided that these criteria are linked to the subject-matter of the contract, do not give the contracting authority an unlimited freedom of choice, are expressly mentioned and comply with the fundamental principles listed in recital 2 (principles of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency). Thus Art. 26 of the Directive, repealed by Directive 2014/24, provided that contracting authorities may require special conditions in connection with the performance of the contract provided that these are compatible with Community law and are indicated in the contract notice or in the contract documents. The conditions under which a contract is performed may relate, in particular, to social and environmental considerations. This provision is, if possible, more precise in the current Directive. As stated in recital 105 of its Explanatory Memorandum, it is important to ensure that subcontractors comply with the applicable obligations in the fields of environmental, social and labour law laid down by Union law, national law, collective agreements or international environmental, social and labour law provisions listed in this Directive, provided that such rules, and their application, comply with Union law, and are ensured by appropriate measures taken by the competent national authorities within the scope of their functions and powers, such as labour inspection or environmental protection agencies. Thus, according to Art. 70, the special conditions that may be required in the performance of the contract may include economic or innovation-related considerations, environmental, social or employment-related considerations.

II. THE EVOLVING DOCTRINE OF THE EUROPEAN COURT ON THE RELATIONSHIP BETWEEN SOCIAL RIGHTS AND BASIC ECONOMIC FREEDOMS

As we have said, the doctrine of the current ECJ initially starts from the consideration of the freedom of establishment and the freedom to provide services as basic rights, subjecting any restriction thereof to a necessary assessment judgment, even when these may be associated, where appropriate, with the recognition of what in a broad sense are considered social rights, which are not exclusive in nature. However, the criteria of this weighting judgment re-

flect with relative clarity an evolution, broadening the scope of these limitations or restrictions in favor of a more social consideration of the Union.

This evolution is not only the result of a case-by-case analysis. It occurs, as we have also mentioned, in parallel with the succession of EU regulations and decision documents that aim to reinforce the social criterion as a differential element in relation to other regions of the world. This is clearly seen in the regulations on the establishment of minimum working conditions in the event of the posting of workers, with a reciprocal impact between successive regulatory changes and case law decisions. A significant impact can also be glimpsed in the changes in the Community regulations on public procurement and the increasingly explicit possibility of linking social or employment aspects directly to the conditions of execution of contracts for public administrations. And, of course, it is reflected in the evolution of the consideration of social rights within the Union, which emerges as another aspect that justifies or modulates this doctrinal evolution.

Beyond its antecedents²², the content of the Viking, Laval and Rüffert judgments, without prejudice to the criticisms they generated and the elements of correction that, as we shall see, the Court itself has been able to incorporate over time, created a body of doctrine, not necessarily coherent, which laid the initial foundations of the difficult relationship between the so-called social rights (mainly, those related to the collective or labour relations level), the determination of the applicable working conditions and the freedoms of establishment and the provision of services.

The starting point was (and is) the consideration of the basic freedoms of establishment and the freedom to provide services as fundamental freedoms or rights directly applicable from the Treaties themselves and worthy

²² The judgments of 12 October 2004 (Case C-60/03, Wolff and Müller), in which the Court declared that Directive 96/71 does not preclude national provisions under which a construction firm which commissions another firm to carry out construction work is liable, as a guarantor who has waived the benefit of *excussio*, for the obligations of that firm or of a subcontractor for the payment of a worker's minimum wage or contributions to a joint body established by the parties to a collective agreement... (even where the protection of the right of a worker to be protected by the Directive does not preclude the protection of his rights under the Directive; of 23 November 1999 (Joined Cases C-365/96 and C-376/96, *Arblade*), where the Court allowed a Member State to oblige an undertaking established in another Member State and temporarily carrying out work in the first State to pay its posted workers the minimum wage fixed by the collective labour agreement applicable in the first Member State, but not to oblige it to pay employer's contributions which are redundant in relation to those which it is obliged to pay in its State of origin; of 5 March 2001 (Case C-165/98, *Guillaume*), in which it accepted that an undertaking established in another Member State and providing services in the territory of the first Member State should be obliged to pay its employees the minimum wage fixed by the national rules of that State, but considered the measure disproportionate in the case of employees of an undertaking established in a frontier region who have to perform part of their work, part-time and for short periods, in the territory of one or more Member States other than the State in which the undertaking is established.

of the maximum protection²³, to the point of situating them as the content of the freedom to conduct a business provided for in Article 16 of the Charter of Fundamental Rights²⁴. It is a presupposition of the doctrine of the ECJ that the fundamental rights guaranteed by the Charter must be applied in all situations governed by Union law and that they must, therefore, be respected when national legislation falls within the scope of application of that law²⁵, admitting only the restrictions or limitations provided for in Community legislation and considering as such (for the purposes of analyzing its possible justification) any provision that imposes, for example, certain working conditions.²⁶

Another matter is, in the sense that we indicate, that these limitations are justified. Restrictions on the freedom of establishment applicable - and without discrimination - may be justified by overriding reasons of general interest, provided that they are suitable for securing the attainment of the objective they pursue and do not go beyond what is necessary to attain that objective²⁷, which entails entering into a necessary balancing test. It will initially be up to the national authorities to demonstrate that the application of the regulation in question and involving such restrictions are necessary to achieve the objective

²³ ECJ of 27 March 1990 (*Rush Portuguesa* case, C-113/89); previously, in the ECJ of 3 February 1982, *Seco* cases C-62 and 63-81). In the *Seco* case, the Court of Justice stated that under Articles 59 and 60, third paragraph, of the Treaty, the provider of a service may, in order to carry out that service, temporarily carry on his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals. This implies (citing in this respect the judgment of 17 December 1981 - *Webb* case C-279/80) the elimination of all discrimination against the provider of the service on grounds of his nationality or the fact that he is established in a Member State other than that in which the service is to be provided, including the obligation to pay contributions allegedly imposed on companies providing temporary services in the State of destination and already paying contributions for their workers for the same periods of activity under the legislation of the State of origin. Thus, the Court of Justice concluded that legislation which imposes on employers a social security charge for their workers which does not correspond to any social advantage for those workers, who are moreover exempt from insurance in the Member State in which the service is provided and who remain, moreover, throughout the period of performance of the work, compulsorily insured under the social security scheme of the Member State in which the employer is established, cannot reasonably be regarded as justified on grounds of the general interest relating to the social protection of workers.

²⁴ Paragraph 66 of the ECJ of 21 December 2016 (Case C-201/15 *Iraklis*).

²⁵ Paragraph 62 of the aforementioned judgment (Case C-201/15 *Iraklis*). It cites, in this regard, the ECJ of 26 February 2013 (*Akerberg Fransson* case, C-617/10).

²⁶ As stated, for example, by the ECJ of 12 September 2019 (*Maksimovic* case, C-64/18), “any measure which prohibits, hinders or renders less attractive the exercise of that freedom must be regarded as a restriction on the freedom to provide services”, an aspect that also extends to the freedom of establishment. Any national legislation “which makes the provision of services on national territory by an undertaking established in another Member State subject to the grant of an administrative authorization” (*Maksimovic* case; paragraph 32. Also *Danieli*, paragraph 44), an important aspect insofar as the determination of social or environmental clauses could be linked to it, is also recurrently admitted as a case of restriction (*Maksimovic* case; paragraph 32; also *Danieli*, paragraph 44).

²⁷ For all, ECJ 11 December 2014 (Case *Commission v. Kingdom of Spain*, C-576/13), paragraph 47.

to be attained²⁸, although it is true that the European Court usually enters into the assessment of such a balancing rule or standard.

In any case, social rights have also come to be understood as a principle and fundamental rights included in the *acquis communautaire*, both by reference to them in the founding treaties and by the provisions of the Charter of Fundamental Rights. They have even been used as a legitimate restriction on the extent to which the basic freedoms of establishment and movement can be understood. The social purpose of the Union has been affirmed even in those judgments that have been understood as referents of the prioritization of entrepreneurial freedoms. As stated in paragraph 79 of the Viking judgment (reiterated in other judgments) since the Community has not only an economic but also a social purpose, the rights deriving from the provisions of the Treaty relating to the free movement of goods, persons, services and capital must be weighed against the objectives pursued by social policy (among which it places, first and foremost, the improvement of life and work, in order to achieve their equalization through progress, adequate social protection and social dialogue). We could even affirm that this consideration has been reinforced both in the doctrine of the ECJ and in the various normative and decision-making documents of the Union.

However, the concurrence of economic freedoms with certain social rights and, in particular, with the determination of minimum working conditions for workers, and even with national rules that may interfere with the regulation of these rights (such as the establishment of formal requirements, administrative authorizations or excessive sanction criteria in the case of employment of workers from third countries²⁹ or the case where national legislation provides for prior authorization for collective redundancies that could discourage the establishment of a company from a different Member State³⁰) requires an analysis of proportionality despite the social consideration of the Union. The so-called social rights, even those of a collective nature with national constitutional recognition, are not excluded from this necessary balancing rule (Viking and Laval cases), which requires the aforementioned proportionality test to be carried out in order to admit their consideration as admissible restrictions of the aforementioned basic freedoms.

It is in this analysis of weighting and proportionality that the evolution of the ECJ's doctrine can be seen. The different referred pronouncements of the

²⁸ Case C-64/18 Maksimovic, paragraph 42.

²⁹ With different content, *confr.* SSTJUE October 7, 2010 (case C-515/08, Santos Palhota), November 13, 2018 (case C33/17, Cepelnik), November 14, 2018 (case C-17/18, Danieli) or September 12, 2019 (case C-64/18, Mañsimovic).

³⁰ ECJ 21 December 2016 (Case C-201/15, Iraklis).

ECJ start from a vision or interpretation that is certainly restrictive to a more “social” understanding, if we may be allowed the reductionism. As we have said, this presents an important parallelism with the evolution of EU law and the definition of its guiding principles in different decision documents. From judgments such as those in the Viking, Laval, Rüffert and Iraklis cases, to judgments such as those in the RegioPost GmbH cases³¹, which finally admitted the inclusion of social clauses as a justified restriction of freedom of movement in accordance with the provisions of the then current Directive 2004/18 (Art. 26), or, above all, those of December 8, 2020 (Poland vs. Parliament and Hungary vs. Parliament), in addition to other considerations that may have to do with the analysis of each case, this evolution is relatively clearly shown, which goes hand in hand - and vice versa - with regulatory changes in the area of social rights, with greater attention to the social feature in the Union’s policy, of which the European Pillar of Social Rights is a clear exponent, and, specifically, although not only, with the determination of working conditions in the event of the posting of workers.³²

Therefore, in this analysis it is evident that one of the recurring issues - although not the only one - is the application and with what objective extension of the provisions of Directive 96/71. Of particular importance in this respect is the process of securing and amending the Directive. As recalled in paragraph 63 of the aforementioned ECJ of 8 December 2020, citing the Parliament’s report on the impact assessment of the proposal for a new Directive - which concluded with the adoption of the aforementioned Directive 2018/957 - Directive 96/71 had led to unfair conditions of competition between undertakings established in a host Member State and undertakings posting workers to that Member State, and to a segmentation of the labour market due to a structural differentiation in the wage rules applicable to their respective workers. This recognition by the Court may imply, to a large extent, a reconsideration of the previous doctrine, which, based on a relatively restrictive interpretation of the Directive, concluded with pronouncements that the most qualified doctrine came to qualify as constitutionalization of *social dumping*³³. The choice of the EU legislator has therefore been, in the words of the Court itself (paragraph 64 of the judgment cited), to adapt the balance on which Directive 96/71 was based by strengthening the rights of posted workers.

³¹ ECJ of 17 November 2015 (Case C-115/11).

³² In this perspective, see, for example, the Guidelines on the application of EU competition law to collective agreements concerning the working conditions of self-employed persons without employees (2022/C374/02) OJEU September 30, 2022. The jurisprudential doctrine cited in the document is also important.

³³ Such as Rodríguez-Piñero Bravo-Ferrer.

From the consideration of these general aspects that make up a body of doctrine of the ECJ (formerly the ECJ), not always concordant and depending on each case, on the not always peaceful relationship between social rights and economic freedoms, we will present the content of the main judgments on the subject. In these judgments, both the common elements that we have highlighted and the evolution of the doctrine of the European Court itself should be seen.

III. THE UNDERSTANDING OF COLLECTIVE BARGAINING OR COLLECTIVE CONFLICT MEASURES AS A RESTRICTION ON THE FREEDOM OF ESTABLISHMENT OR THE FREEDOM TO PROVIDE SERVICES. THE DOCTRINE OF THE VIKING AND LAVAL JUDGMENTS

The doctrine contained in the Viking and Laval judgments was undoubtedly an important milestone that provoked a critical reaction from the most qualified labour doctrine³⁴. In these judgments, the question centered on whether it is admissible or whether it is a restriction on the freedom of establishment or the freedom to provide services, respectively, for trade union organizations to determine collective conflict or negotiation measures that seek to impose certain working conditions on companies that provide their services in a destination country other than the country of origin.

In these judgments, the relationship, in a model of industrial relations such as the Scandinavian model, which is not subject to the regulatory imposition of the results of bargaining, between the rights to adopt collective conflict measures and collective bargaining and the effectiveness of the economic freedom of movement on the part of companies was raised. This meant raising the debate on the position of both rights or freedoms (mainly at EU level, but with a clear impact on the shaping of any model of labour relations at European and national level) from the reductionism of the Court that refuses to accept the application of agreed or allegedly imposed measures if these, if any, were not within the strict scope and object of application of Directive 96/71.

³⁴ See *infra* note. In any case, although referring in this case to the Rüffert case, the reflection of Rodríguez-Piñero Bravo-Ferrer is pertinent as an example of such criticism, which concludes the work cited several times as follows: “the unbridled defense of the freedom to provide services by sacrificing consideration of the working conditions applied in the place where the service is provided is a manifestation of the legitimacy of the use of that freedom for the sole purpose of circumventing the wage and working conditions and the collective rights ensured by the constitutional and labour law in that place”.

Beyond these aspects, which are in themselves transcendental, the judgments in question raised another important debate in relation to the extension of the freedom of establishment or, above all, the freedom to provide services and the possible adoption of collective measures to avoid the so-called “flags of convenience” or “front companies”. It should be noted that paragraph 73 of the ECJ Viking decision does not even consider this circumstance as limiting the freedom to provide services. On the contrary, even if the conflict measure was intended to implement a policy of combating flags of convenience, this aspect was not taken into account. For the Court, this aspect must be considered as at least capable of restricting Viking’s exercise of its right to freedom of establishment.

The possible limitations that national law may apply to the adoption of conflict measures were also considered by the Court. Above all, because it does not declare the exclusion and, therefore, the supremacy of collective rights, even if they were constitutionally recognized at the national level

It is true that for the Court (paragraph 77 of the Viking judgment) “ the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty “, but that legitimate interest can be understood only if it falls within “the objective of protecting workers”, and “ such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat “ (although such a position might appear reasonable in principle, in the Court’s own words).

The possible exclusion of the rights to strike or to take collective action from the treatment of the economic freedoms in the Treaties, sought by the plaintiffs in both the Viking and Laval cases, clashes with the position of the Court, for which the fundamental nature attributed to the right to take collective action does not allow the exclusion of collective action in the main case from the scope of application of Art. 43 TEC (now 49 TFEU). This is why we said that one of the most noteworthy aspects of the body of doctrine that begins mainly with these rulings is the concurrence of these social rights, even though they also deserve to be considered as fundamental³⁵, with the basic economic freedoms. As the Court says (paragraph 45 in the Viking judgment; paragraph 93 in the Laval judgment), “the protection of fundamental rights constitutes a

³⁵ This, on the other hand, is emphasized by a certain sector of the doctrine, which sees in the reference to the fundamental nature of these social rights their entry into the *acquis communautaire* together with the freedoms of movement.

legitimate interest which may, in principle, justify a restriction on the obligations imposed by Community law”, but as the *Laval* judgment (paragraph 94), and similarly *Viking* (paragraph 46), state, citing the doctrine contained in the *Schmidberger* and *Omega* cases (on the possible limitation of economic freedoms for the exercise of the rights of freedom of expression and assembly or for the protection of dignity and reasons of public order)³⁶, “such exercise must be reconciled with the requirements relating to the rights protected by that Treaty and must be in accordance with the principle of proportionality”.

Therefore, the first question to consider is that, for the Court, rights of a collective nature such as the right to adopt conflict measures (through which working conditions could be imposed) are not exempt from being considered as restrictions to economic freedoms, defined - surely because they are fundamental - as fundamental, which requires an analysis of weighting or proportionality. There is no exclusionary supremacy, if we may say so, of collective rights, even if they were constitutionally recognized in the member country of reference and despite their consideration as fundamental rights protected in the *acquis communautaire*.

The *Albany* judgment³⁷, relied upon by the trade union organizations parties to the proceedings, admitted the possibility that the public authorities may confer on a pension fund the exclusive right to manage a supplementary pension scheme in a given sector provided for by collective agreement, despite admitting the consideration of the supplementary pension fund as an “undertaking” and the application, where appropriate, of the rules on free competition. For the trade union organizations, this judgment was a precedent on which to justify that “certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers” (paragraph 49 of the *Viking* judgment), which, in that case, meant, as the Court itself acknowledged (paragraph 50, citing paragraph 60 of the *Albany* judgment), “that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty” (referring to the rules on competition and limitations on restrictions which may affect free competition). However, in this case, the Court does not accept these considerations.

For the Court there is no doubt that trade union claims impose a restriction on economic freedoms, and this (paragraph 101 of the *Laval* judgment) “is

³⁶ ECJ 12 June 2003 (case C-112/00) and 14 October 2004 (case C-36/02).

³⁷ ECJ September 21, 1999 (Case C-67/96).

warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest”³⁸. But it adds a not minor aspect to this consideration, which is in line with the limits admitted to these freedoms by the secondary legislation itself (and, in particular, in Directive 2006/123): the said justification, in order to be admitted, “must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it”.

As we have said, for a large part of the labour doctrine of the time, the European Court’s pronouncement implied the superimposition of basic economic freedoms on collective rights. It is true that the Court, as we have mentioned, considered that the action of the then Community involved not only an internal market, but that, according to the treaties themselves, its mission was a policy in the social field, but, in the weighting game referred to above, the Court did not hesitate to consider that the measures proposed by the trade union side could not be justified as a restriction on basic economic freedoms.

This has a conditioning factor in this case that should be highlighted, because, in one way or another, it serves to determine the Community acquis itself in this respect. To a large extent, the possible limitation derived from the application of minimum working conditions is determined by the content of Directive 96/71, which seems to be where the Court places its weighting criterion. In the Court’s opinion, the alleged application of such conditions beyond the provisions of the aforementioned provision, even knowing the particularity of the local negotiation model in the cases in question -and, in particular, the lack of national legislation providing for the general effectiveness of agreements-, and the limits to the adoption of conflict measures when an agreement is in force -which makes the application of such limitation to trade union action unfeasible when it is a question of imposing conditions on companies from third countries with regard to their workers-, are contrary to the provisions of Art. 49 TEC (now 56 TFEU) and Article 3 of Directive 96/71 (*Laval* case, paragraph 111).

Moreover, the possibility, even implicit, of applying conflict measures to third country entities to force the determination of working conditions, without considering the limitations to such measures under national law, is considered discriminatory by the Court in relation to the right of establishment of a company from another Member State, given that even if they had an applicable

³⁸ In particular, on the reduction implied by the consideration of social rights within the concept of public order as admitted restrictions to economic freedoms, Rodríguez-Piñero Bravo-Ferrer; *op. cit.* pp. 105 et seq.

agreement, they would be treated in the same way as national companies that did not have an agreement. In the Court's terms, such "discrimination", which will not be raised in general terms on other occasions, is not justified on grounds of public policy, public security or public health as would be admitted by the then Article 46 TEC (now Article 52 TFEU), among other reasons, because it does not consider the alleged improvement of the working conditions of posted workers -beyond the limits imposed by the Directive- to be a public policy rule.

IV. MINIMUM WORKING CONDITIONS, FREEDOM OF MOVEMENT AND APPLICATION OF SOCIAL CLAUSES. FROM THE RÜFFERT CASE TO THE REGIO POST CASE

In the Rüffert case, the main issue raised was the consideration as a possible unjustified restriction on the freedom to provide services of the determination to oblige any awardee of a public contract to respect certain working conditions - in particular, the remuneration that the workers would be entitled to under the agreement applicable in the State of destination. From this perspective, another recurring question arises, which had already appeared in previous judgments, particularly in the Laval case, concerning the scope of application and objective extension of Directive 96/71.

The question of reference will focus on what is to be understood by the applicable collective agreement in accordance with the provisions of the aforementioned directive and what, if any, is the notion of minimum wage rates. In the case at hand, taking into account that the application of the agreement required by the state of destination through the public procurement conditions imposed by the territorial administration is carried out by a regulation (law) of a federal state, the referring court asks whether the commitment to comply with the "collective agreements is justified by overriding reasons related to the public interest" or whether more specifically, such a requirement "goes beyond what is necessary for the protection of workers". As the European Court states (paragraph 15 of the judgment), the question therefore centers on whether "the obligation to comply with the collective agreements does not enable them to achieve genuine equality of treatment with German workers but rather prevents workers originating in a Member State other than the Federal Republic of Germany from being employed in Germany because their employer is unable to exploit his cost advantage with regard to the competition". The national court therefore asks whether it constitutes an unjustified restriction on the free-

dom to provide services to legally oblige a contracting authority awarding a public contract to award that contract only to undertakings which, when tendering, undertake to pay their employees at least the remuneration provided for in the collective agreement applicable to the place where the contracted services are provided.

For the Court a statutory provision of a Land, which in itself does not regulate or establish a minimum wage amount, cannot be considered as law for the purposes of Directive 96/71. Nor can the reference to the applicable collective agreement contained in the law of the Land be regarded as generally applicable because of the very legal reference of the territorial administration in question, since it is the federal rule which must declare the agreement to be generally applicable. This leads the European Court to say that the agreement to be considered is not a collective agreement declared to be generally applicable within the meaning of the federal law transposing the Directive. Nor does it consider the collective agreement to which the Land law refers to be applicable because, precisely, the German model does provide for a system of declaration of the general effectiveness of the agreements, so that the case cannot be considered within the provision contained in Art. 3.8 of the Directive (because they are broadly applicable agreements). Finally, the collective agreement purportedly applicable “covers only a part of the construction sector falling within the geographical area of that agreement”, since it applies to public contracts, and not to private contracts, and, moreover, that agreement has not been declared generally applicable in accordance with the federal legislation itself (paragraph 29 of the judgment).

These considerations lead the Court to conclude that the contested measure does not establish a minimum amount of salary in accordance with Directive 96/71. It is therefore not a condition of employment for the purposes of the Directive. Unless the undertaking voluntarily accedes to the agreement in question, the level of protection must be reduced to that laid down in the Directive, which does not include that agreement. Accordingly, “a Member State is not entitled to impose, pursuant to Directive 96/71, on undertakings established in other Member States, by a measure such as that at issue in the main proceedings, a rate of pay such as that provided for by the ‘Buildings and public works’ collective agreement” (paragraph 35 of the judgment). Such a measure cannot be justified ‘by the objective of ensuring the protection of workers’ (paragraph 38), nor “by the objective of ensuring protection for independence in the organisation of working life by trade unions” (paragraph 41), nor by the alleged financial stability of the social security systems and their relationship with workers’ remuneration (paragraph 42).

Consequently, as determined by the Court, the issue in dispute is contrary to the freedom to provide services provided for in Art. 49 TEC (now Art. 56 TFEU) and to the provisions of Directive 96/71 on the posting of workers, by redirecting the scope of application of the same to the cases of agreements of general effectiveness in accordance with the applicable legal system, neither admitting its extension through means such as those under appeal (specifications for the award of public contracts, even if provided for in rules of legal rank) nor accepting its extension through means such as those under appeal (specifications for the award of public contracts, even when provided for in rules of legal rank), nor accepting either, as an argument of general interest for admitting the restriction for companies from third countries to compete with those of the country of destination precisely because of their better position in the market due to the lower costs they have to assume, the referred to “protection of the autonomous organization of professional life through trade unions”. This last aspect means, therefore, restricting the scope of trade union action in these cases to the negotiation of agreements of general effectiveness which, in accordance with the federal regulations in this case, would be applicable.

In the ECJ decision (Ninth Chamber) of 18 September 2014 ³⁹, the recognition of a minimum wage in cases of public contract tenders for the employees of the contracting company is linked not to the recognition of such a right in itself, but to a more generic purpose such as the guarantee of adequate remuneration. This implies a value judgment on the justification of the restriction on freedom of movement that will be left to the Court, based on criteria of opportunity beyond a relatively restrictive interpretation that implies not admitting the imposition of social clauses for cases of subcontracting of services without effective displacement of workers.

In this regard, the Court does not consider that the limitation of *dumping* actions by the possibility of employing workers with salaries lower than those recognized as minimum wages in the State of origin of the contracted services is not in accordance with EU law. In this case, the company concerned argued that the imposition of such a minimum wage on those employees does not achieve the legitimate aim of ensuring adequate remuneration in the performance of public contracts by the contracting authorities of the Land of North Rhine-Westphalia and is not necessary for that purpose. It goes on to argue that the hourly rate corresponding to such a minimum wage would for many Member States be significantly higher than what is necessary to ensure adequate remuneration in the light of the cost of living in those countries. Moreover, as

³⁹ Case C-549/13, Bundesdruckerei GmbH v. Stadt Dortmund.

regards public contracts performed entirely outside German territory, it cannot be ruled out that the general interest in protecting workers has already been taken into account by the legislation of the Member State in which the service is provided.

The main question is therefore, once again, the meaning and extent of this “general interest” which, linked to the supposedly protected rights of workers, can limit the freedom of movement of companies. In this sense, this definition of the limit to freedom of movement serves both to specify its extent and, accordingly, to define the possibilities which, either by collective bargaining or by the establishment of social clauses in the tendering of administrative contracts, seek to recognize minimum working conditions for the workers of the contracting company awarded the contract.

In this sense, the referred judgment concludes that Directive 96/71 is not applicable to this case (unlike the approach taken by the Court in the Rüffert case, despite the conclusion it reaches in this judgment), given that, as it argues (paragraphs 26, 27 and 28), on the one hand, “according to the actual wording of the question referred for a preliminary ruling, that question concerns a situation in which ‘the subcontractor is established in another EU Member State and the employees of the subcontractor carry out the services covered by the contract exclusively in the subcontractor’s home country’ and, therefore, “Such a situation is not covered by one of the three transnational measures referred to in Article 1(3) of Directive 96/71, with the result that that directive is not applicable to the dispute in the main proceedings”. And, secondly, although the requirements laid down in the conditions of employment to comply with a minimum wage “can be classified as ‘special conditions relating to the performance of a contract’, in particular ‘social ... considerations’, which are ‘indicated in the contract notice or in the specifications’, within the meaning of Article 26 of that directive, the fact remains that, in accordance with that latter provision, such requirements may be imposed only to the extent to which they are ‘compatible with Community law’.”.

The judgment concludes, in paragraph 30, that, in accordance with the case law of the Court itself, “.. the imposition, under national legislation, of a minimum wage on subcontractors of a tenderer which are established in a Member State other than that to which the contracting authority belongs and in which minimum rates of pay are lower constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State..”. Consequently, this measure constitutes a restriction on freedom of movement within the meaning of Art. 56 TFEU.

This provision, argues the Court, largely reiterating the arguments of the Rüffert case, may be intended to prevent situations of *social dumping* but, "... in so far as it applies solely to public contracts, such a national measure is not appropriate for achieving that objective if there is no information to suggest that employees working in the private sector are not in need of the same wage protection as those working in the context of public contracts". Moreover, in the Court's view, the necessary relationship of proportionality that would be required for any limitation of the right of free movement of undertakings is not present. As it states in paragraph 34, that legislation "By imposing, in such a situation, a fixed minimum wage corresponding to that required in order to ensure reasonable remuneration for employees in the Member State of the contracting authority in the light of the cost of living in that Member State, but which bears no relation to the cost of living in the Member State in which the services relating to the public contract at issue are performed and for that reason prevents subcontractors established in that Member State from deriving a competitive advantage from the differences between the respective rates of pay, that national legislation goes beyond what is necessary to ensure that the objective of employee protection is attained".

This last aspect refers, as we have said, to a concept such as sufficient remuneration in the area where the work is actually performed, rather than to the possibility of determining a minimum wage as a condition of necessary equality in comparison with the workers who could potentially have performed the work if it had been carried out in the country where the bidding takes place. And this is associated with a criterion of opportunity to be assessed by the Court itself outside the national court itself, which is repeatedly said to be responsible for drawing up the criterion for assessing the necessity of the measure restricting economic freedom. The relative conception of sufficiency of remuneration is where the possible restriction of freedom of movement is circumscribed -especially when there is no effective displacement of the employees responsible for the provision of services- and, therefore, where the possible consideration of the so-called social clauses is limited.

Therefore, far from considering the limitation in public procurement through the imposition of these social clauses as an admissible impediment to avoid *social dumping* and the more favorable competition of companies from different states with the possibility of applying lower wages than those provided for in the state of the bidding administration, it is considered as an unacceptable limitation of the right to free movement of services.

Taking into account that it also does not interfere with the sustainability of the social security systems - which would indeed open an interesting ques-

tion as to when this circumstance would occur (there would necessarily have to be posting of workers and determination of the inclusion within the system of the state of the tenderer) -, the judgment concludes, in the sense indicated, that “In the light of all of the foregoing, the answer to the question referred is that, in a situation such as that at issue in the main proceedings, in which a tenderer intends to carry out a public contract by having recourse exclusively to workers employed by a subcontractor established in a Member State other than that to which the contracting authority belongs, Article 56 TFEU precludes the application of legislation of the Member State to which that contracting authority belongs which requires that subcontractor to pay those workers a minimum wage fixed by that legislation”.

This judgment is of noteworthy importance not only because it associates the justification of the limitation in the aforementioned criteria of opportunity based on a judgment on the sufficiency of the salaries actually received by the employees, but also because, in an increasingly transnational context of provision of services without the need for physical displacement of the workers, it is a potentially important precedent on the position of the European Court in the face of an increasingly widespread reality. This is not the only case where the objective scope of the application of Directive 96/71 is at stake. It will also occur in cases where the linking of workers to the place where their provision of services can be identified or mainly associated with. But on this subject, we will make some reference a little later.

In a different sense from the judgment referred to above, the ECJ (Fourth Chamber) of 17 November 2015⁴⁰, admits “the legitimacy and operability of the social requirements established in the host State”⁴¹. In this case, the Court starts from Art. 26 of Directive 2004/18 to conclude, as opposed to the previous case, that, in accordance with the same, “.... read in conjunction with Directive 96/71, permits the host Member State to lay down, in the context of the award of a public contract, a mandatory rule for minimum protection referred to in point (c) of the first subparagraph of Article 3(1) of that directive, such as that at issue in the main proceedings, which requires undertakings established in other Member States to comply with an obligation in respect of a minimum rate of pay for the benefit of their workers posted to the territory of the host Member State in order to perform that public contract. Such a rule is part of the level of protection which must be guaranteed to those workers”.

⁴⁰ Case C-115/14, RegioPost GmbH.

⁴¹ Marchal Escalona; “The posting of workers in the framework of a transnational provision of services: towards a safer, fairer and more specialized European regulatory framework”, *European Community Law Review*, 62; p. 89.

The setting of a minimum remuneration for potential tenderers and contractors established in a member state other than the contracting state (where the minimum salary provided for could be lower than the latter) is indeed considered a possible restriction within the meaning of Art. 56 TFEU. As the ECJ states (paragraph 69 of the judgment) this may constitute “an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member St” (based, in particular, on the Bundesdruckerei judgment referred to above, paragraph 30).

But, as the Court states on this occasion, such a restriction may be justified “by the objective of protecting workers” (again, it refers to the Bundesdruckerei judgment, paragraph 31). The question that arises, therefore, is the relatively precise delimitation of when the protection of workers can be admitted as a permissible restriction on the freedom to provide services.

The issue really focuses on the requirements of Directive 96/71 and its scope of application. Hence, certainly, the connection that the Court establishes on this occasion between the possibilities provided for in Directive 2004/18 on social clauses and the objective requirements of Directive 96/71 (which are not admitted in the Bundesdruckerei case), particularly with regard to the actual provision of services by employees of the State of the contracting company in the contracting Member State.

As we saw, in the Bundesdruckerei judgment, the Court did not accept the requirement of a minimum salary to be able to access a public contract, and did not accept the application of Directive 96/71, among other reasons, because there was no posting of workers and the arguments on the sufficiency of the salary and, perhaps more strikingly, the prohibition of any case of *social dumping*, were not admitted. On the contrary, as we pointed out above, the imposition of tender conditions applicable to the salary to be paid to the contractor’s employees was interpreted by the ECJ as an “unacceptable” limitation of the right to free movement of services.

Moreover, the fact that the requirements indicated concerned exclusively the public - and not the private - sphere was considered as an indication that the working condition in question - the minimum wage to be guaranteed - did not derive from a generally effective source. Therefore, on this occasion, the ECJ, and the referring court itself, asks whether the application only to public contracts of these working conditions prevents the admission *per se* of this restriction on freedom of movement or freedom to provide services.

On this occasion, as opposed to the previous cases -and particularly, with respect to this last issue, the Rüffert case-, the Court admits this possibility, denying the limitation to it contemplated in the preceding judgments. Once

again, the precision with which the Court's doctrine treats the question incorporates an important nuance. In the Rüffert judgment, the case that gave rise to it concerned a collective agreement that applied only to the construction sector, did not cover private contracts and had not been declared generally applicable and that the amount of the minimum wage fixed in that collective agreement exceeded the amount of the minimum wage applicable in that sector under the AEntG. In the Bundesdruckerei case (not mentioned in the judgment to which we now refer), although the aforementioned Art. 26 of Directive 2004/18 was invoked, this possibility was denied on the basis of a question of timeliness with the aforementioned sufficiency of wages. But in the case. In RegioPost GmbH, on the other hand, the ECJ accepted that "The minimum rate of pay imposed by the measure at issue in the main proceedings is laid down in a legislative provision, which, as a mandatory rule for minimum protection, in principle applies generally to the award of any public contract in the Land of Rhineland-Palatinate, irrespective of the sector concerned" (paragraph 75), insisting, and this is a noteworthy aspect, on the character of "minimum social protection" conferred, in the Court's expression, by the legislation in question.

It is therefore concluded on this occasion that Article 26 of Directive 2004/18 "...must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation".

V. THE AGET IRAKLIS CASE: PRIOR ADMINISTRATIVE AUTHORIZATION IN THE CASE OF COLLECTIVE DISMISSAL AS A CASE OF (JUSTIFIED) RESTRICTION OF FREEDOM OF ESTABLISHMENT

In the Aget Iraklis case,⁴² the question arises as to whether the national legislation requiring prior administrative authorization in the case of collective redundancies infringes Article 49 TFEU by imposing - and this is an aspect to be considered - a restriction on the freedom of establishment of companies from other Member States. In addition, the cross-border nature of the issue is

⁴² ECJ 21 December 2016 (Case C-201/15).

taken as a starting point because the home country company belongs to a group of companies based in another country. The main question focuses on the extent of the freedom of establishment and, in particular, whether a national rule on the regulation of collective redundancies, which prior administrative authorization in the event that no agreement is reached with the workers' representatives, can be considered a restriction on that basic freedom and, if so, whether such a measure - of a legal nature - can be considered justified.

For the Court, Directive 98/59 on collective dismissals does not preclude national legislation from establishing this content (paragraph 44 of the judgment), unless it is intended to deprive the Directive itself of its content and prevent dismissal in any case. But, beyond that, such a provision is considered to be a restriction on freedom of establishment, in so far as it entails "to take up and pursue activities as self-employed persons and to set up and manage undertakings, under the conditions laid down for its own nationals", including the right to carry on business in the Member State concerned through a subsidiary, branch or agency (paragraph 47, citing precedent, and in particular the judgment of 13 December 2005, *Marks & Spencer*, C-446/03, and in particular the judgment of 13 December 2005, *Marks & Spencer*, C-446/03 and C-446/03, cited by the Court of Justice, in which the Court of First Instance held that "the right to pursue his activity in the Member State concerned by means of a subsidiary, branch or agency" (paragraph 47). *Spencer*, C-446/03) and the provision in question is liable to "impede the exercise of freedom of establishment or render it less attractive" (paragraph 48, also citing precedent doctrine: Judgments of 21 April 2005, *Case C-140/03, Commission v Greece*, and 21 October 2010, *Case C-81/09, Idryma Typou*).

From this perspective, the judgment defines the extension of the freedom of establishment on the assumptions already referred to. For the Court (paragraph 50 of the judgment), "the objective of the freedom of establishment guaranteed by Article 49 TFEU is to allow nationals of a Member State or legal persons established in that Member State to set up a secondary establishment in another Member State in order to carry on their business there". Therefore, "freedom of establishment is intended to allow such nationals or legal persons of the European Union to participate, on a stable and continuing basis, in the economic life of a Member State other than their State of origin and to profit therefrom by actually pursuing, in the host Member State, an economic activity through a fixed establishment for an indefinite period" (citing in this regard the judgment of 23 February 2016, *Case C-179/17, Commission v Hungary*).

Freedom of establishment implies "a real establishment of the company concerned in that State and the exercise of an effective economic activity

there” (paragraph 51, citing the judgment of 12 July 2012, Case C-378/10, *Vale*, paragraph 34). It therefore implies that the subsidiary may employ workers in the country of destination. It also implies “the freedom to determine the nature and extent of the economic activity that will be carried out in the host Member State, in particular the size of the fixed establishments and the number of workers required for that purpose” as well as “the freedom subsequently to scale down that activity or even the freedom to give up, should it so decide, its activity and establishment” (paragraph 52 of the judgment). It considers the decision to dismiss collectively “a fundamental decision in the life of an undertaking” (paragraph 54, which refers, by analogy, to the doctrine contained in the judgment of 13 May 2003, *Commission v Spain*, C-463/00, paragraph 79). With all these conditioning factors in the understanding of freedom of establishment, for the Court, national legislation imposing administrative authorization prior to dismissal “constitutes a significant interference in certain freedoms which economic operators generally enjoy” (paragraph 55, citing also, by analogy, the judgment of 28 April 2009, *Commission v Italy*, C-518/06, paragraph 66).

That means, in the Court’s words, that “National legislation such as that at issue in the main proceedings is thus such as to render access to the Greek market less attractive and, following access to that market, to reduce considerably, or even eliminate, the ability of economic operators from other Member States who have chosen to set up in a new market to adjust subsequently their activity in that market or to give it up, by parting, to that end, with the workers previously taken on” (paragraph 56). It therefore considers that the legislation in question “is liable to constitute a serious obstacle to the exercise of freedom of establishment in Greece”.

In addition to the considerations also made in the judgment regarding the possible impact on the free movement of capital ⁴³, its analysis, based on this broad consideration of the content of the freedom of establishment, focuses on the admission of the regulation contained in national legislation as a limit or restriction justified by overriding reasons of general interest.

Once again, it refers to an unavoidable exercise of balancing, starting, as in previous cases, from the consideration of social rights as fundamental “.... it is also settled case-law that the fundamental rights guaranteed by the Charter are applicable in all situations governed by EU law and that they must, there-

⁴³ Insofar as such “restrictive effects on the free movement of capital” would be “the ineluctable consequence of a possible obstacle to freedom of establishment and would not justify an autonomous examination in the light of Article 63 TFEU” (paragraph 59 of the judgment).

fore, in particular be complied with where national legislation falls within the scope of EU law (paragraph 62, referring in particular to the judgment of 26 February 2013, Case C-617/10, *Akerberg Fransson*, paragraphs 19 to 21). And in this balancing exercise, “the national legislation concerned can fall within the exceptions thereby provided for only if it complies with the fundamental rights the observance of which is ensured by the Court” (paragraph 63). In other words, the national rules in the case at issue being a restriction on the freedom of establishment, the consideration of such a restriction as a limit based on overriding reasons relating to the public interest is possible only if, in the words of the Court, “complies with fundamental rights”.

As it states below (paragraphs 69 and 70), “It cannot therefore be contested that the establishment of a regime imposing a framework for collective redundancies such as the regime at issue in the main proceedings constitutes an interference in the exercise of the freedom to conduct a business and, in particular, the freedom of contract which undertakings in principle have, inter alia in respect of the workers which they employ, since it is not in dispute that under that regime the national authority’s opposition to certain plans for collective redundancies may result in the employer being prevented from putting those plans into effect”. However, it must be borne in mind that “Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights enshrined by the Charter as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, in accordance with the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others”. And in this sense, the Court of Justice admits that “under certain circumstances and conditions, be acceptable justifications for national legislation that has the effect of impeding freedom of establishment” (paragraph 75).

In relation to the necessary analysis of proportionality that the court raises from the understanding of the legal provision as a restriction to the freedom of establishment, its admission as such is determined by the adequacy of the general interest objective to which it must be associated and, above all, in line with the provisions of Community law “which must not go beyond what is necessary to attain it” (paragraph 80 of the judgment).

For the Court (paragraph 83 of the judgment) “.... the mere fact that a Member State provides, in its national legislation, that projected collective redundancies must, prior to any implementation, be notified to a national authority, which is endowed with powers of review enabling it, in certain circumstances, to oppose the projected redundancies on grounds relating to the pro-

tection of workers and of employment, cannot be considered contrary to freedom of establishment as guaranteed by Article 49 TFEU or the freedom to conduct a business enshrined in Article 16 of the Charter”, above all because “the freedom to conduct a business is not absolute, but must be viewed in relation to its social function “ (paragraph 85) and “may be subject to a broad range of interventions on the part of public authorities that may limit the exercise of economic activity in the public interest” (paragraph 86). The establishment of mechanisms such as those contained in the rule at issue, taking into consideration the absence of Community rules to prevent dismissals, is accepted as suitable for strengthening the protection of employment and is considered “ appropriate for ensuring the attainment of the objectives in the public interest thereby pursued” (paragraph 92).

However, in the analysis of the specific implementing provisions and, in particular, of the criteria on which the national legislation intends to base it, the ECJ does not accept the criterion of the “interest of the national economy” that is included therein (paragraph 96). It initially accepts the criteria relating to the “situation of the company” and the “conditions of the labour market”, but the generality in which they are contemplated (with the discretion involved in their application) together with the reference to the interest of the national economy, which, as we have said, it does not accept as a reason of general interest restricting the freedom of establishment, imply an unjustified infringement of the aforementioned freedom.

VI. ASSUMPTIONS FOR THE APPLICATION OF DIRECTIVE 96/71: APPLICATION TO THE TRANSPORT SECTOR AND DETERMINATION OF THE MINIMUM WAGE (OR REMUNERATION) IN THE EVENT OF POSTING OF WORKERS

There are three assumptions that determine the objective scope of application of Directive 96/71 and that are broadly maintained after its amendments and adaptations. These are: the existence of a temporary posting (extended in Directive 2018/957), the existence of an effective employment relationship with the company providing services in a third Member State and the activity of a transnational nature giving rise to the posting of workers.

In relation to this aspect, we have already mentioned that in the *Bundesdruckerei* case, the European Court did not admit the application of Directive 96/71, nor did it justify the imposition of minimum wage conditions in cases of public procurement in the absence of an effective posting of workers. How-

ever, this is not the only case in which the requirements of the Directive in this matter - beyond the question of the concurrence of the requirements of Art. 3 and of the applicable agreement, which has always been recurrent and led to the amendment of the Directive - are made clear.

In this regard, it is important to determine the application of Directive 96/71 in the transport sector. Starting from Directive 2014/67, which provides, within the control mechanisms of that Directive, measures specifically applicable to mobile workers in transport, and taking into account recital 7 of Directive 2020/1057, the judgment of December 1, 2020⁴⁴ clarifies that the Posting of Workers Directive is applicable to this activity and therefore the minimum working conditions derived from it are enforceable (despite the exclusion of the legal regime of transport from the scope or object of the freedom to provide services regulated both in Art. 56 TFEU and Directive 2006/123). As the Court states, the Directive “applies, in principle, to any transnational provision of services involving the posting of workers, whatever the economic sector to which that provision is linked, including, therefore, the road transport sector” (paragraph 32).

However, within the conditions required to admit the existence of a posting to which the Directive would be applicable, the judgment clarifies a not minor aspect. In the light of Directive 96/71, a worker can only be considered as posted to the territory of a Member State if the performance of his work has a sufficient link with that territory, a criterion that is also raised by judgments such as that of 19 December 2019⁴⁵, and which requires, in the words of the Court itself, an overall assessment of all the elements characterizing the activity of the worker in question.

In the latter judgment, for example, the ECJ does not accept the application Directive 96/71. In the case, “services such as on-board cleaning or catering services provided on trains, even if they are ancillary to the passenger transport service by rail, are not inherently linked to the latter”. Consequently, taking into account that “...such a transport service may be carried out independently of those ancillary services”, it declares that the Directive in question is not applicable - for lack of the objective conditions.

In another sense, the ruling of July 16, 2020⁴⁶ does not consider the application of this rule because its analysis is based on the determination of the applicable rule. And this is determined, in this case, according to who is actu-

⁴⁴ Case C-815/18, Van den Bosh.

⁴⁵ Case C-16/18, MD and Magistrat der Stand Wien.

⁴⁶ Grand Chamber, Case C-610/18, AFMB Ltd.

ally the employer undertaking for these purposes, starting, as it determines in paragraph 56, that an undertaking which posts an employee to the territory of another Member State to carry out work there in another entity must be considered as the sole employer of that employee, considering the continuation for the duration of the employment and the relationship of effective subordination. Furthermore, the merely formal criterion of the conclusion of an employment contract is, for the Court, an indicator of the employment relationship between an undertaking and the employee, but, as it clarifies, does not in itself make it possible to establish conclusively that such a relationship exists. In order to reach such a conclusion, “the manner in which the obligations incumbent on the employee and the undertaking are performed in practice” must be considered (paragraph 61 of the judgment).

It therefore concludes that the employer of a driver of vehicles engaged in international road transport, for the purposes of Community legislation on transport (in particular Regulations 1408/71 and 883/2004), as well as in relation to the determination of the applicable rule and the rules on the coordination of social security systems, is the undertaking which exercises effective power of management over the driver, for whose account the corresponding salary costs are actually borne and which has the effective power to dismiss the driver.

This ruling provides another interesting aspect. In contrast to precedents such as those analyzed, where the extension of the basic freedoms of establishment and provision of services seemed to prevail despite the risk of *dumping*, and despite the fact that the position of commercial advantage was even considered as part of them, the Chamber’s ruling responds to an approach of the referring court that refers to the need to avoid artificial situations that give rise to conditions of advantage allegedly based on the freedom of establishment. And these approaches, which glimpse a certain evolution in the consideration of the European Court, seem to be heeded.

But beyond this preliminary question on the delimitation of the applicable rule, based both on the identification of the services rendered and the employer, there is another key aspect in the approach to the objective extension of the provisions of Directive 96/71, which has to do with the concept of minimum wage to be guaranteed in accordance with the Directive.

In judgments of the Court of Justice, such as that of 14 April 2005⁴⁷, the relative complexity and litigiousness of the concept of minimum wage for the purposes of applying Directive 96/71 was highlighted. In that case, the starting

⁴⁷ Case C-341/02, Commission v. Federal Republic of Germany.

point was the definition of what should be understood as minimum wage, which referred to the very understanding of the employment relationship and the synallagmatic nature of the reciprocal obligations to provide services, on the one hand, and remuneration, on the other. Thus, increases and supplements should not be considered as minimum wages under national law if they altered the employment relationship. If, on the other hand, as in the case analyzed at the time, there was no such modification of the necessary relationship between the employee's provision of services and the consideration derived therefrom, the salary increase or supplements in question should be considered. Thus, the First Chamber of the Court declared that the State in question had failed to recognize as concepts forming part of the minimum wage the increments and supplements which do not modify the relationship between the provision of services by the worker and the consideration he receives, without prejudice to the fact that, as the Court acknowledged, the concept of minimum wage is defined by the Member State to which the worker is posted.

The issue was undoubtedly an important one. Not only because of its applicability, but also because, despite the conceptual approximation that can be deduced, the relative precision involved in the objective determination of the applicable working conditions on the basis of the aforementioned directive was evident (especially when it was incorporated as an admissible restriction on the freedom to provide services).

In the judgment of 7 November 2013⁴⁸, the national Court that raises the question of preliminary ruling starts precisely from the need to “forestall future differences of interpretation”, considering that “provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply”, regardless of whether they apply to a purely internal or cross-border situation. Irrespective of the fact that such a purpose could be effectively achieved - given the recurrent casuism reflected in the various rulings of the European Court - and despite the fact that the Chamber itself admits the manifest interest of the Union in this respect (paragraph 28), the question in the case is whether the contributions of an undertaking whose purpose is the formation of long-term assets for the employees (savings contributions, for the construction or purchase of housing or contributions to capital life insurance) should be considered part of the minimum amount of salary.

The judgment shows that Directive 96/71 does not in itself provide any data for the material definition of the minimum wage. This depends on the Member

⁴⁸ Case C-522/12, *Isbir*.

State, an obvious consequence of the fact that the Community rule neither intends nor provides for the harmonization of the systems for fixing working conditions. It starts from the first conceptual approach advanced by the judgment of 14 April 2005 and concludes by referring to the national court for it to rule on whether the items in question are indeed of a wage nature and, therefore, can be included within the concept of applicable minimum wage. However, without prejudice to that referral, it goes on to state that items such as those in question, which have a social policy objective, cannot be considered “to form part of the usual relationship between the employment service and the financial consideration payable to the employer” (paragraph 44 of the judgment).

More specifically from a case analysis, the ECJ Court of Justice of 12 February 2015⁴⁹ analyzes the content of the minimum remuneration for the purposes of Directive 96/71. Also, and importantly, it recognizes the legal standing of the trade union of the State of origin of the posted workers to bring an action before a court of the Member State where the provision of services is carried out.

In this judgment (as stated in paragraph 22), “...the subject matter of the main proceedings relates to the determination of the scope of the concept of ‘minimum rates of pay’, within the meaning of Directive 96/71...”, on the basis that without any ambiguity whatsoever, the questions relating to the amount of the minimum wage are governed, irrespective of the law applicable to the employment relationship, by the legislation of the Member State to whose territory the workers have gone to carry out their work (Finland, in the case in question).

The assignment of salary credits in favor of the union acting for the collection of the workers’ salary benefits is in accordance with the law of the State of destination; and, consequently, the claim of the union of said State to collect on behalf of the posted workers the amounts considered as the applicable minimum salary cannot be objected to.

What constitutes a minimum wage for these purposes is therefore determined by the rules of the State of employment (if they meet the requirements of general effectiveness laid down in the Directive). But these rules must be binding and transparent “which means, in particular, that they must be accessible and clear” (paragraph 40).

On the basis of these general considerations, the judgment goes on to evaluate different remuneration or compensatory items included within the concept of minimum wage as defined in the directive; in particular, the guaranteed hourly wage and piecework, the so-called daily commuting allowance, the payment

⁴⁹ Case C-396/13, Sähköalojen ammattiliitto.

of accommodation, restaurant vouchers or vacation pay. Thus, the calculation of the guaranteed wage, in accordance with the system of classification into wage groups provided for in the applicable and enforceable agreement of the host State, is to be considered as a minimum wage, provided that it is determined in accordance with binding and transparent rules, which must be verified by the national court. The daily subsistence allowance also forms part of the concept of minimum wage under the same conditions as those to which the inclusion of such allowance in the salary paid to workers on the occasion of a posting within the Member State concerned is subject. The so-called “daily commuting allowance” also forms part of the minimum wage of posted workers, provided that this condition is met, which must be verified by the national court. Vacation pay must also be considered as minimum wage for the time that the worker is entitled to take it. And finally, the payment of accommodation for such workers and the supplement in the form of meal vouchers cannot be considered as minimum rates of pay for the purposes of the Directive and for the posting itself (without prejudice to their payment in accordance with the rules applicable in the Member State of origin and in the amount provided for therein).

VII. THE SPECIFIC CASE OF STEVEDORING AND DOCK WORK:
THE STJUE 11 DECEMBER 2014 (CASE EUROPEAN
COMMISSION V. KINGDOM OF SPAIN) AND THE STJUE 11
FEBRUARY 2021 (CASE KATOEN TERMINALS NV).

Port activity in general and stevedoring in particular has its own characteristics due to the significance given to this sector by the treatment of national rules. In this case, there are two rulings that are referential, above all because of the consequences that derive or may derive from them in relation to the necessary adaptation of the rules of domestic law. However, they should also be considered as benchmarks because they have served to a large extent to specify the extent of the freedom of establishment and the freedom to provide services in a strategic sector such as this, bearing in mind, moreover, that the arguments of the States have generally been based on two main issues: the need to safeguard the protection of workers and the need to preserve the essential nature of the service or services in question.

In the judgment of 11 December 2014⁵⁰, the Court starts from the preceding general doctrine according to which restrictions on freedom of establish-

⁵⁰ Case C-576/13, European Commission v. Kingdom of Spain.

ment which are applicable without discrimination on grounds of nationality may be justified by overriding reasons in the general interest, provided that they are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary to attain that objective.

The setting of this objective is a matter for domestic law and the national authorities, but this judgment must not only be reduced to the concreteness of the objective but must also demonstrate, on the one hand, that its regulation is necessary to achieve the objective it pursues and, on the other hand, that it complies with the principle of proportionality.

In the case, Spain argued that its port regime pursued objectives related, on the one hand, to the protection of workers and, on the other hand, to the imperative of guaranteeing the regularity, continuity and quality of the port cargo handling service, considered an essential public service.

The protection of workers can be considered, according to the Court, as an overriding reason of general interest that could justify a restriction on the freedom of establishment. The same initial conclusion it gives to the objective of ensuring safety in port waters. However, the required proportionality analysis does not allow such restrictions to be admitted. As the Court states, the application of a regulation of a Member State which pursues a legitimate objective must be indispensable to ensure the attainment of that objective; or, as it clarifies, it is necessary that the same result as that pursued by the regulation in question cannot be achieved by less stringent rules.

In the case under analysis, the Court does not consider that the need for the measures in question has been demonstrated and understands that there are measures that are less restrictive than those applied by the Kingdom of Spain and that, at the same time, are suitable for achieving a similar result and for guaranteeing both the continuity, regularity and quality of the goods handling service and the protection of workers. The Court goes so far as to accept the Commission's own suggestions as a basis for this, suggestions that will be reflected, to a large extent, in the subsequent adaptation of the internal rules.⁵¹

In a certain sense, this general doctrine is also applied by the judgment of February 11, 2021⁵². In substance, there is an analysis of measures adopted in relation to the recruitment and accreditation of sufficient training of workers in

⁵¹ In this regard, the judgment states that, for example, as suggested by the Commission, it would be possible to provide that the stevedoring companies themselves, being free to recruit permanent or temporary workers, could manage the employment offices that are to supply them with their labour and organize the training of these workers, or the possibility of creating a pool of workers managed by private companies, which operate as temporary employment agencies and place workers at the disposal of the stevedoring companies.

⁵² Joined Cases C-407/19 and C-471/19, *Katoen Natie Bulk Terminals NV*.

the broader field of port activity that could affect the basic freedoms of establishment or provision of services (and movement of workers. The judgment, therefore, analyzes the various decisions submitted for a preliminary ruling by the referring authority on the possible impact on both Articles 45 (freedom of movement of workers), 49 (freedom of establishment) and 56 (freedom to provide services) of the TFEU.

The Court asks whether the measures adopted by the Member State, mainly in relation to the accreditation of work activities in the port sector, affect the aforementioned fundamental freedoms. As stated in paragraph 55 of the judgment, the main question is whether national legislation which requires persons or undertakings wishing to carry out port activities in a port area, including tasks other than the loading and unloading of ships in the strict sense, to use only dock workers recognized as such in accordance with the conditions and procedures laid down pursuant to that legislation infringes those fundamental freedoms - Articles 15 and 16 of the Charter of Fundamental Rights and the principle of equal treatment.

Belgium's arguments are based, as in the previous case - although perhaps with a greater degree of specificity - on guaranteeing the safety of workers, mainly in terms of accidents, of the port area and ensuring the availability of skilled labour, as well as ensuring equal treatment, also on the basis of fluctuations in the demand for labour in the sector.

The judgment starts from the same general argumentation as above on the concept of restrictions on the freedom of establishment and the freedom to provide services and considers as such legislation of a Member State which obliges undertakings from other Member States which intend to establish themselves in that Member State in order to carry on port activities there, or which, without establishing themselves there, wish to provide port services there, to use only port workers recognized as such under that legislation, to use only dock-workers recognized as such under that legislation, since, as it goes on to state, this prevents the undertaking in question from using its own staff or recruiting other non-recognized workers and is therefore likely to hinder or render less attractive the establishment of such an undertaking in the Member State concerned or the provision by it of services in that Member State.

The question therefore derives to the analysis of the justified or unjustified nature of such restrictions. In this sense, the Court concludes by accepting a national regulation that obliges persons or companies wishing to carry out a port activity to use only workers with a recognized qualification for such activity, given the need for workers in this field to have adequate professional training. However, the certification criteria must be objective and must exclude any

grounds that could be considered discriminatory. The action of the responsible authority cannot be arbitrary (paragraph 70) and it is considered inappropriate or disproportionate for the training in question to be given or certified by only one particular body in the Member State, without taking into account the possible recognition of the persons concerned as dock-workers in another Member State of the Union, or the training they have undergone in another Member State of the Union (paragraph 73). Access for workers and companies from other Member States and the possibility of proving the required training in those Member States or by means of other instruments provided for must therefore be allowed. Finally, the establishment of these training models (moreover, existing in other economic activities) cannot mean a limited quota of workers or prevent such accreditation from being achieved in other States.

Thus, the doctrine of the ECJ opens the possibility of admitting a model of accreditation required to carry out a certain economic activity on the basis of the assets declared to be protected depending on the “necessary and proportionate nature of such a regime, and consequently its compatibility with Articles 49 TFEU and 56 TFEU”, but considering the above aspects, which must be “assessed globally, taking into account all the conditions laid down for the recognition of dockers and the arrangements for the implementation of such a regime” (paragraph 69 of the judgment).

VIII. JUDGMENTS OF 8 DECEMBER 2020, HUNGARY AND POLAND V. EUROPEAN PARLIAMENT: REINFORCING THE GUARANTEE OF POSTED WORKERS’ RIGHTS

In connection with this interplay between the freedom of establishment and the freedom to provide services with the social rights of workers and, in particular, with the minimum working conditions in the event of posting deriving from Directive 96/71, as amended by Directive 2018/957, it is necessary to refer to the judgments of December 8, 2020⁵³, which resolve the challenge of the latter by the Hungarian and Polish governments respectively. Said challenge is based on similar arguments that allude, precisely, to the infringement of basic business freedoms by the Community rule.

The applicant States take the view that the Directive creates restrictions on the freedom to provide services, both by extending the object of protection

⁵³ Cases C-620/18 (Hungary v. European Parliament) and C-626/18 (Poland v. European Parliament).

(in particular by replacing the more restrictive concept of minimum wage by the broader concept of remuneration) and by the novelty of extending the regime applicable under the Directive to workers posted for a period of more than 12 months. They consider that those measures constitute unjustified and disproportionate restrictions on the economic freedoms in question.

However, the Court rejects the challenges, although these are based precisely on arguments previously used by the Court in previous rulings and, most significantly, on the doctrine contained in the *Laval* case referred to above. In this case, the Court understands that the coordination measures sought by the EU legislature “must not only have the objective of making it easier to exercise the freedom to provide services, but also of ensuring, when necessary, the protection of other fundamental interests that may be affected by that freedom” (paragraphs 53 of the judgment in *Hungary v. Parliament* and 48 of *Poland v. Parliament*). As it goes on to say (paragraphs 56 and 51 respectively), in adopting the contested Directive, the aim is to “ensure the freedom to provide services on a fair basis”, within a regulatory framework “guaranteeing competition that would not be based on the application, in one and the same Member State, of terms and conditions of employment at a level that is substantially different depending on whether or not the employer is established in that Member State, while offering greater protection to posted workers”.

This perspective is undoubtedly different from that contained in previous rulings, where the market position could be favored precisely by the possibility of maintaining differentiated working conditions (something that the Court continues to maintain in certain general pronouncements⁵⁴). In these rulings, and surely in view of the risk of a latent involution in the challenges raised, it includes the social aspect in the very shaping of basic economic freedoms.

As the Advocate General argued at the time in his general conclusions on the case, the contested Directive seeks to reconcile two premises or interests that are difficult to reconcile. On the one hand, the guarantee, for undertakings of the Member States, of being able to provide transnational services by mobilizing, without unjustified restrictions, workers from their State of establishment, so that they can assert their competitive advantage, if they have lower

⁵⁴ Vid. in this regard, the conclusions of the Advocate General in case C-387/22 *Nord Vest Pro Sani Pro SRL*, which recalls that the difference in working conditions is inherent to the Union, so that “such a difference in treatment infringes the fundamental freedoms only when it affects situations that are objectively comparable” (paragraph 36 of these general conclusions). It cites in this regard, the following judgments: Judgments of 4 July 2018, NN (C-28/17), paragraph 31; of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16), paragraph 32; of 22 June 2017, *Bechtel* (C-20/16), paragraph 53; of 12 June 2014, *SCA Group Holding and Others* (C-39/13 to C-41/13), paragraph 28; and of 25 February 2010, *X Holding* (C-337/08), paragraph 22 (vid. footnote 18 of the aforementioned conclusions).

wage costs; but, on the other hand, the protection of the rights of posted workers, whose employment situation in the State of destination must resemble that of workers from that State.

This is perhaps the most noteworthy novelty. The Court's admission that the Union legislator tends to strike a balance between two interests, but on the basis of ensuring the freedom to provide services under fair conditions. As it goes on to say, in a regulatory framework which ensures that competition is not based on the application, in the same Member State, of terms and conditions of employment of a substantially different level depending on whether or not the employer is established in that Member State, while at the same time offering greater protection to posted workers.

The assumption, therefore, of the principle of safeguarding the freedom to provide services under fair conditions implies a reinforced protection of posted workers which modulates to a certain extent - as opposed to the previous doctrine - the freedom to provide services, which will not depend on excessive differences in the working and employment conditions applied, in the same Member State, to undertakings from different Member States. In the Court's view, this does not entail the distortion of freedom of competition alleged by the challenging states but is a consequence of the application of the principle of proportionality and, where appropriate, the balancing of competing interests. The "genuine social convergence" that may be brought about by the uniformity of working conditions pursued derives from the Union's objective of achieving a truly integrated and competitive internal market, as provided for in recital 4 of the Directive, without ignoring the existence of competition based on differences in productivity and efficiency in business management.

These considerations, together with the rejection of the alleged infringement of the principle of equality on the basis of the temporal milestones required by the Directive, lead the Court to reject the challenges raised by the appellant states. Moreover, while they argue that the exercise of the right to strike or the right to take collective action may hinder the effective application of the freedom to provide services, the judgment goes to great lengths to recognize, in contrast to the precedents invoked by Hungary and Poland, that such directive implicitly provides that the exercise of the right to take collective action by workers, in the context of a posting of workers subject to the provisions of Directive 96/71, as amended, must be assessed in accordance with European Union law, as interpreted by the Court of Justice.

In short, the aforementioned judgments certainly imply a change of conception in the consideration not only of the individual rights of the workers derived from the regulatory change, but also the admission of collective rights

as a way of achieving the results established therein. The doctrine of the ECJ evolves, then, in the sense we indicated, in the same process in which the Community rules change to adapt to a more social perception of the Union to a model where the basic business freedoms must also respond to a fair conception of working conditions and to a social convergence that reconfigures, to a large extent, the understanding of what the internal market should be like. The reasons for this evolution are also made explicit in the judgment and are similar to those expressed in the explanatory text of the secondary legislation. The process of enlargement of the Union and the consequences that this could have on the social dimension of competition - on the other hand, relatively alien in the first judgments commented on - imply a need to adapt the rules in matters such as the determination of working conditions.

IX. REQUIREMENT OF A RESIDENCE PERMIT FOR THIRD COUNTRY WORKERS WHO PROVIDE SERVICES IN A COMPANY OF A MEMBER COUNTRY AND CARRY OUT THEIR ACTIVITY IN ANOTHER MEMBER COUNTRY: THE ECJ JUDGMENT OF 20 JUNE 2024 (CASE C-540/22, SN AND OTHERS AND STAATSSECRETARIS VAN JUSTITIE EN VEILIGHEID)

The aforementioned “social” evolution of the ECJ’s doctrine has, however, some nuances. Although we are not really dealing with a social right in the sense in which it has traditionally been understood -referred to working conditions or collective rights-, it seems interesting to highlight the ECJ of 20 June 2024. This connects the application of the limits to the possibilities of residence of workers from third countries with the freedom to provide services on the part of the company that hires them in a country of the Union and intends to provide services in another member country. Above all, because of what it implies. It is interesting to note that the existence of a restriction to the aforementioned freedom of enterprise is admitted, justified by the possibility that the States may establish limitations to it for reasons of public order. The Court, therefore, surely conditioned by the perception of the migratory problem, admits the most restrictive version in the question of the mobility of workers from third countries, even when it is linked to the freedom to provide services of companies, renewing to a large extent the previous doctrine on the understanding of public order as a limiting factor of the essential rights and freedoms within the Union.

In the case in question (Case C-540/22 SN and others), the plaintiffs argue that requiring the same residence requirements as for workers from third countries,

when those recruited by the company from another EU country (in accordance with the legislation of that country) were recruited in the context of a cross-border provision of services, is in fact a restriction on the freedom to provide services. Specifically, the national court asks for a preliminary ruling whether the obligation under Article 56 TFEU to remove any restriction on the freedom to provide services precludes the requirement to hold an individual residence permit for the posting to a Member State of workers from a third country employed by an undertaking providing services established in another Member State (where, in addition, a duty to notify the posting of workers who are third-country nationals by the undertaking from another Member State is required with the same content as that required for the application for a residence permit).

The Court of Justice concludes that Articles 56 and 57 TFEU do not entail the automatic recognition of a “derived right of residence”, either in the state where they have been recruited or in the state to which they have been posted for the provision of services⁵⁵. However, it admits that the situation implies a restriction on the freedom to provide services⁵⁶. As it recalls, under Article 56 TFEU, restrictions on the freedom to provide services within the Union for nationals of Member States established in a Member State other than that of the person for whom the services are intended shall be prohibited. And in particular, national rules which impose additional administrative or economic burdens or make the provision of services between Member States more difficult than the purely internal provision of services within a Member State (paragraph 67) constitute such restrictions. As the following paragraph (68) of the judgment states, citing Art. 57 TFEU, “... the right to the freedom to provide services gives rise to the right, for the person providing a service, in order to do so, to temporarily pursue its activity in the Member State where the service is provided under the same conditions as are imposed by that State on its own nationals”.

⁵⁵ As stated in paragraph 57, “the exercise, by an employer established in one Member State of its right to the freedom to provide services does not give rise, for the third-country workers posted by that employer to another Member State for that purpose”.

⁵⁶ On the basis that the freedom to provide services, ..., like the other freedoms of movement, applies only to areas which have not been exhaustively harmonized, this is the case here in relation to the application of Directive 96/71 and Directive 2006/123. As the Court states, the first of those directives may indeed apply to posted workers who are third-country nationals, but, as the judgment makes clear, this is without prejudice to national laws relating to the conditions for entry, residence and access to employment of workers who are third-country nationals, which would still be applicable. For its part, Directive 2006/123 does not apply to third-country nationals who move to another Member State in the context of the provision of a service. As the Court states, matters relating to the entry and residence of third-country nationals in the territory of a Member State, in the context of a posting by an undertaking providing services established in another Member State, fall within an area which has not been harmonized at the level of EU law and that, consequently, legislation such as that at issue in the main proceedings can be assessed in the light of the provisions of Article 56 TFEU.

Therefore, the ECJ assumes that the requirement of residence conditions for third-country workers in the context of a cross-border provision of services is a restriction on the freedom to provide services as it affects the temporary duration of the provision itself. However, it admits the existence of proportionate reasons justifying such a restriction

In this respect, the Dutch Government invoked four justifications: firstly, to the need to protect access to the national labour market, secondly, to the need to verify whether a service provider established in a Member State other than that in which the service is provided does not use the freedom to provide services for a purpose other than the provision of that service, thirdly, respect for the right to legal certainty of posted workers, insofar as granting them a residence document would enable them to prove that they are not illegally resident in the territory of the Member State to which they have been posted, and, fourthly, the need to check that the posted worker does not represent a threat to public order.

Of these alleged justifications, the Court admits the last two, rejecting the previous ones.

For the ECJ, the need to protect access to the national labour market cannot be accepted as a justification for such a restriction on the freedom to provide services. Nor is the second ground admissible, given that a Member State may check that such undertakings do not use the freedom to provide services for a purpose other than the provision of the service in question, such as, for example, transferring their staff in order to facilitate their placement or ensure their availability.

With regard to the third plea, to ensure legal certainty for posted workers by enabling them to prove more easily that they are posted to the territory of the Member State in which the service is lawfully provided and, therefore, that they are lawfully resident in that territory, the ECJ accepts that such an objective constitutes an overriding reason in the public interest. For the ECJ, the legislation in question is proportionate in this case, since it “merely requires service providers, for the purpose of obtaining residence permits for third-country workers that they intend to post for more than three months, to have previously declared the supply of services in question to the competent authorities and to have communicated to those authorities the residence permits which those workers have in the Member State where they are established, as well as their employment contracts” (paragraph 89)

Finally, it admits the “threat to public policy” as a justification for the aforementioned restriction. In this regard, it is worth noting that Article 52(1) TFEU, to which Article 62 TFEU refers, expressly refers to the protection of

public policy as a ground that may justify a restriction on the freedom to provide services. And despite the fact that, referring to previous case law, grounds relating to public policy may only be invoked against a person where there is a genuine and sufficiently serious threat affecting a fundamental interest of society and, moreover, cannot serve purely economic purposes (citing the judgment of 2 March 2023, *PrivatBank and Others*), as it goes on to state that it is no less true that the Member States must be able to carry out such a control. This leads it to conclude that “the objective consisting in the need to check that the worker concerned does not represent a threat to public policy must be regarded as capable of justifying a restriction on the freedom to provide services” (paragraph 95).

In other words, as the judgment goes on to say, “It is true that the grant of residence permits to third-country nationals may already have been subject, in the Member State in which the undertaking which intends to post them is established, to a check that there is no risk of a threat to public policy”; but, despite this, the Court does not hesitate to admit that “the assessment of the threat which a person may represent for public policy may vary from one country to another and from one moment to another”, which means that “the fact that such a check exists cannot render irrelevant the carrying out, by the Member State in which the supply of services is to be carried out, of a check that the stay of the person concerned in its territory does not give rise to a risk of a threat to its own public policy, even though, pursuant to Article 21(1) of the CISA, such a check takes place only after a three-month period” (the initial period during which there is a residence authorization).

In short, it seems to sacralize the reasons of public order, extending its extension not only to a specific area but to a general conception that can be assessed by the state itself (which implies, at the same time, a modulation according to the assessments of each member country). This implies admitting a restriction of the freedom to provide business services when the development of the same is associated with the provision of work by workers from third countries hired in the country of origin of the company and with the residence requirements of the latter. The demand of the residence requirements to these workers in the country of destination is based on questions of public order. Also of legal certainty for the workers. But, obviously, this argument loses weight in relation to the previous one, which is much more important. This is because it involves an updating, if not a revision, of the previous doctrine in relation, precisely, to the conception of public order as an admissible criterion for the restriction of basic rights and freedoms within the Union. It is a new perspective on the problems of the future.

CHAPTER 17

THE PROTECTION OF THE PERSONS PERFORMING PLATFORM WORK (DIRECTIVE 2024/2831 ON IMPROVING WORKING CONDITIONS IN PLATFORM WORK)

LIDIA GIL OTERO

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Over the last few years, the European Union has made progress in regulating the digital market. The adoption of the final text of the Directive 2024/2831 on improving working conditions in platform work reflects the commitment of the European Union to the social protection of digital platform workers and of the algorithmic management of the workforce. One of the most important measures in the Platform Work Directive is the introduction of a presumption of the employment status of digital platform workers, based on the existence

of facts indicating control and direction by the platforms. In addition, employees and self-employed platform workers would also be granted individual and collective rights of transparency and algorithmic management, such as the right to supervision or the right to human review of automated decisions. Throughout this chapter,¹ the provisions of these Directive will be analysed in detail. This study will explain the true legal nature and effectiveness of the presumption and its implications for the Member States in its transposition, as well as the improvements that the algorithmic management rights can introduce with respect to the General Data Protection Regulation.

I. INTRODUCTION: THE COMMITMENT OF THE EUROPEAN UNION TO PLATFORM WORK

Social protection for digital platform workers has been a topic of debate in the European Union (hereinafter EU) since 2015, in a renewed impetus by the institutions to move towards a Social Europe. The European Commission Communications ‘A Digital Single Market Strategy for Europe’,² ‘Online Platforms and the Digital Single Market Opportunities and Challenges for Europe’³ and ‘A European Agenda for the Collaborative Economy’⁴ paved the way in the study of the legal-labour side of a phenomenon which, disguised as a digital exchange of goods and services, lured the traditional distinction between professional and non-professional service providers and between self-employed and employed workers.

The rise of digital platform work⁵ has also led to a rise of legal disputes in Member States, due to outsourcing and fraudulent recruitment of workers. Even though more than ninety percent of digital platforms operating in the EU employ self-employed workers,⁶ the European Commission was aware that there were more than a hundred court and administrative rulings that have qualified digital platform workers as employees, as it noted in its Communica-

¹ This contribution is part of the results of the research project PID2021-1222540B-100 ‘*La incidencia del Derecho de la Unión Europea en las futuras reformas laborales*’, funded by the Spanish Ministry of Science and Innovation and the European Regional Development Fund.

² COM/2015/0192 final.

³ COM/2016/0288 final.

⁴ COM/2016/0356 final.

⁵ Digital platforms increased their revenues by a factor of five between 2016 and 2020, serving up to 28 million citizens. See DE GROEN, W., KILHOFFER, Z., WESTHOFF, L., POSTICA, D. and SHAMSAKHR, F., *Digital Labour Platforms in the EU: Mapping and Business Models*, Publications Office of the European Union (Luxemburg, 2021), pp. 37-54.

⁶ *Cfr.* DE GROEN, W., KILHOFFER, Z., WESTHOFF, L., POSTICA, D. and SHAMSAKHR, F., *op. cit.*, p. 8.

tion ‘Better Working Conditions for a Stronger Social Europe: harnessing the full benefits of digitalisation for the future of work’.⁷ Moreover, this was not only a national legal problem. The categorisation of platform workers as self-employed or employees had implications for the application of EU social law, as the Court of Justice of the European Union (hereinafter ECJ) had the opportunity to show in the *Yodel* case. In its order of 22 April 2020,⁸ the ECJ held that a delivery driver for a digital platform was excluded from the scope of Directive 2003/88/EC.⁹ In its view, the autonomy and flexibility which characterised the relationship of the driver with the platform prevented him to be classified as an employee within the meaning of the Directive.

The heterogeneity of offline and online digital platforms made clear that case law could not accommodate a type of work that was intentionally evolving rapidly in its characteristics and that, consequently, regulation was needed.¹⁰ This demand was further increased after the approval of Directive 2019/1152.¹¹ Although the initial version of this Directive did offer a solution for platform workers by harmonising the concept of worker in the EU, in the end the regulation did not expressly include such workers in its personal scope of application. Some Member States such as Spain,¹² Portugal¹³ or Belgium¹⁴ already have specific rules for digital platform workers, but these were only partial solutions to a phenomenon that required a supranational response.

The European Parliament in its Resolution of 16 September 2021 ‘On fair working conditions, rights and social protection for platform workers. New forms of employment linked to digital development’¹⁵ stressed the need for specific and legislative intervention to provide platform workers with the same level of social protection as other comparable workers. These demands were a step forward in the construction a renewed Social Europe, culminating with the adoption of the final compromise text of the Directive 2024/2831 on

⁷ COM/2021/761 final.

⁸ C-692/19 (EU:C:2020:288).

⁹ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

¹⁰ See RATTI, L., “A Long Road Towards the Regulation of Platform Work in the EU”, in *Collective Bargaining and the Gig Economy. A Traditional Tool for New Business Models*, MIRANDA BOTO, J. M^a. and BRAMESHUBER, E. (eds.), Hart (Oxford, 2022), p. 41.

¹¹ Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

¹² *Ley 12/2021, de 28 de septiembre, por la que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales.*

¹³ *Lei 13/2023, de 3 de abril, no âmbito da agenda do trabalho digno.*

¹⁴ *Loi du 3 octobre 2022 fixant les dispositions relatives au travail.*

¹⁵ 2019/2186(INI).

improving working conditions in platform work (hereinafter Platform Work Directive).¹⁶

The drafting and approving of the Platform Work Directive took three years and was not a linear process. From the European Commission's activation of the consultation procedure [Art. 154 of the Treaty on the Functioning of the EU (hereinafter TFEU)] in February 2021, which ruled out the possibility of concluding an agreement between the European social partners,¹⁷ to the temporary blocking in the Council¹⁸ and the European Parliament's final approval in April 2024,¹⁹ the regulation went through moments of deadlock that forced substantial changes to some measures contained in the Commission's first proposal.²⁰ These amendments, as will be seen below, were the result of a negotiation process in which the Member States and the institutions of the EU looked after their political positions and the respect of the principles of subsidiarity and proportionality (Art. 5 TFEU). Its final adoption, despite the changes, reflects the fact that the Directive was a firm commitment of the EU.

II. MATERIAL AND PERSONAL SCOPE OF APPLICATION

Following the formalisation of the European Pillar of Social Rights Action Plan, the EU was not only faced with the challenge of the lack of clarity on the employment status of platform workers. This was compounded by the algorithmic management of working conditions by the platforms and the cross-border nature of the services offered.²¹ These challenges posed by the

¹⁶ Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work.

¹⁷ While Business Europe defended the autonomy of the Member States and advocated specific regulation at national level, ETUC welcomed the proposal for specific regulation, insisting that no intermediate categories between self-employed and employed workers should be created to cover platform workers. See BUSINESSEUROPE, *Consultation Response to the First phase social partner consultation on possible action addressing the challenges related to working conditions in platform work* [available online at: https://www.buinessurope.eu/sites/buseur/files/media/position_papers/social/2021-04-06_platform_work_-_final_response_1st-phase_consultation_.pdf]; and ETUC, *Reply to the First Phase Consultation of Social Partners under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work* [available online at: <https://www.etuc.org/en/document/etuc-reply-first-phase-consultation-social-partners-under-article-154-tfeu-possible-0>].

¹⁸ During the Belgian presidency of the EU Council, the proposal remained at an impasse for several months due to France voting against and Germany, Greece and Estonia abstaining.

¹⁹ The approval was the result of 554 votes in favour, 56 against and 24 abstentions.

²⁰ COM/2021/762 final [available online at: <https://data.consilium.europa.eu/doc/document/ST-14450-2021-INIT/en/pdf>].

²¹ See *Second-Phase Consultation of social partners under article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work* (C/2021/4230 final), pp. 5-13

platform economy became the goals to be achieved by the Platform Work Directive. As the title of this Directive itself indicates, it pursues a general objective of improving the working conditions and social rights of platform workers, from which three specific objectives are derived [Art. 1(1)]: introducing measures to facilitate the correct determination of the employment status of persons performing platform work (1), promoting transparency, fairness, human oversight, safety and accountability in algorithmic management in platform work (2); and improving transparency in platform work, including in cross-border situations.

The Platform Work Directive does not aim to regulate every working condition of persons providing services through platforms, but to pursue the correct qualification of these persons and to reduce algorithmic asymmetry between them and the platforms. For this reason, in addition to the labour-related measures (Chapter II), there are other measures aimed at the protection of personal data and algorithmic transparency (Chapter III and IV).

1. Platform workers and persons performing platform work

Following a logical reasoning, one might think that the material rights of algorithmic management in Chapters III and IV would only be granted to platform professionals who have been qualified as employees in accordance with the mechanisms of Chapter II. However, a careful reading of the Platform Work Directive leads to a different answer. Art. 1(2) delimit the scope of application of algorithmic management rights and, when it comes to determining who the rightsholders are, this provision does not recognise the rights simply to platform workers, but to ‘persons performing platform work’, defined, according to Article 2(1)(c), as all persons ‘performing platform work, irrespective of the nature of the contractual relationship or its designation by the parties involved’, that is, those persons who do not have an employment contract or an employment relationship. Such persons are expressly distinguished from ‘platform workers’, defined as any person performing platform work who has an employment contract or is deemed to have an employment relationship [Art. 2(1)(d)].

The Platform Work Directive admits the coexistence of different contracting regimes in the business model of digital platforms. Consequently, certain rights linked to data protection and algorithmic management are recognised, as will be seen later, for employees, self-employed workers and even

workers in an intermediate category in accordance with national law,²² as they are all affected by the same risks of automated systems.²³

Coverage of self-employed workers is not new in the EU, as they have already been included in the anti-discrimination directives.²⁴ Moreover, the European Commission's Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons²⁵ also clarify that collective agreements concluded for self-employed persons are exempted from the prohibition of Art. 101 TFEU.²⁶ However, such coverage of self-employed workers required the Platform Work Directive to have a dual competence base. A directive based solely on Art. 153(1)(b) TFEU would prevent algorithmic management rights from being extended to self-employed workers, because, according to its wording and its genesis, this legal basis seems to be limited to regulations applicable to employees, despite some specific examples to the contrary.²⁷ Consequently, the Platform Work Directive is also based on Art. 16(2) TFEU, empowering the adoption of rules on the protection of personal data. Such basis, little known until now, will condition for sure the interpretation of the nature of the algorithmic management rights. Unlike in the case of the anti-discrimination directives, where the ECJ extended certain employment-type rights to self-employed workers in a situation of vulnerability

²² This would be the case, for example, of TRADEs in Spanish law (Art. 11 of *Ley 20/2007, de 11 de julio, del Estatuto del Trabajo autónomo*) or of coordinated and continuous collaboration in Italian law (Arts. 61 to 69 bis of *Decreto Legislativo 10 settembre 2003, n. 276. Attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui all' legge 14 febbraio 2003, n.30*).

²³ Recital 54: "A number of persons performing platform work are self-employed persons. The impact of automated monitoring systems and automated decision-making systems used by digital labour platforms on the protection of the personal data of self-employed persons and their earning opportunities is similar to that of platform workers".

²⁴ Self-employed workers fall within the scope of certain measures of Directives 2000/43/EC [Art. 3(1)], 2000/78/EC [Art. 3(1)] and 2006/54/EC (Art. 6). See KRAUSER, K., "Recognition of Economically-dependent Workers within EU Law – In Search for a Unicorn?", in *Economically-dependent Workers. Employment in a Decent Economy – International, European and Comparative Law Perspective*, SCHUBERT, C. (ed.), C.H. Beck (Munich, 2022), pp. 260-262.

²⁵ 2022/C 374/02.

²⁶ See BRAMESHUBER, E., "(A Fundamental Right to) Collective Bargaining for Economically Dependent, Employee-Like Workers", in *Collective Bargaining and the Gig Economy. A Traditional Tool for New Business Models*, MIRANDA BOTO, J. M^a. and BRAMESHUBER, E. (eds.), Hart (Oxford, 2022), pp. 245-249.

²⁷ There are already some instruments that have been adopted under the competence title of Art. 153 TFEU and deal with self-employed workers, such as the Directive 2017/159/EU implementing the Agreement concerning the implementation of the Work in Fishing Convention of the ILO (1), the Directive 2002/15/EC on the organization of the working time of persons performing mobile road transport activities (2) and the Council Recommendation of 8 November 2019 on access to social protection for employed and self-employed workers (3).

comparable to that of employees,²⁸ the recognition of algorithmic management rights for platform self-employed workers is not based on an inequality vis-à-vis the platform in relation to ‘employment’ conditions, but in relation to the protection of their personal data. The Platform Work Directive groups platforms providers as persons entitled to data protection rights, irrespective of their employment status.

2. Digital labour platform

Regarding the platform as the counterpart of the contractual or employment relationship, the Platform Work Directive defines it as any natural or legal person who provides a service that fulfils four requirements: it is provided, at least in part, at a distance through electronic means, such a website or a mobile application (1); it is provided at the request of a recipient of the service (2); it involves, as a necessary and essential component, the organisation of work performed by individuals in return for payment, irrespective of whether that work is performed online or in a certain location (3); and it involves the use of automated monitoring or decision-making systems (4).²⁹ This definition is twofold in nature:

1) It is restrictive, because it excludes platforms providing digital intermediation services from the scope of the Platform Work Directive, that is, the platforms that exclusively provide the means for connecting consumers who demand a service with professionals who are willing to provide it (advertising offers, aggregating and displaying available services providers, etc). It thus focuses on platforms providing and underlying commercial service for the organisation of which they must exercise some control over the work performed. Such a position is consistent with the Member States case law, which has shown which platforms are the centre of judicial and labour disputes. In fact, the clearest inspiration for the definition of digital labour platform in the Platform Work Directive is to be found in the case law of the ECJ and the criteria for delimiting the legal nature of platforms in the *Elite Taxi*³⁰ and *Uber France*³¹ cases.

²⁸ Judgment of 12 January 2023, *J.K. and TP, SA*, C-356/21 (EU:C:2023:9)..

²⁹ The latter requirement was not present in the initial version of the proposal and was added by the European Parliament during the procedure.

³⁰ Judgment of 20 December 2017, *Asociación Profesional Élite Taxi*, C-434/15 (EU:C:2017:981).

³¹ Judgment of 10 April 2018, *Uber France*, C-320/16 (EU:C:2018:221).

Consequently, it should be examined on a case-by-case basis whether the digital platform goes beyond its task of organising the service on the market to also organise the work of the professional. Making this assessment will not always be an easy task, due to the platforms' intention to avoid their role as employers and obliged subjects. As appointed by the Platform Work Directive, organising work performed by individuals should imply at a minimum a significant role in matching the demand for the service with the supply of work by the individual, which constitutes a necessary and essential and not merely a minor and purely ancillary component.³² It will be necessary to rely on indications or concrete elements, for example the additional functions the platform performs (payment processing, customer support, geolocation systems, etc.).

2) It is broad, since it covers all digital platforms, both online and offline, regardless of the sector in which they operate and despite the differences that may exist between them in relation to the way work is organised and controlled and the place of establishment of the companies. In relation to the latter aspect, according to Art. 1(3), the Platform Work Directive shall apply and bind the platforms whenever the persons performing platform work provide services in the EU, regardless of whether the place of establishment of the platform is in the EU or not and irrespective of the applicable law.

This *lex loci laboris* criterion will not have a particular impact on employees since their employment contract would already be governed by the law of the Member State in which they provide the services [Art. 8(2) of Rome I Regulation]. However, it may be of relevance for self-employed workers providing services in the EU, since the Platform Work Directive will be applied even if the self-employed and the platform have agreed that the law of a non-Member State will apply to their contractual obligations. Through this provision, the Platform Work Directive partially amends the applicable law criteria of the Arts. 3 and 4 of Rome I Regulation, while limiting the freedom of establishment.

3. Intermediaries

The Platform Work Directive foresees the possibility for digital platform work to be provided not only through a two-way relationship, but also through

³² Recital 20.

a three-way or even a four-way relationship. According to Art. 2(1)(e), the work organised through a digital labour platform can be provided on the basis of a contractual relationship between the individual and the digital labour platform or an intermediary. Intermediary means, for the purposes of the Platform Work Directive, a natural or legal person that establishes a contractual relationship with the digital labour platform and with the person performing platform work (a) or is in a subcontracting chain between the digital labour platform and the person performing platform work (b), with the aim of making platform work available to or through the digital labour platform to which it relates. Consequently, the rights provided for in the Platform Work Directive apply to persons who are assigned to a digital platform by their employer or their principal undertaking, including the temporary work agencies,³³ in order to provide services through that platform, and to persons who provide services through a digital platform whose recipient is another digital platform or a distinct business entity within the same group of undertakings.³⁴

These provisions relating to the intermediary were absent in the initial version of the proposal. They were introduced into legislative procedure at the initiative of the European Parliament following the example of the Portuguese law,³⁵ since there were more and more frequent cases of subcontracting in which a company was interposed between the digital platform and the persons performing platform work.

The extension of the Platform Work Directive's scope in favour of persons performing platform work through intermediaries is based on the idea that such persons are exposed to the same risks of misclassification and algorithmic management as persons performing platform work directly for the platform. For this reason, and to avoid diffuse responsibilities between platforms and intermediaries, the Directive also calls on Member States to ensure that persons performing platform work through a contractual relationship with an intermediary have the same level of protection as persons performing platform work through a direct contractual relationship with the platform. To this end, the Directive requires Member States to take appropriate measures, such as joint and several liability schemes (Art. 3).

³³ Recital 26: 'Where a party is found to be an employer and fulfils the conditions of being a temporary work agency in accordance with Directive 2008/104/EC, the obligations under that Directive are to apply'.

³⁴ Recital 24.

³⁵ Art. 12.º-A(6) of *Código do Trabalho*: '*caso o prestador de atividade alegue que é trabalhador subordinado do intermediário da plataforma digital, aplica-se igualmente, com as necessárias adaptações, a presunção (...) cabendo ao tribunal determinar quem é a entidade empregadora*'.

III. MEASURES FOR THE DETERMINATION OF EMPLOYMENT STATUS

The Platform Work Directive sets out two measures aimed at addressing the problems of qualification of platform workers: the principle of the primacy of facts (Art. 4) and the qualification measures, including the presumption of employment (Art. 5).

1. Primacy of facts

The principle of primacy of facts has a long tradition in EU law. The ECJ has insisted on this issue in several of its rulings on the EU concept of worker. Indeed, it has repeatedly called for the assessment of the real elements of the relationship and the fictitious or simulated spheres of autonomy of the bogus self-employed.³⁶ The express recognition of this principle in digital platform work is intended to leave aside the intentional and unilateral drafting of contracts by the stronger party, that is, the digital platform.³⁷ Therefore, Art. 4(1) of the Platform Work Directive provides that the qualification process should take into account the facts relating to the actual performance and not the contractual agreement between the parties, including in this regard ‘the use of algorithms automated monitoring or automated decision-making systems in the organisation of platform work’. From a comparative perspective, this principle could contribute to the standardisation of qualification processes between Member States, as it would particularly affect legal systems that give precedence to the free disposition of the parties.³⁸

2. The legal presumption of employment: control and direction

Throughout the process of drafting the Platform Work Directive, reports and consultations assessed the suitability of introducing a presumption of em-

³⁶ For example, judgments of 13 January 2004, *Allonby*, case C-256/01 (EU:C:2004:18) and 4 December 2014, *FNV Kunsten*, C-413/13 (EU:C:2014:2411).

³⁷ Recital 27: ‘The principle of primacy of facts (...) is particularly relevant in the case of platform work, where contractual conditions are often unilaterally determined by one party’.

³⁸ The judgments of the Central Arbitration Committee of 14 November 2017 and of the High Court of Justice Queen’s Bench Division (Administrative Court) of 5 December 2018 stand out in this regard. In this judgments, Deliveroo’s delivery drivers were denied workers status on the basis, inter alia, of the autonomy granted to them in the contracts concluded with the company to organise the work. The Belgian *Loi-Programme* of 27 December 2006 also stands out, as it includes the will of the parties expressed in their contracts or agreements among the general employment criteria (Art. 333, section 1).

ployment for the correct qualification of persons performing platform work.³⁹ However, the legal configuration of this presumption, as a strong or moderate presumption, was also discussed during the procedure. It was discussed whether the presumption should directly imply the employment nature of any relationship between the worker and the platform, as the European Parliament's proposal advocated,⁴⁰ or whether it was necessary for the worker to provide some kind of evidence to trigger it, as the Commission initially suggested. In the end, the Platform Work Directive opted for the second option, introducing a moderate presumption. Art. 5(1) of the Platform Work Directive provides that the contractual relationship between a digital platform and a person performing digital platform work shall be legally presumed to be an employment relationship if one requirement is met: that there are facts indicating that the platform exercises control and direction over that person.

This emphasis on the subordination of the worker to the platform is a consequence of Member States' case law on digital platform work. Despite the lack of a common concept of employee in the Member States, most of the judicial pronouncements insisted on direction and control, i.e. subordination, from an indirect perspective, with the integration of the worker into an external organisation prevailing.⁴¹ This last point is shared, moreover, by the case law of the ECJ on the EU concept of employee, which is based on a strict view of the subordination of the worker to the employer's power of management.

In contrast to the initial proposal, the final version of the Platform Work Directive does not specify what such criteria or indications of control and direction may be. It only specifies that they must be established 'in accordance with national law, collective agreements or practice in force in the Member States, with consideration to the case-law of the Court of Justice'. The general presumption of employment is thus built on two steps. The proof of the adequate indications would be sufficient to understand that there is direction of control by the platform; direction or control which, in turn, would allow it to

³⁹ The impact reports revealed that between 1.72 and 4.1 million persons performing platform work in the EU could be re-qualified as employees as result of the presumption. Cfr. BARCEVICIUS, E., GINEIKYTÉ-KANCLERÉ, V., KLIMAVIČIŪTĖ, L. and RAMOS MARTÍN, N., *Study to support the impact assessment of an EU initiative to improve the working conditions in platform work. Final Report*, Publications Office of the European Union (Luxembourg, 2021), p. 149.

⁴⁰ Report of the Committee on Employment and Social Affairs of 23 December 2022 on the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work [P9_A(2022)0301] [available online at: [https://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2022/0301/P9_A\(2022\)0301_EN.pdf](https://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2022/0301/P9_A(2022)0301_EN.pdf)].

⁴¹ For a comparative analysis, see HIESSI, C., "Case law on the classification of platform workers: Cross-European comparative analysis and tentative conclusions [online]", *Forthcoming Comparative Labour Law & Policy Journal*, pp. 5-69.

be understood (presumed) that there is an employment relationship. The facts indicating the control and direction would exempt the worker from providing all the factual elements of the employment relationship.⁴²

Member States have the autonomy to decide how to active the presumption measure. Art. 5(2) leaves them free to construct the presumption in a ‘effective and rebuttable’ manner. It only requires that the presumption simplifies the procedure for the benefit of platform workers and does not impose greater evidentiary burdens on them. Thus, Member States will have to choose whether to include or not such criteria or indications of control and direction in legislation (or collective agreements). Both options will have their advantages and disadvantages. Establishing and detailing the criteria in the legislation, as Portugal did,⁴³ eases the burden of proof on employees,⁴⁴ but is not without risk, as platforms can adapt their terms and conditions and thereby disable the presumption.⁴⁵ Opting for a formulation as broad as the one now included in the Platform Work Directive, so that the courts are the ones to establish the criteria, can encompass direct and indirect forms of subordination and, specially, the ways in which the organisation of work on platforms evolves, as the notion of control and direction is abstract and dynamic.⁴⁶ However, this option

⁴² For example, according to the definition of employee in Art. 1.1 of the Spanish *Estatuto de los Trabajadores* (Real Decreto Legislativo 2/2015, de 23 de octubre), the worker would have to prove, along with the subordination, that he/she is providing work in the employ of another (also know as *ajenidad*).

⁴³ Art. 12.º-A.1 of *Código do Trabalho*: ‘Presume-se a existência de contrato de trabalho quando, na relação entre o prestador de atividade e a plataforma digital se verificarem algumas das seguintes características: a) A plataforma digital fixa a retribuição para o trabalho efetuado na plataforma ou estabelece limites máximos e mínimos para aquela; b) A plataforma digital exerce o poder de direção e determina regras específicas, nomeadamente quanto à forma de apresentação do prestador de atividade, à sua conduta perante o utilizador do serviço ou à prestação da atividade; c) A plataforma digital controla e supervisiona a prestação da atividade, incluindo em tempo real, ou verifica a qualidade da atividade prestada, nomeadamente através de meios electrónicos ou de gestão algorítmica; d) A plataforma digital restringe a autonomia do prestador de atividade quanto à organização do trabalho, especialmente quanto à escolha do horário de trabalho ou dos períodos de ausência, à possibilidade de aceitar ou recusar tarefas, à utilização de subcontratados ou substitutos, através da aplicação de sanções, à escolha dos clientes ou de prestar atividade a terceiros via plataforma; e) A plataforma digital exerce poderes laborais sobre o prestador de atividade, nomeadamente o poder disciplinar, incluindo a exclusão de futuras atividades na plataforma através de desativação da conta; f) Os equipamentos e instrumentos de trabalho utilizados pertencem à plataforma digital ou são por estes explorados através de contrato de locação’.

⁴⁴ BRAMESHUBER, E. and HÖLLWARTH, J., “Die EU-Plattformarbeitsrichtlinie”, *Arbeits- und SozialrechtsKartei*, vol. 28, no. 5, 2024, pp. 173-174.

⁴⁵ This was acknowledged in recital 7 of the Commission’s initial proposal: ‘National case law has resulted in diverse outcomes and digital labour platforms have adapted their business model in various ways, thus increasing the lack of legal certainty over the employment status’.

⁴⁶ See ALOISI, A. and POTOCKA-SIONEK, N., “De-gigging the labour market? An analysis of the ‘algorithmic management’ provisions in the proposed Platform Work Directive”, *Italian Labour Law e-Journal*, vol. 15, no. 1, 2022, p. 42.

could oblige workers to prove their own status as employees, thereby eliminating the procedural advantages attributed to the legal figure of the presumption.

The presumption designed is a hybrid measure. It has implications from a material perspective, because it is related to the concept of employment relationship, and from a procedural perspective, because it is a mechanism that fixes the judicially relevant facts. However, the competence to define the concept of employee and the procedural autonomy of the Member States mean that the final text of the Platform Work Directives does not change the concept of employment relationship or significantly alter the burden of proof.

Art. 5(3) provides that the presumption must be applied in all relevant and administrative or judicial proceedings where the correct determination of employment status of the person performing platform work is at issue. Furthermore, according to Art. 5(5), Member States should provide for the possibility for procedures to determine employment status to be initiated *ex officio* by competent national authorities, such as the labour inspectorate, when they consider that a person performing platform work has been incorrectly classified. This includes not only the specific procedures available to Member States to determine the employment status of a relationship, but all those processes in which such status is a procedural step prior to the examination of other issues of the employment relationship (dismissal, pay, etc.). Proceedings relating to tax, criminal and social security matters are excluded from the above rule, and it is left to the Member State to decide whether to apply the presumption in them in accordance with national law. The social security exclusion, based on the EU's regulatory powers, may lead to a protection deficit, as the protective action of the social security systems in many Member States requires registration as an employee.

It is foreseeable that this measure of the Platform Work Directive will have important implications for those Member States whose legal systems do not have a figure similar to the presumption of employment.⁴⁷ However, it should be noted that the presumption will not simply solve problems of misclassification of all persons performing platform work. There are two issues that prevent this:

1) The effectiveness of the presumption will depend on each Member State's national definition of employee and on how the courts interpret this

⁴⁷ Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Romania, Slovakia and Sweden. The Member States with general presumptions of employment are Belgium, Croatia, Estonia, France, Greece, Malta, the Netherlands, Portugal, Slovenia and Spain. See KULLMAN, M., "Platformisation of Work: an EU Perspective on Introducing a Legal Presumption", *European Labour Law Journal*, vol. 13, no. 1, 2022, pp. 1-15.

concept. It is more likely that the persons performing platform work will qualify as employee if the Member State's law has a broad definition of the concept of employee or employment relationship. Conversely, the more restrictive the definition of employee, the less likely is that the presumption will be triggered, because platforms may exercise indirect organisational power that does not always fit the judicial understanding of the subordination. Thus, while the Portuguese presumption has allowed workers on well-known digital platforms to be judicially classified as employees,⁴⁸ the Belgian presumption has had little impact on the reclassification of workers.⁴⁹

It might be thought that the possible restriction on the national definition on employee is limited by the case law of the ECJ, which the Art. 5(1) says must be taking into account when defining the criteria for control and direction. If it is understood that the Platform Work Directive refers to the case law of the ECJ on the community concept of employee, some pronouncements may favour a flexible understanding of the elements defining an employment relationship.⁵⁰ However, the only pronouncement concerning digital platform work⁵¹ could serve to maintain the strict understanding of subordination and employment relationship. Such reference to the case law of the ECJ can also be understood as including pronouncements concerning the concept of undertaking in the field of the competition law, which, interpreted in the opposite sense, can serve to conceptualise the concept of employee in situations where the subordination is not so much personal as organisational or economic.

2) The persons performing offline platform work will be most successful in triggering the presumption, because they are subject to more 'visible' control and direction (geolocation, express order, customer evaluations, etc.). Online platforms workers will find it more difficult to obtain evidence of the elements of subordination, as some criteria are compatible with the coordination that exists in the relationships between the self-employed and the undertaking.

A similar situation applies to persons performing offline or online platform work through intermediaries. If they want to trigger the presumption to

⁴⁸ For example, judgment of *Tribunal Judicial da Comarca de Lisboa* of 1 February 2024 (reference 432525619). In any case, it should be noted that this judgment has been annulled by the *Juízo do Trabalho de Lisboa* because the company was incorrectly cited.

⁴⁹ See FRANKE, M., PULIGNANO, V. and MARÀ, C., "Workers' contention over unpaid labour time and food delivery and domestic work platforms in Belgium", *Work in the Global Economy*, vol. 3, no. 1, 2024, pp. 11-12.

⁵⁰ See, inter alia, judgments of 13 January 2004, *Allonby*, C-256/01 (EU:C:2004:18) and 1 March 2012, *O'Brien*, C-393/10 (EU:C:2012:110).

⁵¹ Order of 22 April 2020, *Yodel*, *cit.*

be declared as employees of the platform, they will also have to prove that the control or direction does not come from the intermediary, but from the platform. Art. 4(3) seems to allude to this by providing that the party or parties assuming the employer's obligations must be clearly identified when the existence of an employment relationship is established.

3. The rebuttal of the presumption

Art. 5(1) stipulates that if the platform intends to rebut the presumption, it must prove that 'the contractual relationship in question is not an employment relationship as defined by law, collective agreements or practice in force in the Member States, with consideration to the case-law of the Court of Justice'. Consequently, the presumption does not imply an immediate qualification of the persons performing platform work. The platform's possibility of rebuttal would mean nothing more than the platform's counterargument to the workers' proof, so that the proof of control and direction would not be followed by the presumption of employment. Thus, even if the presumed employee were to prove the existence of indications of control and direction, the digital platform could bring other elements to the process that would prove that he or she is a self-employed worker, as has happened in some proceedings in Portugal.⁵² The wording of Art. 5(1), resulting from the autonomy of the Member States and the fear of adopting a European concept of an employee, could end up legitimising the subordination of self-employed workers.

IV. PROTECTING PERSONS PERFORMING PLATFORM WORK FROM ALGORITHMIC MANAGEMENT

Algorithmic management of digital platforms not only poses on risk the core institution of labour law, i.e. the employment contract. It may also significantly affect other rights attached to workers. The Platform Work Directive takes as its premise that the infrastructures of digital platforms raise questions

⁵² The *Juízo do Trabalho de Portimão* in its ruling of 5 April 2024 denied the status of employees to 27 Glovo workers who provided evidence to active the Portuguese presumption of employment. According to the court, the workers were not subordinate to the platform since, among other arguments, they could refuse to carry out a service because if they did not agree with the price offered by the platform. Nor was it considered proven that the platform controlled the provision of work and imposed working hours on the workers, as they could work for other platforms.

about the data protection rights of persons performing platform work and that these questions cannot be resolved through the General Data Protection Regulation⁵³ (hereinafter GDPR), because the latter does not consider the employment perspective.⁵⁴

The most extensive part of the Platform Work Directive (Chapter III) is devoted to measures related to algorithmic management with the aim of protect persons performing platform work from two automated systems used by digital platforms. On the one hand, automated monitoring systems, defined as the systems that ‘are used for or which support monitoring, supervising or evaluating, by electronic means, the work performance of persons performing platform work or the activities carried out within the work environment, including by collecting personal data’ [Art. 2(1)(h)]. On the other hand, automated decision-making systems, defined as the systems that ‘are used to take or support, by electronic means, decisions that significantly affect persons performing platform work, including the working conditions of platform workers’ [Art. 2(1)(i)]. As will be seen below, the Directive attaches great importance to the latter type of systems, insofar as they can determine aspects of relevance for persons performing platform work and platform workers: access to and organisation of work assignments, earnings, safety and health, working time, access to training, promotion or its equivalent, and their contractual status, including the restriction, suspension or termination of their account.

1. Limitations and preventive measures in automated systems

To prevent irregular algorithmic decisions, the Platform Work Directive imposes two obligations on the platform in the construction or design of automated systems:

1) Restrictions on the processing of personal data. From the start of the recruitment or selection procedure and throughout the contractual relationship [Art. 7(2)], digital platforms shall not collect data through automated monitoring and decisions-making systems or through other types of automated sys-

⁵³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

⁵⁴ Recital 38: ‘While Regulation (EU) 2016/679 establishes the general framework for the protection of natural persons with regard to the processing of personal data, it is necessary to lay down specific rules addressing the concerns that are related to the processing of personal data by means of automated monitoring systems or automated decision-making systems in the context of platform work’.

tems supporting or taking decisions that affect person performing platform work when that person is not offering or performing platform work [Art. 7(1) (c) and (3)]. Nor should they process data that are intimately linked to the privacy of the persons performing platform work, such as his or her emotional or psychological state [Art. 7(1)(a)], private conversations, including exchanges with other workers and their representatives [Art. 7(1)(b)], as well as data to predict the exercise of fundamental rights, including the right of association, the right of collective bargaining and action or the right to information and consultation [Art. 7(1)(d)] or to infer racial or ethnic origin, migration status, political options, religious or philosophical beliefs, disability, state of health, trade union membership, sex life or sexual orientation [Art. 7(1)(e)]. This list of prohibited data also includes biometric data in so far as their processing is for the purpose of establishing the identity of the persons performing platform work [Art. 7(1)(f)]. This imply that digital platforms will be able to use biometric data of persons performing platform work to authenticate their identity, e.g. visual recognition systems to access the account and record the working time, provided that the basis required by Art. 9(2) GDPR is met.⁵⁵

2) Restrictions on the effects of automated decisions. Art. 12(3) insist on the most direct care of the platform worker, obliging platforms not to construct or use automated monitoring or decision-making systems in any manner that puts undue pressure on platform workers or put their physical and mental health at risk. Unlike the previous obligation on types of data, this obligation only applies to platforms in respect of employees, excluding self-employed workers from the scope of protection even though they are exposed to comparable risk. This exclusion is due to scope of the measure, i.e. safety and health at work, which, in the EU's view, can only cover employees.⁵⁶

The above constructive measures, if properly implemented, could provide a firewall to unlawful or unfair algorithmic decisions. However, it is well known that many algorithms evolve and deliver results different from those for which they were initially programmed. For this reason, the Platform Work Directive

⁵⁵ In Recital 41, the Platform Work Directive builds on the distinction made between identification and authentication in Art. 3 of Regulation 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC. Thus, it provides that digital platforms cannot use biometric data to identify workers, i.e. to establish the identity of the worker by matching the biometric data of the worker with the stored biometric data of a number of persons in a data base. However, they can use the same biometric data for authentication purposes, i.e. to verify the identity of the worker by comparing his or her biometric data with the data previously provided by the same worker.

⁵⁶ Recital 54: 'The rights pertaining to health and safety at work (...) which are specific to workers pursuant to Union law, should not apply to persons performing platform work who do not have an employment relationship'.

adopts a *human in command* approach. The platforms have two obligations to supervise automated systems under Art. 10. On the one hand, digital platforms must ensure sufficient human resources to effectively oversight decisions relating to persons performing platform work that have been taken or supported by automated systems [Art. 10(2)]. This measure is intended to provide persons performing platform work, i.e. employees and self-employed workers, with a human manager or supervisor who has the competence, training and authority to review automated decisions (on his or her own initiative or at the person performing platform work's request) and, if necessary, to override the decision. On the other hand, digital platforms must periodically, and at least every two years, carry out an evaluation of the effects or the impact on persons performing platform work of each decisions taken or supported by automated systems [Art. 10(1)]. This obligation includes not only the evaluation of the most relevant decisions such as sanction or suspension, but also more routine decisions such as the allocation of task. The purpose of this measure is the protection of working conditions and equal treatment at work. Thus, if after the evaluation a high risk of discrimination or violation of persons performing platform work's rights is detected, the platform must take appropriate measures to correct it, including the modification or interruption of the automated systems [Art. 10(3)].

2. Algorithmic information rights

Full protection of persons performing platform work require that they are fully aware of the processing of their personal data by automated systems and its impact. Articles 9 and 11 of the Platform Work Directive aim to improve the asymmetry of information between the platform and the persons performing platform work by recognising the right to information and the right to human review for employees and self-employed workers. In fact, they can be considered as one of the flagship articles of the Platform Work Directive, significantly improving the rights that persons performing platform work would be entitled to under Arts. 13, 15 and 22 of GDPR.

The right to information of persons performing platform work, i.e. employees and self-employed workers, in Art. 9 is constructed based on the two types of automated systems of digital platforms (monitoring and decision-making).

Firstly, it includes a general obligation common to both systems, stipulating that digital platforms should inform persons performing platform work of the use of automated monitoring or decisions-making systems and the types of

decisions supported or taken by such systems, including the decisions that do not affect persons performing platform work in any manner [Art. 9(1)(c)]. This last provision would make it possible to overcome the doubts that arise when applying the guarantees provided for in Art. 22 GDPR, which requires that the automated decisions significantly affect the person who is the subject of it.

Secondly, it breaks down specific information obligations for each of the systems. In the area of automated monitoring systems, the platform would be obliged to inform persons performing platform work about the categories of data and actions monitored, supervised or evaluated, including evaluation by the recipient of the service⁵⁷, the aim of the monitoring and how the systems is to achieve it and the recipients or categories of recipients of the personal data processed by such systems [Art. 9(1)(a)]. In the area of the automated decision-making systems, the platform would be obliged to inform persons performing platform work on three connected points: the categories of decisions that are taken or supported by such systems (1), the categories of data and main parameters that such systems take into account and the relative importance of each of them, including how the persons performing platform work's personal data or behaviour may influence it (2); and the grounds for any decisions on the persons performing platform work's contractual status or any decisions of equivalent or detrimental effect, including the decisions to restrict, suspend or terminate the account and to refuse the payment for work (3) [Art. 9(1)(b)].

All such information must be provided in a concise, transparent, intelligible and easily accessible form by means of a written document using clear and plain language to explain the characteristics of automated systems affecting persons performing platform work's working conditions. This document, which may be electronic, must be made available to the person performing platform work at any time on request, at the latest on the first working day following the introduction or modification of the systems affecting his or her working conditions and before the start of recruitment or selection procedure [Arts. 9(2), 9(3) and 9(4)]. Information about changes or modifications to the automated system ensures that persons performing platform work are, to some extent, protected from constant adaptation of working conditions through algorithms. However, in such cases, the platforms should not rely on compliance

⁵⁷ On the need to anonymise customer evaluations of digital platform workers in application of the GDPR, see judgments of the Amsterdam Court of Appeal (Civil Chamber) of 4 April 2023 (Nos. 200.295.747/01 and 200.295.806/01).

with the right to information to circumvent the procedures for substantial changes in working conditions.

3. Accountability and human review of automated systems

Of the two automated systems used by digital platforms, it is the automated decision-making system that has the greatest impact, because digital platforms manage human resources through it in an intrusive way, without workers having direct contact with a supervisor. The information provided to persons performing platform work on such systems under Art. 9 would be provided *ex ante*. However, once the automated systems were in operation, they could take or suggest decisions that contradict this prior information. These dysfunctions are addressed in Art. 11 through three measures, which would be recognised for employees and self-employed platform workers:

1) Right to *ex post* explanation and information. Art. 11(1) provides that persons performing platform work have the right to obtain an explanation from the platform in relation to any decision taken or supported by an automated decision-making system. In contrast to previous versions of the Platform Work Directive, it is no longer necessary for this right to arise that the decisions significantly affect the person performing platform work. However, this circumstance is considered when establishing how the explanation is to be given. Thus, the explanation must always be given in written form when the decision restricts, suspends or terminates the worker's account, refuses the payment for work performed or affects the essential of the employment or the contractual relationship, including the contractual status.

2) Right to human intervention. Under Art. 11(1), digital platforms should designate a contact person with the necessary competence, training and authority to whom persons performing platform work would have access to discuss and clarify the information provided, i.e. the facts, circumstances and reasons for the decision.

3) Right to human review. Persons performing platform work and their representatives, including representatives of self-employed workers, if any, have the right to request the digital platform to review any decision taken or supported by an automated decision-making system. Upon the worker's request, the platform shall provide a reasoned written response without delay, within two weeks at the latest [Art. 11(2)]. If, after the review, the platform detects that the decision violates the worker's rights, it must rectify the deci-

sions within a maximum of two weeks of its adoption. If such rectification is not possible, the platform must offer the worker adequate compensation for the damage sustained. In both cases, the platform must take necessary measures, including, if appropriate, a modification of the automated system or the discontinuance of its use, to prevent such decisions from being repeated in the future [Art. 11(3)].

Art. 11(4) warns that the above rights cannot affect disciplinary and dismissal procedures laid down in national law and practices and collective agreements. Consequently, if a digital platform decides to sanction an employee through a decision adopted or supported by an automated decision-making system, the imposition of such a sanction must follow the procedures established in the applicable national labour law, without such procedures being fulfilled through the rights recognised in Art. 11. The same rule applies when the platform decides to dismiss the employee, with the particularity that the decisions to terminate must not be taken in an automated manner. Art. 10(5) requires that any decisions to restrict, suspend or terminate the contractual relationship or the account of a person performing platform work, or any other decisions causing equivalent detriment, to be taken by a human being. Considering that the Platform Work Directive leaves open the possibility that the dismissal decision taken by the human is supported by an automated decision-making system, it will be necessary to analyse on a case-by-case basis what role is attributed to the human decision-maker. In this regard, the criteria or indications being used by some national data protection agencies and courts to assess whether, for the purposes of the GDPR, a decision ceases to be automated because there is significant human intervention may be useful. These include the organisational environment in which the decision is taken, such as the company's internal policies and procedures,⁵⁸ the chains of approval of decisions and the level of staff training.⁵⁹

In any case, the configuration of the three previous measures also solves many of the interpretative problems of Art. 22 GDPR, not only because the need for decisions to significantly affect workers has been eliminated, but also

⁵⁸ See BARROS VALE, S. and ZANFIR-FORTUNA, G., "Automated decision-making under the GDPR: Practical cases from Courts and Data Protection Authorities", *Future of Privacy Forum* [available online at: <https://fpf.org/wp-content/uploads/2022/05/FPF-ADM-Report-R2-singles.pdf>].

⁵⁹ This criterion was taken into account by the Vienna Data Protection Agency in its decision of 18 December 2020 (No. W256 2235360-1/5E), which concluded that the company had not made an automated decision despite the use of an algorithm assessing the potential of job applicants, because the final decision rested with the company's counsellor, who was specifically trained for this purpose and had at his disposal a number of criteria to verify elements that were not examined by the algorithm (motivation, indebtedness, housing, etc.).

because the scope of application of such rights is extended to decisions ‘supported’ by an automated system. Thus, algorithmic managements rights of the Platform Work Directive include multi-stage systems and all final decisions that are taken by a human decision-maker based on suggestion of automated systems. Notwithstanding the above, it should be noted that the final text of the Platform Work Directive, unlike the provisions of Art. 22 GDPR, does not expressly prohibit digital platforms from profiling or fully automated data processing. Consequently, if there is an automated decisions on a digital platform, Art. 11 of the Platform Work Directive and Art. 22 GDPR would coincide in the recognition of complementary rights of algorithmic management for persons performing platform workers. However, the purpose and extension of the Art. 11 allows to recognise rights which, *a priori*, would be excluded according to certain interpretations of Art. 22 GDPR.⁶⁰

V. SAFETY AND HEALTH OF PLATFORM WORKERS

The obligation to evaluation and monitor automated systems are not only related to algorithmic management and data protection of platform workers. Such monitoring also extends to the effects of automated systems on the safety and health of platform workers. Article 12 obliges digital platforms to evaluate the risks of the automated systems, in particular work-related accidents and psychosocial⁶¹ and ergonomic risks, and the adequacy of the safeguard of the automated systems to prevent such risks in view of the specific characteristics of the work environment [Art. 12(1)(a) and (b)].

Although this was an obligation that could be deduced from Art. 6 of Directive 89/391/EEC,⁶² Art. 12(1)(c) reminds platforms of the need to introduce appropriate preventive and protective measures, specifying that they must not use automated systems in any manner that puts undue pressure on platform

⁶⁰ See judgments of the Amsterdam *Rechtbank* of 11 March 2021 (cases C/13/692003 and C/13/687315) considering that Uber workers were not entitled to object to the decisions of the ride allocation systems under Art. 22 GDPR because, despite being automated decisions, these did not produce legal effects on them. To the contrary, concluding that automated decisions of the platforms’ service allocation system have a significant effect on workers because they determine the opportunity to work and to be paid, see judgements of the Amsterdam Court of Appeal (Civil Chamber) of 4 April 2023, *cit.*, and decision of the Italian Data Protection Agency of 22 July 2021 (No. 285).

⁶¹ On the most frequent psychosocial risks at work on digital platforms, see FERNÁNDEZ MARTÍNEZ, S., “Los riesgos psicosociales en el trabajo realizado mediante plataformas digitales”, *Iuslabor*, no. 3, 2020, pp. 81-101.

⁶² Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

workers or otherwise endanger their safety and their physical and mental health [Art. 12(3)]. In addition, preventive measures against violence and harassment, including effective reporting channels, must be put in place [Art. 12(5)].

One of the particularities of these safety and health measures is that they are only binding on platforms in respect of platform workers with whom they have an employment contract, but not in respect of self-employed workers, even though both types of workers may be exposed to the same risks.

VI. INFORMATION AND CONSULTATION AND COLLECTIVE RIGHTS IN PLATFORM WORK: REPRESENTATIVES OF EMPLOYEES AND SELF-EMPLOYED WORKERS

The absence of a workplace, the lack of connection between workers and the competitiveness are factors that weaken the collective feeling and the rights of workers' representatives. The Platform Work Directive, with the intention of promoting effective social dialogue, recognises several prerogatives for workers' representatives. It should be noted that the Directive makes a clear distinction between representatives of employees and representatives of self-employed workers. Two types of rights can therefore be distinguished according to their personal scope of application.

1) Rights granted to representatives of employees and to representatives of self-employed workers, which would be: the right to opinion when carrying out the data protection impact assessment of automated systems required by Art. 35(1) GDPR [Art. 8(1)] and to receive the result of such assessment [Art. 8(2)]; the right to receive the same information provided to persons performing platform work under Art. 9(1); the right to receive comprehensive and detailed information about all relevant automated systems and their features at their request, prior to their use or prior to the introduction of changes affecting working conditions, the organisation of work or monitoring work performance [Art. 9(4)]; the right to receive information on the evaluation made under Art. 10.1 on the effects of the decisions of automated systems [Art. 10(4)]; the right to request a review of an automated decisions on behalf of the persons performing platform work [Art. 11(2)]; the right to receive information on the number of persons performing platform work, disaggregated by level of activity and the contractual status, the general terms and conditions applicable to those contractual relationships, the average duration of the activity, the average weekly number of hours worker per person, the average in-

come from activity of persons performing platform work on a regular basis and the intermediaries the digital platform has a contractual relationship with [Art. 17(1)]; and the right to use the communication channel created by the platform, through its digital infrastructure, to enable people performing platform work to communicate with each other privately (Art. 20).

The recognition of such rights for representatives of self-employed workers could be seen as furthering the Commission's commitment to 'personal work' as worthy of protection in collective bargaining.⁶³ However, it should be stressed that the rights conferred on the representatives of self-employed workers are not based on the collective protection of the latter's working conditions. As stated above, the Platform Work Directive is not intended to grant employment-type rights to self-employed worker on digital labour platforms, nor to put them on an equal footing with employees, despite the similarities between them. It only aims to provide them with effective protection as data subjects against algorithmic management. Thus, Art. 15 specifies that representatives of self-employed workers may only exercise such collective rights if they act on behalf of self-employed workers regarding the protection of their personal data.

2) Collective rights granted only to employees' representatives. Art. 13 of the Platform Work Directive reserves information and consultation rights, as measures of an employment nature, for employees' representatives and, in the absence of such representatives, for the employees.⁶⁴ Thus, based on the obligations already provided for in Directive 2002/14/EC,⁶⁵ a new circumstance is introduced on which the platform, as the employer, must inform and consult the employees' representatives: decisions on the introduction or substantial modification of automated monitoring or decisions-making systems [Art. 13 (1) and (2)]. This would be a procedure of exchange of views and dialogue within the meaning of Art. 2(f) and (g) of Directive 2002/14/EC. Accordingly, the employees' representatives or the employees concerned should give an opinion on the platforms' proposal. In the preparation of this opinion, they could be assisted by an expert of their choice due to the technical complexity of the issues to be discussed. The cost of that expert shall be borne by the platform if they are proportionate, and the platform has more than 250 employees in the Member State concerned [Art. 13(3)]. If the decision is to be communicated and consulted directly to the employee, in the absence of rep-

⁶³ Commission' Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 374/02).

⁶⁴ Recital 54.

⁶⁵ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

representatives, the platform shall provide them with a written document setting out the information in a transparent, intelligible and easily accessible form, using clear and plain language (Art. 14).

The EU is aware that the variety of digital platforms makes it difficult for these information and consultation rights to be applied in a homogeneous way, bearing in mind, moreover, that representatives will not have the same degree of impact in offline and online digital platforms. In addition, there are two important reasons that can undermine the effectiveness of information and consultation rights. Firstly, the fragmentation of the workforce caused by outsourcing through intermediaries. Secondly, the difficulties in adapting the concepts of undertaking and establishment on which Directive 2002/14/EC is based, specially from a spatial point of view on online platforms.⁶⁶ For this reason, Article 28 of Platform Work Directive legitimates the social partners to maintain, negotiate, conclude and enforce collective agreements establishing different provisions on the right to information and consultation in platform work. Ultimately, such provision is in line with Article 25, which calls on Member States to take appropriate measures to promote the role of social partners and to encourage the exercise of the right to collective bargaining at work on digital platforms.

VII. TRANSPARENCY OBLIGATION OF DIGITAL LABOUR PLATFORMS VIS-À-VIS NATIONAL AUTHORITIES

The Platform Work Directive aims, as one of its objectives, to increase control by authorities over less visible digital platforms, i.e. those that are established in a Member State other than the one in which the person performing platform work provides his or her services. Therefore, digital platforms are obliged to declare the work performed by their employees to the authorities of each Member State in which the work is performed (Art. 16) and to transmit to them every six months (or every year in the case of small or medium-size enterprises) the same information which they are required to make available to representatives under Art. 17(1) of the Directive. This would indirectly address the challenge of the cross-border nature of digital platforms by ensuring that

⁶⁶ See ALOISI, A., RAINONE, S. and COUNTORIS, N., *An unfinished task? Matching the Platform Work Directive with the EU and international 'social acquis'*, ILO Working Paper 101 (Geneva, 2023), pp. 20-21.

they comply with the labour and social security rules of all Member States in which they provide their services.

VIII. PROCEDURAL IMPLICATIONS OF THE RIGHTS CONFERRED BY THE PLATFORM WORK DIRECTIVE

So far, most of the legal proceedings on digital platform work have concerned the delimitation of the employment relationship, initiated either by the workers themselves, on an individual basis, or by the authorities, following inspections. Once the Platform Work Directive is transposed, it is likely that qualification proceedings will increase in the short and medium terms. However, once market actors adjust, other objects of litigation would emerge, such as those linked to data protection or algorithmic discrimination, and the subjects at the head of such litigation could also change.

Article 19 of the Platform Work Directive recognises representatives of the persons performing platform work, i.e. representatives of employees and self-employed workers, and entities with a legitimate interest the right to initiate proceedings in support of or on behalf of persons performing platform work in accordance with national law. Through this measure, the EU strengthens the role of certain organisation, such as trade unions, as guarantors of the directives.

The Platform Work Directive also ensures that the possible increase in litigation does not lead to a lack of protection for workers. For this reason, Articles 22 and 23 provide for the protection of platform workers, both self-employed and employees, against adverse treatment or consequences for having exercised the rights laid down in the Platform Work Directive or for having lodged a complaint against the digital platform. Adverse treatment expressly includes dismissal or termination of contract, as well as any preparatory acts. Accordingly, persons performing platform work who suspect that they have been dismissed or that their contract has been terminated for exercising their rights can request the digital platform to provide duly substantiated grounds for the termination of the contract in writing and without undue delay [Art. 23(2)]. In addition, the burden of proof in that case is reversed, with the onus being on the platform to prove in the proceeding that the dismissal or termination of the contract was based on reasons unrelated to the person performing platform work's claim [Art. 23(3)].

The exercise of algorithmic management rights gives a whole arsenal of evidence to persons performing platform work and their representatives. With-

out prejudice to the above, Art. 21 of the Platform Work Directive contains another obligation of transparency for platforms, in this case referring to courts or competent authorities. In proceedings concerning the provisions of the Platform Work Directive, these public bodies could order the platform to disclose any relevant evidence which lies in their control [Art. 21(1)], including those containing confidential information where relevant to the proceeding [Art. 21(2)].

Finally, infringements of rights under the Platform Work Directive will give the persons performing platform work a right to redress, including adequate compensation for the prejudice suffered (Art. 18). It will be up to the Member States to provide, in such circumstances, for administrative or criminal penalties.

IX. CONCLUSIONS: A BALANCE BETWEEN PROTECTION AND INNOVATION

The Platform Work Directive is presented as balanced, innovative, protective and consistent with the judicial development of the Member States and the EU itself. Such a degree of coherence denotes an important preliminary work in which the perspective of the social partners and the results of academic research have been considered. However, as is usual for rules that take the form of a directive, most of the success of its measures will depend on transposition by Member States.

The EU's competence limitations, the lack of a specific model and the commitment to a moderate presumption mean that the re-qualification of platform workers will remain in the hands of national judicial bodies and will proceed at different paces. Member States will not only have to reconcile such a presumption with their normative and jurisprudential *acquis* on the concept of employee. They will also have to decide how they transpose the presumption, i.e. whether they choose to maintain a generic presumption, to be developed in case law, or whether they specify in the legislation what are the criteria that trigger the presumption. The second option, which is more favourable for platform workers from a procedural point of view, will be more feasible in those Member States that already have presumptions of employment in their legal system and have a broad concept of employee. The risk lies, then, in those Member States that have a strict concept of 'control and direction' and opt for a transposition of *minimums*, making it difficult for the court to assess and apply the presumption to offline and, especially, online platform workers.

Measures relating to transparency and algorithmic management rights are also exposed to the different points of view of Member States. The Plat-

form Work Directive opens a new era of accountability, but it does so through generic mandates. The monitoring or evaluation duties of the platforms will have to be developed and specified in each Member State, thus bringing into play different appreciations of the burdens imposed on employers, the extent of responsibilities to subcontractors or, finally, the systems of workers' representative legitimacy.

Notwithstanding the above, the fact remains that the Directive adds another piece to the complex mosaic of rules governing data protection of individuals and of workers. The measures contained therein make a decisive contribution to the EU digital transformation and to the implementation of a human approach among the technology that governs the workforce. However, they can create a double layer of protection. Because of the Platform Work Directive, platform workers will have more rights than workers in 'traditional' sectors that do not provide services through platforms but are also algorithmically managed, as the latter will have recourse only to the safeguards of the GDPR, which are not designed for the employment sphere. The focus is undoubtedly on social partners, who could take the algorithmic management measures of the Platform Work Directive as an example to collectively regulate the uses of technology in the workplace. In the meantime, the debate around digital platform work adds new chapters that will shape the future of the labour law in the Member States.

CHAPTER 18

FIXED-TERM CONTRACTS
(COUNCIL DIRECTIVE 1999/70/EC OF JUNE 28, 1999)

JOAQUÍN PÉREZ REY AND EMMA RODRÍGUEZ RODRÍGUEZ

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I. BACKGROUND OF THE REGULATION OF FIXED-TERM WORK
IN EUROPE

The origin of the community regulation of fixed-term contracts lies in the observation that since the mid-1970s, with varying intensity, labour law

in many European countries, due to the employment crisis, had been generating contractual formulas that deviated from the typical model of labour relations: the indefinite full-time contract, the *polar star* of labour regulations, as Romagnoli¹ pointed out. The emergence and extension of what was then referred to as atypical work created a need within the institutions of the European Community to harmonize the conditions under which states should allow deviations from the prototypical formula of labour relations.

The path that ultimately led to Council Directive 1999/70/EC of June 28, 1999², concerning the framework agreement on fixed-term work concluded by ETUC, UNICE, and CEEP, was not precisely straightforward. Attempts to address fixed-term work from the community level date back to the early 1980s³ and represent a succession of failures, which are quite common in the slow European machinery, especially when it comes to tackling issues embedded in social policy.

It was European collective autonomy that managed to overcome this long wave of unfinished projects by reaching a consensus on a regulation, certainly minimal compared to previous attempts, regarding fixed-term labour relations. The Framework Agreement on Fixed-Term Work achieved by the ETUC, UNICE, and CEEP represents a significant milestone in what was then referred to as the development of the conventional dimension of community social law, and its effectiveness was ensured through the expedient method of “elevating” the outcome of the negotiations to the level of a directive⁴. A “strong agreement,” as it was doctrinally maintained.

Moreover, this is a norm that is part of a broader and more ambitious project to address, from a European scale, the most important and common manifestations of deviation from indefinite full-time contracts, such as, alongside temporary employment, part-time work or temporary work that falls within the triangular phenomenon of temporary-work agencies. These two additional manifestations of the breakdown of the labour contractual

¹ ROMAGNOLI, Umberto: *El Derecho, el trabajo y la historia*. Madrid: CES, 1997, p. 170.

² “Throughout this work, we will refer to this regulation, for the sake of brevity, as Directive 99/70.”

³ The path began with a Council Proposal for a Directive on temporary work and fixed-term contracts from 1982. The Community Charter of the Fundamental Social Rights of Workers of 1989 also, despite its limited effectiveness, made reference to atypical work in Article 7. The Charter led to other attempts to regulate fixed-term work, of which only the one related to occupational safety and health succeeded, embodied in Directive 91/383/EEC of the Council, of 25 June 1991, supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship.

⁴ This circumstance—namely, that we are dealing with a Directive that almost exclusively incorporates, to enhance its effectiveness, a European social dialogue Agreement—means that throughout the text we will refer interchangeably and for the sake of brevity to either the Directive or the Agreement, with the understanding that the normative clauses are those of the Agreement, which is attached as an annex to Directive 99/70.

paradigm, whose European regulation also takes the form of a directive, are discussed in other chapters of this book to which we refer.

The compromise solution reached regarding fixed-term work and its final incorporation into a directive, which requires state intervention to be fully operational, did not suggest significant changes in the ways various European legal systems had previously approached temporary employment.

However, the apparent modesty of the Directive did not prevent it from gradually revealing interpretative problems under what is now the Court of Justice of the European Union (ECJ⁵). The re-emergence of Directive 99/70 into the spotlight, driven by the ECJ's rulings of September 2016⁶ and subsequent ones that we will address in these pages⁷.

II. THE MAIN GUIDELINES OF THE EU AGREEMENT ON FIXED-TERM WORK⁸

Precisely because we are dealing with an agreement, the regulation incorporated into the Directive operates with calculated ambiguity, and some of its core statements are left in the recitals. In this regard, the ECJ firmly states that the Agreement does not establish under what conditions indefinite employment contracts may be used or under what conditions fixed-term contracts may be used⁹. Thus, among other matters, it falls outside its scope and is left exclusively to the national court to assess whether the fixed-term clause has operated correctly in terminating the contract¹⁰.

⁵ We will use this abbreviation generally, without distinguishing the changes in the Tribunal's name over its history.

⁶ . The judgments we are referring to are all dated 14 September 2016: *Diego Porras* (C-596/14, EU:C:2016:683) *Martínez Andrés* (Joined cases C-184/15 and C-197/15, EU:C:2016:680); and *Pérez López* (C-16/15, EU:C:2016:679).

⁷ The most recent ones are the ECJ judgments of 22 February 2024 (Joined cases C-59/22, C-110/22, and C-159/22, EU:C:2024:149;) and 13 June 2024, *Generalitat de Catalunya* (Joined cases C-331/22 and C-332/22, EU:C:2024:496)..

⁸ Although throughout the text we will use the concepts of fixed-term contracts, as referred to by the Directive, and temporary contracts interchangeably, it is important to note that from the perspective of EU law, these concepts are not entirely synonymous. Directive 1991/533/EEC, when discussing temporary contracts, has provided the ECJ the opportunity to assert that this term does not equate to fixed-term contracts as defined in Directive 1999/70, but rather refers to short-term relationships, see judgment of 18 December 2008, *Ruben Andersen* (C-306/07, EU:C:2008:743).

⁹ Judgments of 21 November 2018, *Viejobueno Ibáñez and de la Vara González*, (C-245/17, EU:C:2018:934), para. 36; 18 October 2012, *Valenza* (C-302/11, EU:C:2012:646), para. 63; 14 September 2016, *Martínez Andrés* (Joined cases C-184/15 and C-197/15, EU:C:2016:680), para. 39.

¹⁰ Judgment of 21 November 2018, *Viejobueno Ibáñez and de la Vara González* (C-245/17, EU:C:2018:934), para. 45.

Keeping this in mind, and without ignoring its ambiguities, the Agreement is based on a traditional understanding of employment stability, which considers that “employment contracts of an indefinite duration are the general form of employment relationships and contribute to the quality of life of the workers concerned and improve performance” (General Consideration No. 6). Therefore, there is no attempt to conceal the preferential treatment towards indefinite employment contracts, which continue to be viewed as the typical employment relationship, and whose scope should be preserved by ensuring that temporary contracts, which are an exception, respond to objective circumstances, as this is a suitable formula for preventing abuse (General Consideration No. 7). In brief: stability is the rule, and temporality is the exception, though it is acknowledged—here is a clear example of the ambiguity mentioned—that “fixed-term contracts are a feature of employment in certain sectors, occupations, and activities, which can suit both employers and workers,” thus it is necessary to take into account “the circumstances of particular sectors and occupations, including the activities of a seasonal nature” (General Consideration Nos. 8 and 10). This does not seem to undermine the classic understanding of stability since the apparent expansion of the scope of temporary hiring is carried out for seasonal or sectoral reasons, which are, in sum, objective considerations. Therefore, the European Agreement does not promote temporary hiring but adopts a clearly restrictive view of it, which the ECJ confirms by stating that “the benefit of stable employment is viewed as a major element in the protection of workers, whereas it is only in certain circumstances that fixed-term employment contracts are liable to respond to the needs of both employers and workers.”¹¹

Finally, the general considerations point out that the signatories of the Agreement are aware of the greater impact that fixed-term employment has on women, and they understand that the Agreement contributes to improving equality of opportunity. This creates a close link between discrimination arising from the duration of the employment contract, which is the focus of the Directive, and other more classic, if you will, grounds of discrimination. This relationship may become significant as an additional argument for supporting the inclusion in Article 21(1) of the CDFUE of the prohibition of discriminatory treatment under Clause 4 of the Agreement.

¹¹ Judgments of 21 September 2016, *Popescu* (C-614/15, EU:T:2016:675), para. 37; 4 July 2006, *Adeneler*, (C-212/04, EU:C:2006:443), para. 62; 3 July 2014, *Fiamingo* (C-362/13, EU:C:2014:204), para. 55; 26 November 2014, *Mascolo* (C-22/13, EU:C:2014:204), para. 73.

This is, as we will see, of decisive importance for the potential direct effect of the Directive in relations between individuals.

Leaving aside the general considerations, which remain relevant for assessing the true scope of the Agreement, the strictly regulatory part of the Directive focuses on a series of aspects that we will examine in more detail later on, and that we now only briefly outline to provide an overview of the EU's regulation of temporary employment, or fixed-term employment, in the terminology of the Agreement.

A European definition of a fixed-term contract is introduced, which has proven useful to avoid certain national particularities and generating a uniform interpretation of certain aspects of temporality across the EU.

Substantively, the Directive guarantees the rights of temporary workers through two main elements, which, as we will see, operate very differently:

- a) The principle of non-discrimination of fixed-term workers compared to permanent workers, and
- b) The establishment of a binding commitment for Member States to prevent abuses in the successive use of fixed-term contracts.

Other aspects recognized by the Directive are of lesser significance, but they also aim to ensure non-discrimination against temporary workers, seeking to create opportunities for their permanent integration into companies and thus avoid the “trap” of temporality. This is the case with the right to information under Clause 6, which aims to guarantee that temporary workers have the same opportunities to access permanent positions as other workers. Or, in the same clause, the business obligation to facilitate “access by fixed-term workers to appropriate training opportunities to enhance their skills, career development, and occupational mobility.” Finally, temporary hiring cannot artificially reduce the workforce size for representation purposes, meaning that temporary employment relationships must be “taken into consideration in calculating the threshold above which workers’ representative bodies provided for in national and Community law may be constituted,” and, where possible, employers will seek to provide these bodies with appropriate information on fixed-term work in the company (Clause 7).

The implementation of the Agreement, covered in Clause 8, stands out for two elements that have generated the most interpretative challenges, especially the second one. Firstly, Member States and social partners are allowed to maintain or introduce more favorable provisions for workers than those provided for in the Agreement. Secondly, it is explicitly stated that the

application of the Agreement's provisions "shall not constitute a valid justification for reducing the overall level of worker protection" in the area of fixed-term contracts. We will later examine what conclusions the ECJ has drawn from these indications.

In any case, and although it is an obvious point, it is worth emphasizing that the Agreement "does not aim to harmonize all national rules regarding fixed-term employment contracts, but rather seeks, by setting general principles and minimum standards, to establish a general framework for ensuring equal treatment of workers with fixed-term contracts, protecting them against discrimination, and preventing abuses arising from the successive use of fixed-term contracts or employment relationships of this type"¹². The Directive explicitly leaves out the designation of national competent authorities and the procedural regulation of judicial remedies aimed at ensuring its application. Instead, Clause 8.5 of the Agreement refers this matter to national legislation, collective agreements, and practices¹³.

Therefore, given its limitations, the Agreement has not been overly effective in preventing "causal" temporality or employment-motivated reasons, especially when applied in isolation¹⁴. For instance, in *Mangold*¹⁵ it was determined that the Directive did not extend to conditioning age reductions for the conclusion of fixed-term contracts without any limit, as this is related to encourage employment of older workers in Germany and does not stem from the need to apply the framework Agreement but rather from the promotion of employment. Similarly, the *Abercrombie* case should also be mentioned¹⁶. In this case, although the Directive 99/70 was not under discussion, but rather age discrimination under Directive 2000/78/EC, the ECJ, somewhat excessively in our view, held that Member States have broad discretion not only in choosing specific social and employment policy objectives but also in defining the measures to achieve them (paragraph 46), so that "in a context of persistent economic crisis and

¹² Orders of 7 March 2013, *Rivas Montes* (C-178/12, EU:C:2013:150), para. 41; 11 November 2010, *Vino* (C-20/10, EU:C:2010:677) para. 54; 22 June 2011, *Vino* (C-161/11, EU:C:2011:420), para. 27.

¹³ Judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:22), para. 39.

¹⁴ Order of 22 June 2011, *Vino* (C-161/11, EU:C:2011:420), para. 29.

¹⁵ Judgment of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709).

¹⁶ Judgment of 19 July 2017, *Abercrombie* (C-143/16, EU:C:2017:566). Also indirectly related to Directive 99/70: Judgment 18 November 2010, *Georgiev* (C-250/09, EU:C:2010:699), which allows for the exclusive temporary hiring of university professors starting at the age of 65, as this regulation pursues a legitimate objective linked, in particular, to employment policy and the labour market, such as establishing quality education and the optimal distribution of professorship positions among generations, and it enables the achievement of this objective through appropriate and necessary means. See also Judgment of 10 March 2011, *Deutsche Lufthansa* (C-109/09, EU:C:2011:129).

weak growth, the situation of a worker under 25 years of age who, thanks to a flexible and temporary employment contract, can access the labour market is preferable to the situation of one who does not have such an opportunity and who, as a result, is unemployed” (paragraph 42).

We cannot conclude these brief reflections on the Directive without noting the non-regression clause it contains. As previously mentioned, Clause 8 of the Directive prevents the application of the Agreement by Member States from being an opportunity to reduce the level of worker protection in the area covered by the European rule.

The ECJ has on several occasions clarified the scope of this Clause 8.3, which cannot be interpreted restrictively¹⁷, explaining its effectiveness and its temporal and material scope. It is denied that the non-regression clause has direct effect, meaning that individuals cannot derive from it any right that is sufficiently clear, precise, and unconditional. However, this does not preclude the national court’s obligation to interpret it accordingly¹⁸.

As for its temporal scope, Clause 8.3 naturally conditions the initial transposition of the Directive, but it also has an effect on subsequent reforms, so that “it refers not only to the original transposition of the Directive 1999/70 [...], but must also cover all domestic measures intended to ensure that the objective pursued by the directive may be attained, including those which, after transposition in the strict sense, add or amend domestic rules previously adopted”¹⁹.

Regarding the material scope of the non-regression clause, it refers to “all the domestic legal provisions relating to fixed-term employment contracts” and not exclusively to the rules governing successive fixed-term employment contracts²⁰. To determine whether there has been a reduction in the level of protection, a global comparison of national regulations must be made, not through a “cherry-picking” approach, which allows for the conclusion that Clause 8.3 is not affected when restrictions are limited to a specific category of fixed-term employment contracts or are compensated by the adoption of other measures compatible with the Directive²¹.

¹⁷ Judgments of 23 April 2009, *Angelidaki et al* (C-378/07, EU:C:2009:250) para. 113; 24-6-10, 24 June 2010, *Sorge* (C-98/09, EU:C:2010:369) para. 34.

¹⁸ Judgment of 23 April 2009, *Angelidaki et al* (C-378/07, EU:C:2009:250) para. 210-211.

¹⁹ Judgment of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709) para. 51.

²⁰ Judgment of 23 April 2009, *Angelidaki et al* (C-378/07, EU:C:2009:250) para. 120 y 121; order of 23 November 2009, *Lagoudakis* (C-162/08, EU:C:2009:727); judgment of 24 June 2010, *Sorge* (C-98/09, EU:C:2010:369), para. 35.

²¹ Judgment of 23 April 2009, *Angelidaki et al* (C-378/07, EU:C:2009:250) para. 146; order of 23 November 2009 *Lagoudakis* (C-162/08, EU:C:2009:727); order of 24 April 2009, *Koukou* (C-519/08, EU:C:2009:269); judgment of 24-6-10, *Sorge* (C-98/09, EU:C:2010:369) para. 47; order of 28 January 2011, *Berkizi* (C-272/10, EU:C:2011:19).

That said, this material scope is limited to domestic legislative measures that implement or enforce the Agreement ²², but it does not extend to areas that, although related to temporary employment, are not part of the Directive's, implementation ²³, which, it should be noted, does not regulate this sector comprehensively.

As can be seen from the quick overview described, the content of the Agreement is not overly ambitious, but it has nonetheless led to significant case law developments, exceeding all expectations. Without considering rulings where the Directive had some indirect impact on the relationships between European institutions and their temporary agents ²⁴, the European Agreement on Fixed-Term Contracts has been analyzed by the ECJ (we are now referring to the Court of Justice) in more than fifty cases, with strong participation from southern European countries: Italy, Greece, and certainly Spain.

Notably, the transposition technique, which largely downplayed the scope of the European Agreement, has created a chaotic situation in public-sector temporary employment, resulting in intense judicial activity and subsequent ECJ decisions that reveal a critical and severe tone regarding the situation in some countries, like Spain ²⁵. Additionally, the Directive's presence in ECJ decisions has increased recently and is likely to continue growing.

III. THE SCOPE OF APPLICATION OF THE AGREEMENT

1. Broadness of the Definition of Fixed-Term Workers

At first glance, and unlike what occurs in other areas of EU law, Directive 99/70 refers to national laws to determine its scope. Clause 2.1 of the Agreement defers to the legislation, collective agreements, or practices in force in each Member State to define the contracts and employment relationships to

²² Judgment of 23 April 2009, *Angelidaki et al* *Angelidaki et al* (C-378/07, EU:C:2009:250), para. 209.

²³ Judgments of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709), para. 54 (Contracts to promote the employment of elderly workers in Germany); 23 April 2009, *Angelidaki et al* (C-378/07, EU:C:2009:250), para. 135 (to ensure objective access to public employment); order of 11 November 2010, *Vino* (C-20/10, EU:C:2010:677) (to dispense with the need to specify the objective reasons justifying the use of a fixed-term contract).

²⁴ There is a range of decisions from the General Court and the former Civil Service Tribunal in this regard. It should be noted that, although the provisions of Directive 99/70 do not impose obligations on the Council or the Commission, as they are addressed to the Member States, to the extent that these provisions reflect general principles of EU law, they could bind those institutions.

²⁵ Judgment of 22 December 2010, *Gavieiro Gavieiro and Iglesias Torres* (Joined cases C-444/09 and C-456/09, EU:C:2010:819).

which the Agreement applies²⁶. However, this referral cannot arbitrarily exclude any category of individuals from the Agreement, as would be the case if purely formal qualifications imposed by national legislators did not align with the true nature of the employment relationships²⁷. This situation, combined with the definition of temporary worker, which we will now examine, leads in practice to an expansive effect of the European Agreement, though not unlimited or entirely closed to interpretations of national law²⁸.

While the scope of the Agreement is broad, so is the definition of a fixed-term worker, which has effectively encompassed a wide range of temporary relationships, as we shall see. The Directive defines a fixed-term worker as “a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event” (Clause 3.1).

Therefore, we are dealing with a generous scope of application, as repeatedly emphasized by the ECJ, which has elaborated on this broadness to ensure effective harmonization of national regulations that:

a) It is consistent with the pivotal role of the principles of equal treatment and non-discrimination in EU law. These principles should be granted a general scope as they entail key EU social law rules, which must protect all workers, being a minimum protective requirement.²⁹

b) It seeks uniform application of the Directive across Member States and guarantees its effectiveness, preventing national particularities from allowing states to arbitrarily exclude certain categories of people from the protection required by these Union instruments³⁰.

²⁶ Judgments of 15 March 2012, *Sibilio* (C-157/11, EU:C:2012:148) para. 42; 11 April 2013, *Della Rocca* (C-290/12, EU:C:2013:235) para. 35.

²⁷ Judgment of 15 March 2012, *Sibilio* (C-157/11, EU:C:2012:148) para. 49. Order of 26 April 2022, *Universitat de Barcelona* (C-464/21, EU:C:2022:337) para. 25.

²⁸ Thus, for example, in the case of Italian ‘socially useful workers,’ one potential ground for exclusion may stem from the fact that they do not benefit from an employment contract defined as such by the legislation, collective agreements, or current practices in each Member State (Judgment of 15 March 2012, *Sibilio* (C-157/11, EU:C:2012:148).

²⁹ Judgments of 13 September 2017, *Del Cerro Alonso* (C-307/05, EU:C:2007:509), para. 27; 9 July 2015, *Regojo Dans* (C-177/14, EU:C:2015:450), para. 32.

³⁰ Judgment of 13 September 2017, *Del Cerro Alonso* (C-307/05, EU:C:2007:509), para. 29. Order of 26 April 2022, *Universitat de Barcelona* (C-464/21, EU:C:2022:337), para. 25, regarding the conversion of an employment relationship into ‘indefinite but non-permanent’ as a penalty for the successive misuse of fixed-term contracts.

2. Specific National Features of Temporary Employment

The requirement for uniform application of the Agreement has led to the irrelevance of a broad group of features in temporary relationships to which the Directive aspires to apply. This has been the case with:

a) The nature of the employer: The Agreement encompasses all workers, without distinction based on whether the employer is public or private ³¹. Thus, the first avenue is opened for the Directive to have a broad impact on public employment in each Member State, especially in those states most involved in controversies regarding temporary employment before the ECJ. If the nature of the employer is irrelevant, the same applies, perhaps even more so, to the classification of the contract under national law ³².

It seems that a unique EU legal concept emerges, unshaken by potential national law conditions and justified, despite the literal wording of Clause 2.1 of the Agreement, by the aim to prevent arbitrary state exclusions. In this context, all workers with fixed-term employment are considered those whose relationship is characterized by the end being “determined by objective conditions such as a specific date, the completion of a particular task, or the occurrence of a specific event,” even if this termination occurs automatically when the person for whom the duties are discharged ceases to hold his post ³³. Similarly, it is irrelevant whether an employment is classified as “permanent” under national law, even when it includes elements characteristic of public functions ³⁴ or when it involves a type of “non-permanent” indefinite employment as a penalty for successive abuses of fixed-term contracts.

b) Irrelevance of sectoral characteristics in temporary work: Although general considerations of the Agreement suggested that temporary employment might play a role based on sector-specific features, the Directive does not exclude any particular sector from its scope. It applies, as a

³¹ Judgments of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859), para. 43; 14 September 16, *Pérez López* (C-16/15, EU:C:2016:679), para. 24; 4 July 2006, *Adeneler* (C-212/04, EU:C:2006:443), para. 55-57; 13 March 2014, *Márquez Samohano* (C-190/13, EU:C:2014:146) para. 38; 3 July 2014, *Fiamingo* (C-362/13, EU:C:2014:2044) para. 28 y 29; 26 November 2014, *Mascolo* (C-22/13, EU:C:2014:2401) para. 67; 13 January 2022, *MIUR and Ufficio Scolastico Regionale per la Campania* (C-282/19, EU:C:2022:3), concerning Catholic religion teachers in public schools.; 11 February 2021, *M.V. and Others* (C-760/18, EU:C:2021:113).

³² See the judgments cited in the previous note.

³³ Judgment of 9 July 2015, *Regojo Dans* (C-177/14, EU:C:2015:450) para. 35.

³⁴ Judgment of 13-9-07, *Del Cerro Alonso* (C-307/05, EU:C:2007:509), para. 29.

matter of example, to construction³⁵, education³⁶ or ferry services operating between two ports in the same Member State³⁷.

Although one might think the obligations deriving from the Directive apply solely to common labour relationships and not to those outside the labour system, this conclusion is clearly erroneous. The ECJ's broad interpretation of the European Agreement has led to disregarding the legal nature assigned by national law to temporary relationships in public employment.

The ECJ has so far included the following temporary administrative relationships within the scope of the Agreement: - Interim civil servants³⁸; – Temporary regulated staff³⁹; – Non-permanent staff⁴⁰.

The frequent use of these types of relationships (especially the first two), explains why they are recurrently analyzed by ECJ case law. However, this does not rule out the possibility of extending this criterion to other types of temporary public employment relationships, regardless of their particularities.

In this vein, note that the ECJ has also incorporated into the scope of the Agreement, beyond its conclusions, categories such as professors⁴¹, assistant professors⁴² or retired professors who do not have doctoral supervisor status⁴³, which are specific to the university sector. More recently,

³⁵ Judgment of 24 June 2021, *Obras y Servicios Públicos and Acciona Agua* (C-550/19, EU:C:2021:51). The judgment held that the so-called 'specific construction project worker' was not justified by objective reasons and considered that the national legislation was not in compliance with the Agreement.

³⁶ Judgment of 26 November 2014, *Mascolo* (C-22/13, EU:C:2014:204) para. 69.

³⁷ Judgment of 3 July 2014, *Fiamingo* (C-362/13, EU:C:2014:2044).

³⁸ Temporary tenured university teachers (Order of 9 February 2017, *Rodrigo Sanz* (C-443/16, EU:C:2017:109); Temporary secondary education teacher (Order of 21 September 2016, *Álvarez Santirso* (C-631/15, EU:C:2016:725); Temporary official of a municipality (judgment of 14 September 2016, *Martínez Andrés* (Joined cases C-184/15 and C-197/15, EU:C:2016:680); Temporary non-university civil servant teacher (order of 9 February 2012, *Lorenzo Martínez* (C-556/11, EU:C:2012:67); Former temporary official of the Junta de Andalucía (judgment of 8 September 2011, *Rosado Santana* (C-177/10, EU:C:2011:557); Former temporary civil servant teachers of the Autonomous Community of Galicia (judgment of 22 October 2010, *Gavieiro Gavieiro and Iglesias Torres* (Joined cases C-444/09 and 456/09, EU:C:2010:819); Temporary official of administrative and service staff of the University (order of 22 March 2018, *Centeno Meléndez* (C-315/17, EU:C:2018:207).

³⁹ Temporary statutory personnel of the Basque Health Service (judgment of 14 September 2016, *Martínez Andrés* (Joined cases C-184/15 and C-197/15, EU:C:2016:680); 13-9-07, *Del Cerro Alonso* (C-307/05, EU:C:2007:509); Temporary event-based statutory personnel of the Madrid Health Service (judgment of 14 September 16, *Pérez López* (C-16/15, EU:C:2016:679); Personnel of the Aragonese Health Service (judgment of 3 June 2021, *Servicio Aragón de Salud* (C-942/19, EU:C:2021:440).

⁴⁰ Event-based personnel of the Council of State (Judgment of 9 July 2015, *Regojo Dans* (C-177/14, EU:C:2015:450).

⁴¹ Judgment of 13 March 2014, *Márquez Samohano* (C-190/13, EU:C:2014:146), para. 39.

⁴² Order of 18 March 2011, *Montoya Medina* (C-273/10, EU:C:2011:167).

⁴³ Judgment of 8 October 2020, *Universitatea «Lucian Blaga» Sibiu* (C-644/19, EU:C:2020:810).

Italian justice of the *Giudice di pace* (Magistrate)⁴⁴ and Catholic religion teachers appointed by ecclesiastical authority have also been included⁴⁵.

3. Materially Temporary Relationships

The Directive also raises another question: whether it applies to relationships that national law defines as indefinite but whose design allows for a materially temporary use. The ECJ ruled that a one-year probation period, for instance, does not fall under the European definition of a fixed-term worker⁴⁶.

However, the ECJ has also included “non-permanent indefinite workers” under Directive 99/70⁴⁷, establishing a material notion of fixed-term relationships that cannot be altered by national law. In the ECJ’s view, non-permanent indefinite workers are clearly within the scope of the framework agreement, and the contract’s title is irrelevant since it is essentially a sanction for the abusive use of successive fixed-term contracts without altering the nature of those contracts.

For the ECJ, fixed-term workers with indefinite contracts are clearly within the scope of the Framework Agreement, and the name give to the contract is irrelevant, as it has essentially been turned into an indefinite contract as a sanction do to the abusive use of successive fixed-term contracts which does not alter the nature of these contracts (para. 41).

However, the debate about whether fixed-term workers with discontinuous contracts are truly temporary or not remains uncertain in light of recent judicial decisions. The ECJ appeared to maintain the temporary nature of non-permanent fixed-term workers in the context of Directive 99/70, as seen in several paragraphs of judgment of 25 July 2018, *Vernaza Ayovi* (C-96/17, EU:C:2018:603)⁴⁸. Indeed, domestic rules traditionally prevent public administrations from granting non-permanent status to their temporary staff, except when mandated by a court decision. This prohibition,

⁴⁴ Judgment of 7 May 2022, *Ministero della Giustizia e.a. and Others* (C-236/20, EU:C:2022:263).

⁴⁵ Judgment of 13 January 2022, *MIUR and Ufficio Scolastico Regionale per la Campania* (C-282/19, EU:C:2022:3).

⁴⁶ Judgment of 5 February 2015, *Nisttahuz Poclava* (C-117/14, EU:C:2015:60), para. 35-38.

⁴⁷ Order of 11 November 2014, *León Medialdea* (C-86/14, EU:C:2014:2447).

⁴⁸ However, it should be noted that the ECJ leans towards the temporary nature of such contracts because “the referring court states that, by the criteria laid down in national law, an employment contract such as that of Ms. Vernaza Ayovi must be regarded as a fixed-term employment contract.” This does not preclude a change in response to the evolution of domestic law.

which prevents administrations from amending their errors, challenges the effective implementation of Directive 99/70⁴⁹.

The jurisprudence surrounding non-permanent fixed-term workers and the issue of abusive temporary employment has given rise to significant cases and their treatment by the ECJ, particularly related to Spain. Specifically, the IMIDRA case addresses the abuse of interim contracts due to vacancies within public administration, where the employment relationship ends upon regulatory coverage of the position⁵⁰. The ECJ concludes that “the national legislation ... as interpreted by the national case-law, does not appear to include ... measures to prevent the abusive use of successive fixed-term employment contracts, within the meaning of Clause 5(1)”. It reiterates that a national law prohibiting the conversion of temporary contracts into indefinite contracts is not contrary to the Directive, provided that there are “another effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts”, otherwise, it would undermine the Directive’s effectiveness.

More recently, as will be discussed in the following pages, two judgments from the Court of Justice have revisited the issue of abuse in temporary public employment contracts.

On one hand, compensation and the stabilization process are not solutions to the abuse of temporary contracts in public employment; this ruling seemed to favor converting abusive temporary contracts into “non-permanent fixed-term” contracts as a sanction⁵¹. On the other hand, in its latest judgment, the ECJ clarified the need to respect national law, stating that “(...) the conversion of those successive fixed-term contracts or relationships into an employment contract or relationship of indefinite duration is capable of constituting such a measure, provided that that conversion does not entail an interpretation of national law that is *contra legem*⁵²”.

In other words, the ECJ asserts that, in the absence of adequate measures envisaged under national law, converting abusive temporary relation-

⁴⁹ Vid. judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223).

⁵⁰ Judgment of 3 June 2021, *Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario (IMIDRA)* (C726/19, EU:C:2021:439).

⁵¹ Judgment of 22 February 2024, *Consejería de Presidencia, Justicia e Interior de la Comunidad de Madrid*, (Joined cases C-59/2022, C-110/22 and C-159/22, EU:C:2024:149), analyzes the succession of fixed-term contracts in the public sector and suggests that measures such as consolidation processes or possible compensation do not deter the abuse of temporary employment by public administrations.

⁵² Judgment of 13 June 2024, *DG de la Función Pública, Generalitat de Catalunya* (Joined cases C-331/22 and C-332/22, EU:C:2024:496), readdresses the abuse of temporary employment in the public sector and establishes that the conversion of fixed-term contracts into indefinite contracts cannot imply a *contra legem* interpretation of national law.

ships into indefinite employment relationships can be an appropriate measure, as long as it does not imply a *contra legem* interpretation of national law.

4. Exclusions from the Agreement's Scope

The Agreement also defines its scope in negative terms, allowing for the exclusion of certain relationships, such as training relationships or indirect temporary work through temporary-work agencies (TWA).

a) Training relationships under Clause 2(2)

At the discretion of the entities responsible for transposing the Directive and in consultation with social partners, the Agreement allows the exclusion of:

- Initial vocational training and apprenticeship schemes;
- Employment contracts or relationships concluded under specific public training, insertion, or professional retraining programs.

This discretionary power of exclusion must be exercised transparently and controlled to prevent the exclusion of temporary workers unrelated to the categories mentioned in Clause 2(2)⁵³.

b) Workers on assignment from temporary-work agencies (TWA).

The Directive excludes the triangular manifestation of fixed-term work carried out through TWAs, which is governed by its own European regulations. The exclusion of TWAs is anticipated in the preamble of the Agreement⁵⁴.

Once the scope of the Directive is defined, we can address its key elements: the principle of non-discrimination and the prevention of abuses in successive fixed-term employment contracts.

IV. THE PRINCIPLE OF NON-DISCRIMINATION BETWEEN TEMPORARY AND PERMANENT EMPLOYEES

1. Direct Effect of the Principle of Non-Discrimination.

It is essential to note that the ECJ has long asserted that the principle of non-discrimination enshrined in Directive 99/70 has an unconditional and suf-

⁵³ Judgment of 15 March 2012, *Sibilio* (C-157/11, EU:C:2012:148), para. 56.

⁵⁴ Judgment of 11-4-13, *Della Rocca* (C-290/12, EU:C:2013:235), para. 37.

ficiently precise content to be directly invoked by an individual before a court⁵⁵.

This debate was reignited in the *Porras* case, where the core issue was whether the direct application of Directive 99/70 to horizontal relationships could be accepted due to the fact that Clause 4 of the European Framework Agreement embodies a general principle of EU law with a legal foundation in Article 21(1) (non-discrimination) or Article 20 (equality before the law) of the Charter of Fundamental Rights of the European Union (CFR).

Despite the absence of an explicit reference, Article 21(1) open nature would cover discrimination based on the temporary nature of the contract, thereby opening the door to its horizontal effect. Although the ECJ has been specifically asked about this issue, it has not yet ruled on it, deeming it unnecessary to resolve the matter⁵⁶.

As far as Article 20 of the CFR is concerned, the ECJ confirms its link with Clause 4 of the Directive, stating that the latter that the principle of legal equality set out in Article 20 of the Charter applies to fixed-term workers⁵⁷.

The direct effect of the principle of non-discrimination also allows for its retroactive application, without prejudice to national statute of limitation rules, to the date by which Member States should have transposed the Directive, even if retroactive application is excluded by domestic law⁵⁸.

2. Dynamics of the Principle of Non-Discrimination: The Comparison Test and Objective Justifications for Differential Treatment

The operation of Clause 4 begins with its expansive nature. It expresses a principle of EU social law which, as such, cannot be interpreted restrictively⁵⁹. The principle of non-discrimination needs to pass two tests for its application:

⁵⁵ Judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, para. 68; 12-12-13, Carratù C-361/12, para. 28. On the Obligation of Conformity Interpretation, 11 February 2021, *M.V. and Others* (C-760/18, EU:C:2021:113).

⁵⁶ Judgment of 5 June 2018, *Grupo Norte Facility* (C-574/16, EU:C:2018:390) para. 62.

⁵⁷ Judgment of 25 July 2018, *Vernaza Ayovi* (C-96/17, EU:C:2018:603), para. 20. Insisting on this point, judgment of 22 January 2020, *Baldonado Martín* (C-177/18, EU:C:2020:26), para. 56.

⁵⁸ Judgment of 22 October 2010, *Gavieiro Gavieiro and Iglesias Torres* (Joined cases C-444/09 and 456/09, EU:C:2010:819).

⁵⁹ Order of 9 February 2017, *Rodrigo Sanz* (C-443/16, EU:C:2017:109), para. 31; order of 21 September 2016, *Álvarez Santirso* (C-631/15, EU:C:2016:725), para. 33; judgment of 14 September 2016, *de Diego Porras* (C-596/14, EU:C:2016:683) para. 27; 13 September 2007, *Del Cerro Alonso* (C-307/05, EU:C:2007:509), para. 38; judgment of 22 October 2010, *Gavieiro Gavieiro and Iglesias Torres* (Joined cases C-444/09 and 456/09, EU:C:2010:819), para. 49; judgment of 13 March 2014, *Nierodzik* (C-38/13, EU:C:2014:152) para. 24.

a) The temporary worker experiencing discriminatory treatment must be in a comparable situation to a permanent worker. b) The unfavorable treatment must not be justified by objective reasons.

- a) The principle is purely relational, requiring a comparison between the treatment of temporary and permanent workers when both are in comparable situations. This occurs when both perform identical or similar work⁶⁰ considering factors such as the nature of the work, training requirements, and working conditions⁶¹. This is the only valid comparison under EU law, which does not allow for comparisons between temporary workers themselves⁶², although this might be relevant under domestic law (e.g., the Italian debate). Certain temporary employment relationships incorporated into the European Agreement may fail the comparison test if they do not result in comparable situations⁶³.
- b) If the comparison is successful, it is necessary to verify that there are no objective reasons justifying the different treatment. These reasons must be transparent to ensure that the inequality addresses a genuine need, achieves the intended objective, and is essential for that purpose⁶⁴. The ECJ⁶⁵ has identified three causes:
 - 1. The specific nature of the tasks for which fixed-term contracts are made.
 - 2. The inherent characteristics of these tasks.
 - 3. The pursuit of a legitimate social policy objective by a Member State.

⁶⁰ The Directive provides, as previously mentioned, that in the absence of a comparable permanent employee at the same workplace, the comparison shall be made by reference to the applicable collective agreement or, if no applicable collective agreement exists, and in accordance with the legislation, to national collective agreements or practices (Clause 3(2)). Order of 19 September 2024, Consiglio nazionale delle Ricerche (C-439/23, EU:C:2024:773)

⁶¹ Order of 9 February 2017, *Rodrigo Sanz* (C-443/16, EU:C:2017:109), para. 38; judgment of 18 October 2012, *Valenza* C-302/11, EU:C:2012:646), para. 42; judgment of 14 September 2016, *de Diego Porras* (C-596/14, EU:C:2016:683), para. 40; Order of 21 September 2016, *Álvarez Santirso* (C-631/15, EU:C:2016:725), para. 43.

⁶² Judgment of 21 November 2018, *Viejobueno Ibáñez and de la Vara González* (C-245/17, EU:C:2018:934) para. 51; judgment of 14 September 2016, *de Diego Porras* (C-596/14, EU:C:2016:683), para. 38.; order of 11 November 2010, *Vino* (C-20/10, EU:C:2010:677), para. 57.

⁶³ Judgment of 20 December 2017, *Vega González* (C-158/16, EU:C:2017:1014), para. 44. Or Order of 12 June 2019, *Aragón Carrasco* (C367/18, EU:C:2019:487).

⁶⁴ Judgment of 5 June 2018, *Montero Mateos* (C-677/16, EU:C:2018:393), para. 57; 20 September 2018, *Motter* (C-466/17, EU:C:2018:758), para. 37.

⁶⁵ Judgment 20 June 2019, *Ustariz Aróstegui*, (C-72/18, EU:C:2019:516), para. 49. Order of 9 February 2017, *Rodrigo Sanz* (C-443/16, EU:C:2017:109), para. 45; 13-9-07, *Del Cerro Alonso* (C-307/05, EU:C:2007:509), para. 57; judgment of 22 October 2010, *Gavieiro Gavieiro and Iglesias Torres* (Joined cases C-444/09 and 456/09, EU:C:2010:819), para. 55; judgment of 8 September 2011, *Rosado Santana* (C-177/10, EU:C:2011:557), para. 73; judgment of 14 September 2016, *de Diego Porras* (C-596/14, EU:C:2016:683), para. 45, Order of 21 September 2016, *Álvarez Santirso* (C-631/15, EU:C:2016:725), para. 51.

However, the following circumstances do not entail objective justifications for discriminatory treatment:

- The mere fact that the difference is provided for by a general and abstract national rule, such as a law or collective agreement ⁶⁶;
- The general and abstract invocation of the temporary nature of the employment relationship, both within and outside the public sector ⁶⁷;
- Budgetary considerations alone do not justify differential treatment to the detriment of temporary workers ⁶⁸, ruling out, for instance, appeals to rigorous personnel management ⁶⁹.
- Differences in compensation upon termination of a contract between a fixed-term contract linked to a contract and a permanent contract ⁷⁰.
- The exclusion of honorary judges and prosecutors, unlike their career counterparts, from any right to compensation and social insurance during vacation periods ⁷¹.

3. Working Conditions Governed by the Principle of Non-Discrimination

The differential treatment of comparable temporary and permanent employees, where no objective justification exists, consists of granting less favorable “working conditions,” according to European standards. The ECJ applies the same construction to Directive 99/70 as it does to part-time work. The

⁶⁶ Judgment of 20 December 2017, *Vega González* (C-158/16, EU:C:2017:1014), para. 47; Order of 9 February 2017, *Rodrigo Sanz* (C-443/16, EU:C:2017:109), para. 42; judgment of 13 September 2007, *Del Cerro Alonso* (C-307/05, EU:C:2007:509), para. 53 y 58; judgment of 22 October 2010, *Gavieiro Gavieiro and Iglesias Torres* (Joined cases C-444/09 and 456/09, EU:C:2010:819), para. 54; judgment of 8 September 2011, *Rosado Santana* (C-177/10, EU:C:2011:557), para. 72; judgment of 14 September 2016, *de Diego Porras* (C-596/14, EU:C:2016:683), para. 46; Order of 21 September 2016, *Álvarez Santirso* (C-631/15, EU:C:2016:725), para. 48; 20 September 2018, *Motter* (C-466/17, EU:C:2018:758), para. 36.

⁶⁷ CJUE 20 December 2017, *Vega González* (C-158/16, EU:C:2017:1014), para. 48; Order of 9 February 2017, *Rodrigo Sanz* (C-443/16, EU:C:2017:109), para. 43 y 44; judgment of 22 October 2010, *Gavieiro Gavieiro and Iglesias Torres* (Joined cases C-444/09 and 456/09, EU:C:2010:819), para. 56 and 57; judgment of 8 September 2011, *Rosado Santana* (C-177/10, EU:C:2011:557), para. 74; judgment of 14 September 2016, *de Diego Porras* (C-596/14, EU:C:2016:683), para. 47; Order of 21 September 2016, *Álvarez Santirso* (C-631/15, EU:C:2016:725), para. 49 y 50.

⁶⁸ Order of 9 February 2017, *Rodrigo Sanz* (C-443/16, EU:C:2017:109), para. 53 and, by analogy, 26 November 2014, *Mascolo* (C-22/13, EU:C:2014:204), para. 110; judgment of 21 September 2016, *Popescu* (C-614/15, EU:T:2016:675), para. 63.

⁶⁹ And thereby exclude from national law workers who employed under a fixed-term contract of for no more than six months or on a casual basis: Judgment of 22 April 2010, *Tirols* C-486/08, para. 46 y 47.

⁷⁰ Judgment of 11 April 2019, *Cobra Servicios Auxiliares* (Joined cases C-29/18, C-30/18 y C-44/18, EU:C:2019:315) para. 52.

⁷¹ Judgment of 27 June 2024, *Peigli* (C-41/23, EU:C:2024:554) para. 59.

decisive criterion for determining whether a measure falls within “working conditions” is precisely the employment relationship between the worker and the employer, meaning that anything granted to a worker due to their employment relationship constitutes a working condition⁷². For example, pensions dependent on and result from the employment contract qualify as working conditions, whereas “statutory social-security pensions” do not⁷³.

As also evidenced in this case, and in order to ensure the greatest effectiveness of the principle of non-discrimination, the ECJ has adopted a broad interpretation of what is understood by working conditions. This interpretation has even extended to the realm of contract termination, including aspects such as remuneration, the consideration of previous periods of employment, and access to training.

The European Court of Justice has repeatedly addressed several working conditions to which the European principle of non-discrimination applies, often in the context of public employment. These cases have allowed for claims, even when workers were no longer temporary at the time. Notable working conditions include:

Seniority payments (triennia)⁷⁴;

- Consideration of prior service as a temporary worker⁷⁵, though the calculation does not necessarily need to be in full⁷⁶;
- Pay supplements for continuous professional development (six-yearly continuing education increments)⁷⁷;

⁷² Judgments of 25 July 2018, *Vernaza Ayovi* (C-96/17, EU:C:2018:603), para. 27; 5 June 2018, *Grupo Norte Facility* (C-574/16, EU:C:2018:390), para. 41; 20 December 2017, *Vega González* (C-158/16, EU:C:2017:1014) para. 30; 12 December 2013, *Carratù* (C-361/12, EU:C:2013:830) para. 35.

⁷³ Judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, para. 132).

⁷⁴ Judgment of 13-9-07, *Del Cerro Alonso* (C-307/05, EU:C:2007:509), for statutory staff of the Basque Country Health Service; judgment of 22 October 2010, *Gavieiro Gavieiro and Iglesias Torres* (Joined cases C-444/09 and 456/09, EU:C:2010:819), for non-permanent non-university teaching staff; Order of 18 March 2011, *Montoya Medina* (C-273/10, EU:C:2011:167), for assistant professor with a PhD; 9 July 2015, *Regojo Dans* (C-177/14, EU:C:2015:450), temporary staff of the Council of State.

⁷⁵ Judgment of 8 September 2011, *Rosado Santana* (C-177/10, EU:C:2011:557), Calculation of periods as an interim civil servant for access to career civil servant status. The consideration of temporary periods in cases of stabilization is somewhat present in Orders of 4 September 2014, *Bertazzi and others* (C-152/14, EU:C:2014:2181) and 7 March 2013, *Bertazzi and others* (C-393/11, EU:C:2013:143).

⁷⁶ Judgment of 20 September 2018, *Motter* (C-466/17, EU:C:2018:758), which allows the Italian national rule to take into account in full previous fixed-term contracts up to the fourth year and at a rate of two-thirds for any period thereafter. This was intended to avoid “reverse discrimination” of career civil servants who gained access by competition compared to those who did so by having acquired professional experience under fixed-term employment contracts. Judgment 17 October 2024, *Lufoni*, (C322/23, EU:C:2024:900).

⁷⁷ Order of 9 February 2012, *Lorenzo Martínez* (C-556/11, EU:C:2012:67), interim official in non-university education.

- Participation in an teaching evaluation plan and its associated incentives ⁷⁸;
- Impossibility of concentrating organizational restructuring measures on temporary civil servants¹⁰⁰;
- The right to notice periods ⁷⁹;
- Recognition of special administrative leave for interim civil servants who hold public representative positions ⁸⁰;
- Participation in a horizontal professional career system that results in a salary supplement ⁸¹.
- Salary supplements granted based on the length of service ⁸².
- Economic compensation and social insurance rights during vacation periods ⁸³.

This significant impact of the principle of non-discrimination on public employment conditions is, in any case, compatible with recognizing states' discretion to organize their own public administrations. This discretion must be exercised transparently, objectively, and subject to oversight, relating to the objective conditions previously discussed. For example:

- It is possible to impose seniority criteria to access certain posts, restrict internal promotion to career civil servants, and require those candidates to demonstrate professional experience corresponding to the immediately lower group in the selection procedure ⁸⁴;

⁷⁸ Order of 21 September 2016, *Álvarez Santirso* (C-631/15, EU:C:2016:725), interim official in non-university education. Order of 9 February 2017, *Rodrigo Sanz* (C-443/16, EU:C:2017:109), interim university school teachers.

⁷⁹ Judgment of 13 March 2014, *Nierodzik* (C-38/13, EU:C:2014:152), the impossibility of setting different notice periods for comparable temporary and permanent workers, a ruling that analyses Polish national legislation but which, as is evident, may also have profound effects on other legislation.

⁸⁰ Judgment of 20 December 2017, *Vega González* (C-158/16, EU:C:2017:1014).

⁸¹ Order of 22 March 2018, *Centeno Meléndez* (C-315/17, EU:C:2018:207), interim official of the administration and services staff of a university.

⁸² Judgment of 20 June 2019, *Ustariz Aróstegui* (C72/18, EU:C:2019:51), para. 49, administrative contract professor who requests the regional salary supplement for career civil servant professors.

⁸³ Judgment of 27 June 2024, *Peigli* (C-41/23, EU:C:2024:554), para. 59, difference between honorary judges and prosecutors and career judges and prosecutors during the period of rest from judicial activity.

⁸⁴ Order of 9 February 2017, *Rodrigo Sanz* (C-443/16, EU:C:2017:109), para. 47; judgment of 8 September 2011, *Rosado Santana* (C-177/10, EU:C:2011:557), para. 76; judgment of 18 October 202, *Valenza* (C-302/11, EU:C:2012:646) para. 57; Order of 21 September 2016, *Álvarez Santirso* (C-631/15, EU:C:2016:725), para. 53. CJUE 8-10-20, C-652/19, Consulmarketing SpA, para. 66. Judgment of 8 October 2020, *Universitatea «Lucian Blaga» Sibiu* (C-644/19, EU:C:2020:810).

- Differentiate between career civil servants selected through competitive exams and those selected after gaining professional experience through fixed-term contracts⁸⁵;
- Establish different consequences for dismissing permanent administrative employees compared to temporary workers⁸⁶.

The Directive also does not generally prohibit potential differences in treatment between civil servants and labour staff, as these differences do not fall within the scope of the principle of non-discrimination⁸⁷.

4. Application of the Principle of Non-Discrimination to the Termination of Fixed-Term Contracts: The Erratic Reasoning of the ECJ

One of the most contentious issues related to the application of Directive 99/70 has been the termination of fixed-term contracts. The ECJ firmly upholds that certain aspects of the termination of temporary contracts constitute “working conditions” to which the principle of non-discrimination applies. This includes not only the rules on notice periods, but also compensation for the end of a contract, and even the right to reinstatement following dismissal⁸⁸.

However, despite this broad interpretation, the principle of non-discrimination does not encompass the analysis of the temporality clause in the contract itself, i.e., whether the termination of the fixed-term relationship was in accordance with national law⁸⁹.

From this broad consideration of working conditions, which the Court continues to uphold, there has been a succession of significant rulings. The famous Diego Porras judgment caused a real upheaval in the public procurement system, followed by other well-known rulings that implied a change in the legal interpretation, such as the *Montero Mateos*⁹⁰ and *Grupo Norte Facility* judgments⁹¹.

⁸⁵ CJUE 18-10-12, *Valenza* C-302/11 para. 60; 20 September 2018, *Motter* (C-466/17, EU:C:2018:758), para. 46.

⁸⁶ Judgment of 25 July 2018, *Vernaza Ayovi* (C-96/17, EU:C:2018:603).

⁸⁷ Order of 7 March 2013, *Rivas Montes* (C-178/12, EU:C:2013:150) para. 44.

⁸⁸ Judgment of 11 April 2019, *Cobra Servicios Auxiliares* (Joined cases C-29/18, C-30/18 y C-44/18, EU:C:2019:315), para. 52.

⁸⁹ Judgment of 21 November 2018, *Viejobueno Ibáñez and de la Vara González* (C-245/17, EU:C:2018:934), para. 45: “it is solely for the referring court to determine whether the employer terminated the employment relationship of the interested parties before the circumstance objectively established by the parties in the cases before it occurred”.

⁹⁰ Judgment of 5 June 2018, *Montero Mateos* (C-677/16, EU:C:2018:393).

⁹¹ Judgment of 5 June 2018, *Grupo Norte Facility* (C-574/16, EU:C:2018:390).

These decisions pertain to Clause 4 of the Framework Agreement, with relevant implications for the direct effect of the Directive. The debate now focuses on the principle of non-discrimination and, more recently, on the conditions tied to the lawful conclusion of temporary contracts due to the expiration of the contract term or, according to European standards, due to the occurrence of objective conditions such as reaching a specific date, the completion of a specific work or service, or the occurrence of a particular event (Clause 3).

Following these series of decisions, and once the peculiar objective cause related to compensation purposes was acknowledged, the Court's conclusion was clear. It understood that Clause 4 of Directive 99/70/EC does not oppose a national law which does not provide any compensation (for temporary employment) or provides lower compensation (for replacement) when the term of the contracts ends, while permanent employees receive compensation for the termination of their employment contract based on objective grounds.

In summary, the ECJ generally supports differences in compensation as opposed to the doctrine established in the *Diego Porras* judgment. The main consequence of the *Porras* doctrine is thus undermined, and differences in compensation between redundancy of permanent employees and the termination of temporary contracts are excluded from the non-discrimination principle of Clause 4, as the unequal treatment is justified by an objective reason.

However, the departure from the *Porras* doctrine does not occur without opening other interpretative enigmas. In the *Montero Mateos* judgment, the Court found that the interim worker (due to a vacancy) at the time their contract was signed could not know the exact date when the position they occupied would be permanently filled, nor could they foresee that the contract would last unusually long (almost a decade). Therefore, the Court instructed the national judge to verify whether, given the unpredictability of the contract's end and its unusually long duration, the contract should be reclassified as permanent⁹².

Thus, a specific interpretative channel seems to be opening for those temporary contracts that involve conditions of unpredictability and unusually long duration. In these cases, the ECJ's validation of the compensation system for the conclusion of temporary contracts might not be adequate. The problem, once again, is that this exception is nebulous and very complex to grasp, ensuring a guaranteed dispersion in its application.

We will address the ECJ's response to the national court's questions related to the role of compensation as a mechanism against the abuse of temporary employment in detail when analyzing Clause 5 of the Agree-

⁹² Judgment of 5 June 2018, *Montero Mateos* (C-677/16, EU:C:2018:393), para. 64.

ment. By now, it is sufficient to note that the ECJ, from the perspective of EU law, confirms the compensation system and its troubling distinction between two types of temporary workers and, in turn, between these and permanent workers.

However, this doctrine has been nuanced by more recent rulings regarding the normative interpretation that allows for the successive renewal of labour contracts in the public sector, or even the abusive use of such renewed contracts, both in Spanish⁹³ and Italian law⁹⁴. It depends on the effectiveness and deterrence of penalties or the transformation of the employment relationship into an indefinite duration. It is a highly complex issue where such measures may become acceptable provided that the transformation of these contracts does not take place *contra legem*⁹⁵. We will explain this in more detail below.

V. PREVENTION OF ABUSE DUE TO SUCCESSIVE USE OF FIXED-TERM CONTRACTS

The other central point of the Directive is its Clause 5, which aims to impose limits on the successive use of fixed-term contracts by establishing a series of minimum protective provisions designed to prevent the precariousness of employees' situations⁹⁶.

1. The European Framework for Successive Fixed-Term Contracts, the Necessary State Complement, and the Lack of Direct Effect

This is a very vague and difficult-to-interpret clause that imposes on states lacking equivalent legal measures the effective and binding adoption of one or more of the following measures:

⁹³ Judgment of 22 February 2024, *Consejería de Presidencia, Justicia e Interior de la Comunidad de Madrid*, (Joined cases C-59/2022, C-110/22 and C-159/22, EU:C:2024:149).

⁹⁴ Judgment of 27 June 2024, *Peigli* (C-41/23, EU:C:2024:554).

⁹⁵ Judgment of 13 June 2024, *DG de la Función Pública, Generalitat de Catalunya* (Joined cases C-331/22 and C-332/22, EU:C:2024:496).

⁹⁶ Judgments of 25 October 2018, *Sciutto* (C-331/17, EU:C:2018:859), para. 30; 28 February 2018, *John* (C-46/17, EU:C:2018:131), para. 40; 21 September 2016, *Popescu* (C-614/15, EU:T:2016:675), para. 36; 4 July 2006, *Adeneler* (C-212/04, EU:C:2006:443), para. 63; 23 April 2009, *Angelidaki et al* (C-378/07, EU:C:2009:250), para. 73; 26 January 2012, *Küçük* (C-586/10, EU:C:2012:39) para. 25; 13 March 2014, *Márquez Samohano* (C-190/13, EU:C:2014:146), para. 41; 3 July 2014, *Fiamingo* (C-362/13, EU:C:2014:2044), para. 54; 26 November 2014, *Mascolo* (C-22/13, EU:C:2014:204), para. 72.

a) **Objective Reasons for Renewing Fixed-Term Contracts:** According to the ECJ, “objective reasons” must be understood as specific and concrete circumstances that characterize a particular activity and can therefore justify the successive use of fixed-term employment contracts in that context. Such circumstances can originate from the special nature of the tasks for which these contracts are concluded and the inherent characteristics of these tasks or, potentially, from pursuing a legitimate social policy objective by a Member State⁹⁷.

b) **Setting a Maximum Duration for Successive Fixed-Term Contracts**

c) **Determining the number of Renewals.**

As can be seen, these rules do not affect isolated or limited temporary employment, which falls outside Clause 5. Instead, the Directive’s mandate in this clause exclusively concerns successive contractual relationships⁹⁸, prohibiting a national provision that would generally and abstractly authorize the use of successive temporary employment contracts⁹⁹ through legislative or regulatory provisions. It requires that the renewal of successive fixed-term

⁹⁷ Judgments of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859), para. 39; 21 September 2016, *Popescu* (C-614/15, EU:T:2016:675), para. 49; 23 April 2009, *Angelidaki et al* (C-378/07, EU:C:2009:250), para. 96; 26 January 2012, *Kücük* (C-586/10, EU:C:2012:39), para. 27; 13 March 2014, *Márquez Samohano* (C-190/13, EU:C:2014:146), para. 45. Objective reasons that do not justify the lack of measures against the abuse of successive temporary contracts include “avoiding exposing the State, in its capacity as employer in the relevant sector, to any financial risks whatsoever.” or “budgetary considerations” (judgment of 21 September 2016, *Popescu* (C-614/15, EU:T:2016:675), paras. 62 and 63). However, objective reasons that may justify the renewal of temporary contracts include “meeting temporary needs” (judgment of 23 April 2009, *Angelidaki et al* (C-378/07, EU:C:2009:250), paras. 101 and 102); “replacing other workers who are temporarily unable to perform their duties or to meet additional company needs”; “replacing staff pending the completion of selection processes” (judgment of 26 January 2012, *Kücük* (C-586/10, EU:C:2012:39), para. 34); in the case of our “real” associate professors, “the need to entrust the part-time performance of specific tasks to specialists of recognized competence, who carry out another professional activity outside of that fixed-term employment contract” (13 March 2014, *Márquez Samohano* (C-190/13, EU:C:2014:146), paras. 48 and 49); that the worker, upon reaching the ordinary retirement age, is entitled to a retirement pension, which would support national provisions authorizing the parties to a work contract to defer, by mutual agreement during the employment relationship, without time limitation or other requirements, and possibly several times, the stipulated termination date of the contract, linked to reaching the ordinary retirement age (28 February 2018, *John* (C-46/17, EU:C:2018:131), para. 57). However, these objectively admissible reasons cannot have the effect of allowing temporary contracts to be used, in fact, to cover the employer’s permanent and stable staffing needs, so it is necessary “to consider in each case all the circumstances at issue, taking account, in particular, of the number of successive contracts concluded with the same person or for the purposes of performing the same work, in order to ensure that fixed-term employment contracts or relationships, even those ostensibly concluded to meet a need for replacement staff, are not abused by employers” (judgment 26 January 2012, *Kücük* (C-586/10, EU:C:2012:39), para. 40; 26 November 2014, *Mascolo* (C-22/13, EU:C:2014:204), para. 102).

⁹⁸ Judgment 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709), para. 42-43.

⁹⁹ Judgments of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859), para. 40; 21 September 2016, *Popescu* (C-614/15, EU:T:2016:675), para. 50; 23 April 2009, *Angelidaki et al* (C-378/07, EU:C:2009:250), para. 97; 26 January 2012, *Kücük* (C-586/10, EU:C:2012:39), para. 28; 13-3-14, *Márquez Samohano* C-190/13, para. 46.

contracts or employment relationships, when permitted, be aimed at covering temporary and not lasting needs of the company¹⁰⁰.

However, it is important to note the broad discretion guaranteed to states, as the Directive only assigns them a general objective that can be achieved through very diverse means: either by adopting some or all the measures just mentioned, opting for existing equivalent legal measures¹⁰¹ or combining both approaches¹⁰². Additionally, states have the added capacity to consider the needs of different sectors and categories of workers, although this state possibility does not exempt them from the obligation to establish an appropriate measure to prevent and, where appropriate, sanction the successive use of fixed-term employment contracts¹⁰³, without invoking objectives such as flexibility¹⁰⁴ or tradition¹⁰⁵.

Following the previous rules, the Directive, without excessive clarity, entrusts member states, when necessary, with determining under what conditions fixed-term employment contracts or relationships: a) will be considered successive; b) will be considered concluded for an indefinite period.

It is complex to derive a sanction system from these provisions, as the transformation to an indefinite period contract is established as a state power¹⁰⁶ and even the ECJ warns that if states, exercising their discretion, do not implement this transformation, they cannot be compelled to grant compensation for the lack of such contract transformation¹⁰⁷. Thus, alternative compensatory systems to transformation are possible, provided they are effective, equivalent, and act as a deterrent, i.e., they preserve the Directive's useful effect¹⁰⁸.

¹⁰⁰ Judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859), para. 50.

¹⁰¹ Judgment of 21 September 2016, *Popescu* (C-614/15, EU:T:2016:675), para. 39; 3 July 2014, *Fiamingo* (C-362/13, EU:C:2014:2044), para. 54; 26 November 2014, *Mascolo* (C-22/13, EU:C:2014:204), para. 75.

¹⁰² Judgment of 23 April 2009, *Angelidaki et al* (C-378/07, EU:C:2009:250), para. 87.

¹⁰³ Judgment of 24 June 2021, *Obras y Servicios Públicos and Acciona Agua* (C-550/19, EU:C:2021:51).

¹⁰⁴ Judgment of 26 February 2015, *Comisión v Luxemburgo* (C-238/14, EU:C:2015:128), para. 51, regarding occasional workers in the entertainment sector.

¹⁰⁵ Judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859), para. 44 regarding the sector of activity of lyric and symphonic foundations.

¹⁰⁶ Judgments of 12 December 2013, *Papalia* (C-50/13, EU:T:2014:96), para. 16; 4 July 2006, *Adeneler* (C-212/04, EU:C:2006:443), para. 91; 7 September 2006, *Marrosu and Sardino* (C-53/04, EU:C:2006:517), para. 47; 23 April 2009, *Angelidaki et al* (C-378/07, EU:C:2009:250), paras. 145 and 183; orders of 12 June 2008, *Vasilakis et al.* (C-364/07, EU:C:2008:346), para. 121; 24 April 2009, *Koukou* (C-519/08, EU:C:2009:269), para. 85; 1 October 2010, *Affatato* (C-3/10, EU:C:2010:574) para. 38. However, if the sanction provided is the conversion of the contract into a permanent one, the guarantee of the Directive's effective effect requires that such conversion is not accompanied by substantial modifications of the previous contract's terms in a globally unfavorable manner for the worker when their duties and the nature of their functions remain the same (judgment of 8 March 2012, *Huet* (C-251/11, EU:C:2012:133)).

¹⁰⁷ Judgment of 7 March 2018, *Santoro* (C-494/16, EU:C:2018:16), para. 47.

¹⁰⁸ Judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859), para. 59-60.

Furthermore, the ECJ accepts distinguishing between public and private sectors, excluding public sector from transforming contracts into indefinite ones in favor of establishing an alternative effective and equivalent measure to prevent and sanction the abusive use of temporary employment in the public sector¹⁰⁹.

Definition of successive contracts is also left to states, although it must be noted that this is a key concept for the effectiveness of the Directive itself, so it is not possible to adopt a rigid and formal definition of successive contracts that would render it ineffective, such as considering contracts successive only in case that no more than 20 days have elapsed between them¹¹⁰. This would compromise the object, purpose, and useful effect of the Framework Agreement.

This preservation of the useful effect of the European Directive is the true interpretative key of the mechanism designed under Clause 5. Regardless of the measures adopted by states within the broad margin granted by the Agreement, they must prevent abuses arising from the successive use of temporary employment and ensure stability or, more appropriately in the context of the Directive, protection against instability.

In this sense, the ECJ warns that EU law does not establish specific sanctions for abuse cases, and it is up to national authorities to adopt measures that must not only be proportionate but also effective, entailing a sufficient deterrent to ensure the full effectiveness of the Directive¹¹¹.

As evidenced by the above, Clause 5 grants a very broad state discretion that prevents, unlike what occurred with the principle of non-discrimination, the clause from having direct effects, as it lacks unconditionality and precision¹¹².

However, this vagueness and imprecision do not prevent the interpretation in accordance with the Directive, meaning that through hermeneutics, it must be applied in the best possible way to achieve the Directive's preventive objective against abuse¹¹³. It is up to national judges to interpret and apply national provisions in cases of abuse in the successive use of temporary contracts, being able to properly sanction such abuses and eliminate the consequences of breaching EU law¹¹⁴. The ECJ has even suggested that national

¹⁰⁹ Judgments of 7 March 2018, *Santoro* (C-494/16, EU:C:2018:16), para.33; 7 September 2006, *Marrosu and Sardino* (C-53/04, EU:C:2006:517); 7 September 2006, *Vassallo* (C-180/04, EU:C:2006:518).

¹¹⁰ This refers to the well-known judgment of 4 July 2006, *Adeneler* (C-212/04, EU:C:2006:443), paras. 76-89.

¹¹¹ Judgment of 3 July 2014, *Fiamingo* (C-362/13, EU:C:2014:2044), para. 62; Judgment of 26 November 2014, *Mascolo* (C-22/13, EU:C:2014:204), para. 77.

¹¹² See for all, Judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223), para. 73 et seq.

¹¹³ Judgment of 11 February 2021, *M.V. and Others* (C-760/18, EU:C:2021:113), para. 70, insists on the obligation of consistent interpretation and what it implies for the State as the guarantor of the Agreement's compliance.

¹¹⁴ Judgment of 10 March 2011, *Deutsche Lufthansa* (C-109/09, EU:C:2011:129), para. 56; 23 April 2009, *Angelidaki et al* (C-378/07, EU:C:2009:250), para. 203.

judges might need to change constitutional interpretations contrary to the transformation of temporary workers into indefinite ones, though it clarified in a later judgment that such interpretations cannot go against the law¹¹⁵.

Judges are also responsible for ensuring that workers with successive fixed-term contracts concluded abusively are not dissuaded, in the hope of remaining continuously employed in the sector, from asserting their rights before national authorities, including judicial ones, based on the application of all preventive measures established in Clause 5 of the Agreement¹¹⁶. This mandate is of vital importance and can be integrated in various ways by national judges but seems to aim to ensure the protection of temporary workers asserting their rights under the Directive. This was not merely a negotiation possibility but a mandate for agreements to address the issue of objective concatenation of temporary contracts, which has had a modest outcome and could again compromise the Directive's useful effect in preventing abuse of successive employment contracts, extending also to its objective aspect or a single job position¹¹⁷.

Ultimately, if there is an area where our divergence from the Directive's indications on successive employment contracts is most evident, it is once again the public sector. There has been a disproportionate use of successive temporary relationships for decades, with barely adequate counterweights, leading to a delicate situation concerning compliance with Directive 99/70.

2. Difficulties in Public Employment

2.1 INDEFINITE BUT NON-PERMANENT: EFFECTIVENESS, EQUIVALENCE, AND DETERRENT CAPACITY OF THE ALTERNATIVE MEASURE?

The issues in the Spanish legal system with Clause 5 of the Agreement begin with the judicial construction intended to remedy the abuse of temporary employment by public administrations: the indefinite non-permanent figure.

¹¹⁵ Judgment of 22 February 2024, *Consejería de Presidencia, Justicia e Interior de la Comunidad de Madrid*, (Joined cases C-59/2022, C-110/22 and C-159/22, EU:C:2024:149), nuanced by judgment 13 June 2024, *Generalitat de Catalunya* (Joined Cases C-331/22 and C-332/22, EU:C:2024:496). The time interval between them is barely four months, but the latter responds more in line with the Spanish legal system's sources. In any case, the interpretative difficulty is evident.

¹¹⁶ Judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859), para. 68.

¹¹⁷ Recall Judgment of 3 July 2014, *Fiamingo* (C-362/13, EU:C:2014:2044), para. 72: consideration must be given to "the number of successive contracts concluded with the same person or for the purposes of performing the same work, in order to ensure that fixed-term relationships are not abused by employers".

The fact that, in some stages of this complex judicial figure, administrations were not required to compensate indefinite non-permanent employees at the “natural” end of their contracts led to criticism from the ECJ, which stated that “the Framework Agreement [...] opposes a national regulation [...] that does not include any effective measure to sanction abuses, in the sense of Clause 5, Section 1, of that Framework Agreement, resulting from the use of successive fixed-term contracts in the public sector, since there is no effective measure in domestic law to sanction such abuses”¹¹⁸.

2.2 INTERIM CIVIL SERVANTS AND STATUTORY STAFF: THE EMERGENCE OF THE INDEFINITE INTERIM?

The problem is fully evident concerning interim civil servants and temporary statutory staff. Moreover, the already limited legal regime of these temporary figures was compounded by a judicial interpretation complacent with the administration, which, in practice, makes the use of temporary administrative appointments almost unrestricted.

Regarding both relationships, the ECJ first warned that it is not possible to exclude temporary administrative staff from Clause 5 of the Directive and that it is contrary to the Directive to reserve sanctions only for labour staff but not for administrative staff when there is no effective equivalent measure in this latter area¹¹⁹. Secondly, focusing on statutory temporary staff, the ECJ found a mechanism that does not ensure that temporary appointments are not used to cover permanent tasks contrary to the Directive, as there is no obligation to provide structural positions which may encourage the end of temporary appointments¹²⁰.

This seemingly definitive response from the ECJ to the preliminary questions referred by Spanish courts leaves a sense of dissatisfaction. This state of non-compliance with the administrative hiring practice concerning the obligations arising from the Agreement required seeking correction methods, which could include an interpretation-compatible mechanism. Somehow, the ECJ¹²¹ suggested that extending the labour and jurisprudential construction of indefinite non-permanent figures to the administrative realm might be appropriate,

¹¹⁸ Order of 11 November 2014, *León Medialdea* (C-86/14, EU:C:2014:2447).

¹¹⁹ Judgment of 14 September 2016, *Martínez Andrés* (Joined cases C-184/15 and C-197/15, EU:C:2016:680). More recently, reiterated in Order of 12 June 2019, *Aragón Carrasco* (C367/18, EU:C:2019:487).

¹²⁰ Judgment of 14 September 2016, *Pérez López* (C-16/15, EU:C:2016:679).

¹²¹ Judgment of 14 September 2016, *Martínez Andrés* (Joined cases C-184/15 and C-197/15, EU:C:2016:680).

though not obligatory or necessary as long as there is effective redress within administrative law. In the Tribunal's words, to the extent "there is no other equivalent and effective protective measure, the assimilation of that fixed-term staff with 'workers having non-permanent contracts of indefinite duration', in accordance with the existing national case-law, could therefore constitute a measure capable of penalising abuse resulting from use of fixed-term employment contracts and eliminating the consequences of infringement of the provisions of the framework agreement" (para. 53).

As previously noted, the ECJ has recently addressed several issues directly related to the abuse of interim positions in Spain's public administration¹²². In 2021, the case involved an interim worker whose contract had been in place from 2003 to 2016, having been extended in 2008, and whose employment ended with the regulatory coverage of the position.

The five preliminary questions are reflected upon and answered in the European court's judgment. Regarding the applicability of Clause 5, it concludes that although there is no strict succession of contracts, there is an automatic extension of a contract whose initial duration was fixed. The judgment then focuses on the interim contract as a usual contractual modality, especially in the public sector. In fact, there were doubts about excluding interim contracts, which is strongly questionable from European standards as there is no equivalent measure to prevent successive hiring in this contractual modality. The conclusions regarding compliance with Clause 5 are overwhelming: it does not contain any reference to the objective reasons justifying its renewal or maximum duration; it does not specify the number of renewals; it does not include equivalent legal measures to ensure the Directive's useful effect; and it does not provide any compensation for these contracts upon termination. Ultimately, the ECJ considers the classification of indefinite non-permanent as a valid solution provided that, obviously, the selection process is timed and notes the convenience of recognizing "compensation" at the end of the contract.

In 2024, as previously mentioned, with just a four-month gap, the ECJ resolved two highly complex matters with more than ten preliminary questions in some cases—though not all were accepted¹²³.

In February 2024, the Court considered that since there are no measures in the public sector to prevent the abusive use of fixed-term contracts, converting temporary contracts into an indefinite employment relationship "could

¹²² Judgment of 3 June 2021, *Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario* (C726/19, EU:C:2021:439).

¹²³ Judgment of 22 February 2024, *Consejería de Presidencia, Justicia e Interior de la Comunidad de Madrid*, (Joined cases C-59/2022, C-110/22 and C-159/22, EU:C:2024:149).

constitute” an adequate measure, with the national court potentially modifying consolidated national jurisprudence if it is based on an interpretation of national, including constitutional, provisions incompatible with the objectives of Directive 1999/70. The Court explained that indefinite non-permanent staff are within the scope of Directive 1999/70/CE, and successive use of temporary contracts could constitute an abuse of temporary hiring, which is not sufficiently addressed by a twenty-day’s salary per year compensation. Consequently, it opposes calling for consolidation processes for temporary employment through public calls for positions occupied by temporary workers, “(...) including indefinite non-permanent workers, when such a call is independent of any consideration regarding the abusive nature of the use of such fixed-term contracts” and considers that converting temporary contracts into permanent ones could be an effective sanction.

In the judgment rendered on June 2024, the ECJ revisits the abuse of temporality in public employment and establishes that converting temporary contracts into indefinite ones cannot imply an interpretation *contra legem* of national law. In its latest ruling, the ECJ attempts to clarify some important aspects that deviate from an obligation to make interim staff with years of temporary contracts permanent. In other words, converting temporary contracts into indefinite ones is only valid if it does not contradict national law, meaning that permanency cannot be the answer to abuse of temporality when national law is based on the principle of equality in access to public employment ¹²⁴.

2.3 OTHERS, ESPECIALLY RESEARCH AND UNIVERSITY STAFF

A particularly contentious sector in terms of preventing successive fixed-term contracts is the one of research and universities. In these cases, for the university sector, these same modalities were exempt from the maximum duration limit of fixed-term contracts. Such exclusions were possible according to the Directive, as the specifically university or research temporary modalities have their own concatenation rules, justified by the sector-specific individualization permitted by the Agreement. However, there were still some issues with adapting to the European law concerning successive temporary research contracts with specifically university temporary contracts.

¹²⁴ Judgment of 13 June 2024, *DG de la Función Pública, Generalitat de Catalunya* (Joined cases C-331/22 and C-332/22, EU:C:2024:496).

However, the most notable issue from the perspective of EU law has been the case of associate university professors. As previously indicated, the ECJ viewed them as an objective reason to possibly disregard limits on successive renewals, though without entirely closing the door to monitoring whether such contracts meet their genuine reasons¹²⁵. The ECJ's interpretation allowed to infer that, in many cases, the practice of hiring associate professors and similar figures in the academic field fell into abusive patterns that should not escape the Directive's abuse prevention requirements.

As we have noted for some time, a more hermeneutic perspective respecting job stability is needed to prevent the legitimacy of using temporality that conceals structural deficits in staffing, even when the formal legality of the temporary modalities used is complied with.

APPENDIX JURISPRUDENCE

Judgments of the Court of Justice of the European Union (ECJ)

1. Mangold C-144/04
 - Date: 22-11-2005
 - ECLI: ECLI:EU:C:2005:709
2. Adeneler C-212/04
 - Date: 04-07-2006
 - ECLI: ECLI:EU:C:2006:443
3. Marrosu and Sardino C-53/04
 - Date: 07-09-2006
 - ECLI: ECLI:EU:C:2006:511
4. Impact C-268/06
 - Date: 15-04-2008
 - ECLI: ECLI:EU:C:2008:223
5. Andersen C-306/07
 - Date: 18-12-2008
 - ECLI: ECLI:EU:C:2008:752
6. Angelidaki et al. C-378/07
 - Date: 23-04-2009
 - ECLI: ECLI:EU:C:2009:250
7. Koukou C-519/08
 - Date: 24-04-2009
 - ECLI: ECLI:EU:C:2009:262

¹²⁵ Judgment of 13 March 2014, *Márquez Samohano* (C-190/13, EU:C:2014:146);

8. Deutsche Lufthansa C-109/09
 - Date: 10-03-2011
 - ECLI: ECLI:EU:C:2011:140
9. Vino C-20/10
 - Date: 11-11-2010
 - ECLI: ECLI:EU:C:2010:675
10. Vino C-161/11
 - Date: 22-06-2011
 - ECLI: ECLI:EU:C:2011:419
11. Huet C-251/11
 - Date: 08-03-2012
 - ECLI: ECLI:EU:C:2012:132
12. Küçük C-586/10
 - Date: 26-01-2012
 - ECLI: ECLI:EU:C:2012:33
13. Rivas Montes C-178/12
 - Date: 07-03-2013
 - ECLI: ECLI:EU:C:2013:148
14. Papalia C-50/13
 - Date: 12-12-2013
 - ECLI: ECLI:EU:C:2013:815
15. Márquez Samohano C-190/13
 - Date: 13-03-2014
 - ECLI: ECLI:EU:C:2014:165
16. Fiamingo C-362/13
 - Date: 03-07-2014
 - ECLI: ECLI:EU:C:2014:2040
17. Mascolo C-22/13
 - Date: 26-11-2014
 - ECLI: ECLI:EU:C:2014:2401
18. Rosado Santana C-177/10
 - Date: 08-09-2011
 - ECLI: ECLI:EU:C:2011:546
19. Valenza C-302/11
 - Date: 18-10-2012
 - ECLI: ECLI:EU:C:2012:638
20. Santoro C-494/16
 - Date: 07-03-2018
 - ECLI: ECLI:EU:C:2018:161
21. Vega González C-158/16
 - Date: 20-12-2017
 - ECLI: ECLI:EU:C:2017:989

22. Centeno Meléndez C-315/17
 - Date: 22-03-2018
 - ECLI: ECLI:EU:C:2018:210
23. Vernaza Ayovi C-96/17
 - Date: 25-07-2018
 - ECLI: ECLI:EU:C:2018:588
24. Motter C-466/17
 - Date: 20-09-2018
 - ECLI: ECLI:EU:C:2018:749
25. Grupo Norte Facility C-574/16
 - Date: 05-06-2018
 - ECLI: ECLI:EU:C:2018:398
26. Cobra Servicios Auxiliares C-29/18, C-30/18 and C-44/18
 - Date: 11-04-2019
 - ECLI: ECLI:EU:C:2019:284
27. Ustariz Aróstegui C-72/18
 - Date: 20-06-2019
 - ECLI: ECLI:EU:C:2019:528
28. Viejobueno Ibáñez and de la Vara González C-245/17
 - Date: 21-11-2018
 - ECLI: ECLI:EU:C:2018:926
29. C-726/19
 - Date: 03-06-2021
 - ECLI: ECLI:EU:C:2021:414
30. Agios Nikolaos C-760/18
 - Date: 11-02-2021
 - ECLI: ECLI:EU:C:2021:111
31. Consulmarketing SpA C-652/19
 - Date: 08-10-2020
 - ECLI: ECLI:EU:C:2020:795
32. Universitatea “Lucian Blaga” Sibiu C-644/19
 - Date: 08-10-2020
 - ECLI: ECLI:EU:C:2020:796
33. C-59/22, C-110/22 and C-159/22
 - Date: 22-02-2024
 - ECLI: ECLI:EU:C:2024:149
34. C-331/22 and C-332/22
 - Date: 13-06-2024
 - ECLI: ECLI:EU:C:2024:496
35. Peigli C-41/23
 - Date: 27-06-2024
 - ECLI: ECLI:EU:C:2024:554

CHAPTER 19

PART-TIME WORK
(COUNCIL DIRECTIVE 97/81/EC OF 15 DECEMBER 1997)

JOSÉ FERNANDO LOUSADA AROCHENA

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I. THE LONG ROAD TO THE EUROPEAN FRAMEWORK AGREEMENT ON PART-TIME WORK (COUNCIL DIRECTIVE 97/81/EC)

At the end of the seventies, the Council of Ministers of the EEC proposed a community regulation on part-time work (1979)¹. As a result of this initiative, the Commission presented to the Council, in the early 1980s, an initial proposal (1982)² and a modified one (1983)³ for a directive on part-time work. These two proposals were already built on the principles of non-discrimination and voluntariness that are also basilar in current legislation. But with greater breadth, precision and effectiveness than current legislation.

Regarding non-discrimination, the conditions of employment that did not allow justification for a difference in treatment were specified, and the application of *pro rata temporis* based on the working day was limited to remuneration and compensation conditions; Social Security aspects were also included.

As for voluntariness, it was specified, in these directive proposals, in a right of priority for part-time workers over vacancies of their qualifications or experience in the establishment or company.

Another interesting fact about these proposals was the consideration of the regulation as complementary to the legislation on equality between men and women, enabling the reinforced interpretation of the regulation of part-time work with the strictest parameters of sexist anti-discrimination protection.

After the above developments, the next step was the so-called Papandreou Proposal, since it was this woman commissioner of social affairs who proposed a joint regulation with fixed-term work and temporary work agencies that was finalized, with regard to part-time work, in two directive proposals, one on working conditions, and another on distortions of free competition (1990)⁴. Both proposals reveal a change of direction in the policy on “atypical work”, which is no longer conceived as exceptional compared to permanent full-time work, but as a normal situation in the interest of flexibility. Which explains, for example, that small jobs with an average weekly duration of less than 8 hours are excluded from the scope of the norm, or the right of part-time worker over vacancies is been limited to be informed and for their candidacy to be taken into consideration. Also notable, in this line of devaluation, is the absence of reference to the principle of equality between men and women.

¹ Council Resolution December 18, 1979, on the organization of working time (OJ no. C of 4 January 1980).

² Presented on 4 January 1982 (OJ no. C 62/7 of 12 March 1982)

³ Presented on 5 January 1983 (OJ no. C 18/5 of 22 January 1983).

⁴ Both proposals published in OJ no. C 224/4 of 8 September 1990.

In the mid-nineties, a normative event of relevance to the matter occurred: ILO Convention 175 on part-time work (1994) and Recommendation 182 (1994). The business representation at ILO was reluctant to approve an international agreement, and this motivated a text that, although it was based on the principles of equality and voluntariness, was insufficient in terms of worker's rights, and also included a strategic commitment to normalization of part-time.

Given the failure of the previous directive proposals compared to the success in the approval of an international instrument based on negotiation, the European institutions tried to take advantage of the possibility of negotiation collective by European interprofessional organisations, which had been institutionalized in the Treaty of Maastricht - Social Protocol (1993). And that is how UNICE, CEEP and ETUC approved on June 6, 1997 the European Framework Agreement on part-time work, which was included in the Directive 97/81/EC of 15 December 1997⁵.

The culmination of a long process, the Agreement must be hailed as an achievement of social policy. But the text appears conditioned by the transaction context, typical of the time, between the most protective proposals and the most flexible, as occurred with ILO Convention 175.

The most positive thing is that the Agreement has regulated two aspects as the cornerstones of its regulation: the principle of non-discrimination (developed in its Clause 4) and the principle of voluntariness (developed in its Clause 5).

Nevertheless, the Agreement manifests some important weaknesses that are susceptible to criticism. In fact, some unions criticized its moderation (such as the German DGB, which is significant given that part-time work was and is widely implemented in Germany).

— Firstly, many of its regulations are built on indeterminate legal concepts or are of low obligation. Thus, the principle of non-discrimination allows exceptions justified “on objective grounds”, and the application of *pro rata temporis* is generalized to “where appropriate” (Clause 4.1-2), in a significant lack of specificity in as to where the principle of equal treatment applies, or not.

And the principle of voluntariness does not generate authentic subjective rights in favour of the worker but rather mere expectations that the employer will take into consideration only “to the extent possible” (Clause 5.3).

— Secondly, the Agreement, without excluding a generic category of workers from its scope (as in the Papandreou Proposal), does allow Member States to exclude casual workers for objective reasons (Clause 2.2), which, if opting out

⁵ Published in OJ no. L 14/9 of 20 January 1998.

clause is used by many countries, may lead to a loss of uniformity among Member States. Besides, the Agreement contemplates (Clause 4.4) another opting-out clause, which, although only admissible for particular conditions, turns out to be of greater subjective scope as it is not limited to occasional workers.

— Thirdly, it contains a reference to legislation on equality between men and women (forgotten in the Papandreou Proposal), but not considering the Agreement as a complement to that legislation (as stated in the early eighties directive proposals). Agreement only establishes that it does not prejudice that legislation (Clause 6.4). Thus, the Agreement is not integrated into non sex discrimination laws, with the obvious consequences in terms of its interpretation and application.

— Fourthly, and given its approval mechanism with the participation of the social agents and without the participation of the Member States, the Social Security aspects have been left out. Although the parties, as stated in the preamble to the Agreement, adhere to the Employment Declaration of the Dublin European Council of December 1996, in which the Council stressed the need to make social protection systems more conducive to job creation, capable of adapting to new work models and providing adequate protection to people who carry out these new types of work. Unfortunately, high-sounding declarations of community policy do not always coincide with the reality of the laws of the Member States.

In short, the Agreement on part-time work has sought to place itself at an intermediate point between the most guaranteeing directive proposals of the early eighties and the more flexible position of the Papandreou Proposal, although the final result has undoubtedly placed it more along the latter than along those lines. We cannot be surprised, therefore, that ECJ has applied the Agreement in a way that is sometimes disappointing with respect to what was expected from judicial application. You can get little from where there is none.

II. GENERAL CLAUSES (CLAUSES 1, 2 AND 3)

1. Purpose (Clause 1)

The Agreement begins its substantive regulation with a clause delimiting its “purpose” (Clause 1):

a) “to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work”;

b) “to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organization of working time in a manner which takes into account the needs of employers and workers”.

The Framework Agreement directly develops the principles of non-discrimination (Clause 4) and voluntariness (Clause 5). In consequence, its immediate purposes are “removal” discrimination and “facilitate” the voluntariness (by the way, the verbs used reveal the greater intensity of purpose non-discrimination compared with the purpose of voluntariness).

The purposes (non-developed in Framework Agreement) of “improving” the quality of part-time work (which is associated with non-discrimination) and “contributing” to the flexible organization of working time for employers and workers (which is associated with the voluntariness) demonstrate a strategy for normalizing part-time work, such as that seen in ILO Convention 175.

Although provisos, like this one, on the objectives of legislative texts do not have immediate direct effectiveness, they are useful for interpretation. From that perspective, ECJ has used this Clause 1 to justify those interpretations that it considers most in accordance with the useful effect of the agreement. For example: in the judgement of 24 April 2008, *Michaeler* and others⁶, ECJ reaches the conclusion that the promotion of part-time work comes up against the establishment of legal or administrative obstacles; or in the judgement of 1 March 2012, *O’Brien*⁷, ECJ concludes that, for its purposes, the Agreement applies to both public and private employers, hence holding a public office does not necessarily exclude its application.

Precision: Framework Agreement is not a complete regulation of part-time work. In that sense, ECJ judgement of 5 May 2022, *Universiteit Antwerpen*, C-265/20⁸, establishes that Framework Agreement must be interpreted as meaning that it does not lay down any requirements for an employer hiring a part-time worker as to the method of calculating the percentage of a comparable full-time position to which that part-time position corresponds.

The most recent Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions, partially covers this gap because, although it does not oblige the employer to reporting the percentage of partiality, requires communicate to workers information related to the work day, whether it is totally or mostly predictable or not (article 4), with guarantees linked to the minimum predictability of work (article 10), and complementary measures for on-demand contracts (article 11).

⁶ Judgement of 24 April 2008, *Michaeler* and others (C-55/07 and C-56/07, EU:C:2008:248).

⁷ Judgement of 1 March 2012, *O’Brien* (C-393/10, EU:C:2012:110).

⁸ Judgement of 5 May 2022, *Universiteit Antwerpen* (C-265/20, EU:C:2022:361).

2. Scope (Clause 2)

2.1 GENERAL SCOPE (CLAUSE 2 (1))

Clause 2, which is titled “scope”, establishes, under paragraph 1, a general rule in order to determine the scope: “This Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State”.

Unlike what is usual in European Union Law, the reference to “an employment contract or employment relationship” refers to domestic law, in a way similar to the one we find in Clause 2 of the Framework Agreement of ETUC, UNICE and CEEP on fixed-term work (Council Directive 1999/70/EC of 28 June 1999). With this legislative technique, ECJ is unable to directly apply its own doctrine on the autonomy of the concepts of European Union Law.

However, ECJ does not surrender to this regulatory obstacle, and considers that an unconditional referral to domestic law would conflict with the objectives of the Agreement, and with its useful effect, since it would be enough for domestic law to affirm that a contract or relationship is not employment to avoid its application, leaving the equality and voluntariness contemplated in Agreement to be nothing.

In this sense, in its judgement of 1 March 2012, *O’Brien*⁹, ECJ has considered that the power of appreciation that the European Framework Agreement grants to the Member States to define what is a contract or employment relationship is not an unlimited power, and those must respect the useful effect of the Directive, as well as the general principles of European Union Law.

From these considerations, ECJ concludes the following regarding the relationship of Mr. *O’Brien* (a part-time English judge) with the Ministry of Justice:

– firstly, that the scope of application of the Agreement does not exclude any category of work and is conceived in an extensive manner, encompassing all workers without establishing differences depending on the public or private nature of the employer for whom they work (and ECJ reinforces this conclusion with the analogical application of the interpretation given in the similar norm contained in the European Framework Agreement on fixed-term work)¹⁰;

⁹ See *O’Brien*, cited *ut supra*.

¹⁰ See *O’Brien*, cited, paragraphs 36 and 37.

– secondly, that the mere fact that judges are classified as holders of a judicial office is not sufficient, in itself, to deprive them of the benefit of the rights provided for in the Agreement, being necessary to admit the exclusion of the judges in their scope of application to prove that their relationship with their employer is, by its nature, substantially different from an employment relationship between an employer and a worker, based on the distinction between dependent and self-employed work¹¹, and, from that perspective, taking into consideration the methods of appointment and separation of judges, and the way their work is organized¹², as well as whether they have the right to compensation for illness, maternity, paternity and similar¹³.

On the basis of these arguments, ECJ decides “that European Union law must be interpreted as meaning that it is for the Member States to define the concept of “workers who have an employment contract or an employment relationship” in Clause 2.1 of the Framework Agreement on part-time work ... and, in particular, to determine whether judges fall within that concept, subject to the condition that that does not lead to the arbitrary exclusion of that category of persons from the protection offered by Directive 97/81 ... An exclusion from that protection may be allowed only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, under the category of workers”.

A new matter related to another judge (an Italian peace judge) allows ECJ to reiterate its doctrine about what is a part-time worker and what is not for the purposes of the Agreement: judgement of 7 April 2022, *Ministerio della Giustizia*¹⁴. ECJ takes note that an Italian peace judge does not enter by competitive examination like a career judge, and his position in the judicial organization, incompatibilities and exclusivity, remuneration, duration of the relationship and nature of his functions are different. However, having said that, ECJ brings up its judgement of 16 July 2020, *Governo della Repubblica Italiana*¹⁵, which considered a Italian peace judge appointed for a limited period, who performs real and effective services, which are not merely marginal or accessory, and for which he receives compensation of a remunerative nature, as included within the scope of application of the European Framework Agreement on fixed-term

¹¹ See *O'Brien*, cited, paragraph 44.

¹² See *O'Brien*, cited, paragraph 45.

¹³ See *O'Brien*, cited, paragraph 46.

¹⁴ ECJ judgement of 7 April 2022, *Ministerio della Giustizia* (C-236/20, EU:C:2022:263).

¹⁵ ECJ judgement of 16 July 2020, *Governo della Repubblica Italiana* (C-658/18, EU:C:2020:572).

work. Therefore, and now applying the Framework Agreement on part-time work, ECJ ends up referring to the national judicial body to determine whether the plaintiff is included in the concept of “part-time worker” within the meaning of Framework Agreement.

In both cases (*O’Brien* and *Ministerio della Giustizia*) the question of concept of part-time worker is intertwined with the choosing of right *tertium comparationis* with the typical category of judges in UK or Italy. A simpler argumentative approach would be to consider that they are workers applying the parameters usually used by ECJ and, from there, verify if there is a comparison module that allows the Agreement to be applied in relation to each specific employment condition. But the legislative technique used by the Framework Agreement, referring the definition of worker to national law, does not help the interpretative task of ECJ, nor the desirable uniform application of the Framework Agreement.

2.2 OPTING-OUT CLAUSE (CLAUSE 2 (2))

According Framework Agreement, Clause 2 (2), “Member States, after consultation with the social partners in accordance with national law, collective agreements or practice, and/or the social partners at the appropriate level in conformity with national industrial relations practice may, for objective reasons, exclude wholly or partly from the terms of this Agreement part-time workers who work on a casual basis. Such exclusions should be reviewed periodically to establish if the objective reasons for making them remain valid”.

Let it be clear that we are not facing an automatic exclusion of small jobs (casual jobs, on-call jobs, zero-hour contracts, intermittent jobs ...), but rather the State concerned, as long as it meets its requirements, must explicitly make use of this possibility of exclusion. Therefore, an employment contract whose duration and distribution of the working day are determined based on the workload and in each case by mutual agreement between the parties (which could be classified as occasional work) is not excluded from the scope of the Agreement when the worker: (1) has a contract or employment relationship according to Clause 2.1; (2) their working day is less than that of a comparable full-time worker under the terms of Clause 3.1 and 2; (3) the Member State has not exercised the exclusion permitted in Clause 2.2 (ECJ judgement of 12 October 2004, *Wippel*¹⁶).

¹⁶ ECJ judgement of 12 October 2004, *Wippel* (C-313/02, EU:C:2004:607).

3. Definitions (Clause 3)

According Framework Agreement, Clause 3, “for the purpose of this agreement:

1. The term «part-time worker» refers to an employee whose ordinary hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.

2. The term «comparable full-time worker» means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/ occupation, due regard being given to other considerations which may include seniority and qualification/ skills.

Where there is no comparable full-time worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice”.

The influence of ILO Convention 175 is very clearly noted here, both by the subjective perspective adopted (part-time work is not objectively defined, but rather the part-time worker subjectively), and by the content of the definitions of a worker part-time and full-time.

Regarding the concept of part-time worker, that of Convention 175 is practically transcribed, specifying the maximum of one year as the period of employment to be taken as a reference. According to Convention 175, the working day can be considered weekly or on average during a given period of employment: the Agreement has therefore opted for a very broad period, which prevents, due to sometimes random changes in the weekly working day or in temporary periods less than one year, the qualification is modified as worker full or part-time.

Regarding the concept of comparable full-time worker, the Agreement specifies the elements of comparison using, with some differences, the criteria of Convention 175 where the comparable full-time worker is defined according to whether: (i) he has the same type of employment relationship; (ii) carries out or exercises an identical or similar type of work or profession (these first two elements of comparison have been taken almost literally by the European concept); and (iii) is employed in the same establishment or, where there is no full-time worker in a comparable situation in that establishment, in the same company or, where there is no full-time worker in a comparable situation

in that company, in the same branch of activity (in this third element there is also no difference with the European concept in the primary reference to the establishment, but there is in the successive ones since the European concept is built, not on the company and the branch of activity, but on the collective agreements and, where appropriate, national practices).

There is not much case law on the problematic concept of a comparable full-time worker, which often becomes an obstacle difficult to overcome. For instance, in ECJ judgement of 12 October 2004, *Wippel*. This was a female worker with a part-time contract in which neither the duration nor the distribution of working time was stipulated (a zero-hour contract), while full-time workers had a perfectly scheduled day, so that none of these had the same type of contract as Ms *Wippel*, ergo there was no comparable full-time worker. We arrive to the paradox that extremely atypical contracts, which would justify greater protection, are excluded from protection. Only the adequate flexibility of the term of comparison would solve this undesirable paradox (for example, using hypothetical comparisons or comparisons based on the value of the work, or expanding the scope of comparison beyond the scope of action or organization of the employer).

In any case, the comparable third party must be a full-time worker; or, in other words, a possible difference in treatment between two categories of part-time workers would not be included in the scope of application of the principle of non-discrimination enshrined in the Framework Agreement (judgement of 7 July 2022, *Ville de Mons - Dry zone Hainaut-Centre*¹⁷).

One last clarification: ILO Convention 175 excludes from its scope full-time employees who are partially unemployed as a result of a collective and temporary reduction in the normal duration of their work for economic, technological or structural reasons. Agreement does not contain such exclusion. ECJ, in judgement of 8 November 2012, *Heimann and Toltschin*¹⁸, has achieved a Solomonic solution. According this judgement, “that workers on short-time working have indeed, from a formal point of view, a full-time employment contract”, but, “for the duration of short-time working, the reciprocal obligations of the employee and the employer as regards work and salary are suspended on the basis of the short-time working, or completely eliminated”, so “the workers on short-time working must be qualified as «temporary part-time workers», since their situation is *de facto* comparable to that of part-time workers”.

¹⁷ Judgement of 7 July 2022, *Ville de Mons - Dry zone Hainaut-Centre* (C-377/21, EU:C:2022:530).

¹⁸ Judgement of 8 November 2012, *Heimann and Toltschin* (C-229/11 and C-230/11, EU:C:2012:693).

III. THE PRINCIPLE OF NON-DISCRIMINATION (CLAUSE 4)

The Framework Agreement develops, in its Clause 4, the principle of non-discrimination of part-time workers (paragraph 1), with exceptions for objective reasons (paragraph 1 *in fine*), and for *pro rata temporis* (paragraph 2), modalities of application (paragraph 3), and even a specific opting out clause (paragraph 4).

1. Non-discrimination general principle (Clause 4 (1))

According, Clause 4 (1): “In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds”. In its judgement of 10 June 2010, *Bruno and Pettini*¹⁹, ECJ states that Clause 4 expresses a principle of Social Law of the European Union that cannot be interpreted in a restrictive manner. A plausible affirmation based on the Agreement on Social Policy Annexed to the Treaty of Maastricht (1993), the EEC Treaty and the Community Charter of the fundamental rights of workers (1989).

We will now analyze those employment conditions that, according to the jurisprudence of ECJ, must comply with this principle of equal treatment.

1.1 BENEFITS OF PROFESSIONAL REGIMES

ECJ, precisely in the recently cited judgement *Bruno and Pettini*, has construed the concept “conditions of employment” in Clause 4 as inclusive of the benefits of professional regimes, understanding that these are not social security issues (which would leave them outside of the Agreement), but (in a similar way to how the benefits of professional schemes have been interpreted in the field of the directives on equality between women and men) as deferred remuneration and, consequently, included in the concept of employment conditions.

Furthermore, ECJ establishes the following criteria to differentiate legal and complementary pensions: (1) “if the pension concerns only a particular category of workers”, (2) “if it is directly related to the period of service completed”

¹⁹ Judgment of 10 June 2010 *Bruno and Pettini* (C-395/08 and C-396/08, EU:C:2010:329).

or (3) “if its amount is calculated by reference to the last salary”²⁰. But the final decision on whether the pension is legal (excluded) or complementary (included) corresponds to the national court, without being synonymous with a legal regime or management by a public body, or public ownership of the company.

Once this interpretation has been made, the *Bruno and Pettini* Judgment clarifies (with affirmation of refined legal technique) that the periods not worked in cyclical work are not periods of suspension of the employment contract given that “part-time work constitutes a particular mode of performing the employment contract, characterised by the simple fact that the normal hours of work are reduced”²¹. So, ECJ considers contrary to the Framework Agreement a “national legislation which, for vertical-cyclical part-time workers, disregards periods not worked in calculating the period of service required to qualify for such a pension, unless such a difference in treatment is justified on objective grounds”. Another interpretation would produce inequality treatment between part-time workers and full-time workers because “the part-time worker will be credited with qualifying periods of service for a pension at a slower rate than the full-time worker”²².

Besides, ECJ has addressed another aspect related to the acquisition of the right to benefits from professional regimes in the judgement of 7 November 2018, *O’Brien*²³. We meet here again with an old friend, Judge O’Brien, who already gave rise to the judgement of 1 March 2012, *O’Brien*²⁴. There it was resolved that a part-time judge could be included in the scope of application of the Framework Agreement and criteria were offered for the English jurisdiction to decide whether, in the case, he was included or not. Well, the English jurisdiction decided that it was included, and what was now questioned was whether the time worked before the expiration of the deadline for transposition of the Directive applying the Agreement was computable for the purposes of determining the amount of the retirement pension. ECJ answers in the affirmative sense.

More recently, the principle of non-discrimination with full-time workers to the conditions of acquisition of rights in professional regimes has been applied in judgement of 7 April 2022, *Ministerio della Giustizia*²⁵, where ECJ resolves the contradiction with several European regulations (among them, Clause

²⁰ See *Bruno and Pettini*, cited, paragraph 47.

²¹ See *Bruno and Pettini*, cited, paragraph 72.

²² See *Bruno and Pettini*, cited, paragraph 62.

²³ ECJ judgement of 7 November 2018, *O’Brien*, C-432/17, EU:C:2018:879.

²⁴ See *O’Brien*, cited *ut supra*.

²⁵ See *Ministerio della Giustizia*, cited *ut supra*.

4 of the Framework Agreement on part-time work) of a national regulation that does not establish for a part-time peace judge the right to enjoy a regime of social benefits and pensions of the employment relationship as that established for career judges, provided that the peace judge is included in the concept of part-time employee and is in a situation comparable to that of the career judge.

1.2 SENIORITY PREMIUMS

The acquisition of the right to seniority supplement has also been considered subject to the principle of equal treatment in Order of 15 October 2019, *AEAT*²⁶. These were the staff (mostly female) of the Spanish Tax Agency hired part-time during the personal income tax campaign. ECJ considered contrary to Clause 4 (1) and (2), of the European Framework Agreement on part-time work (and contrary to the European law on discrimination on grounds of sex) a national regulation according to which, in the case of seasonal fixed-term employees, only the periods actually worked are counted, for the purposes of calculating the seniority required to be able to receive three-year periods as salary premiums, thus excluding the periods in which no work has been done, while this regulation does not apply to full-time workers.

1.3 CONVERSION FROM FIXED-TERM EMPLOYMENT CONTRACT INTO A PERMANENT ONE

In two cases concerning temporary part-time university staff (one from Austria and the other from Belgium), ECJ analyses the obstacles that these staff face in order to access permanent contracts in comparison with the conditions applied to full-time staff.

Austrian legislation on the recruitment of university personnel made possible in certain cases the succession of consecutive temporary contracts up to a total duration of 6 years with an extension up to 10 years, but in the case of part-time employment the duration is 8 years and the extension is 12 years. ECJ, in its judgement of 3 October 2019, *Minoo Schuch-Ghannadan*²⁷, considers this regulation contrary to the principle of equal treatment enshrined under Clause 4 (I), of the Framework Agreement, unless that such a difference

²⁶ Order of 15 October 2019, *AEAT*, EU:C:2019:858 (only available in Spanish and French).

²⁷ ECJ judgment of 3 October 2019, *Minoo Schuch-Ghannadan*, C-274/18, EU:C:2019:828.

in treatment is justified by objective reasons and is proportionate in relation to those reasons, which is for the referring court to verify. Additionally, ECJ establishes that the principle of *pro rata temporis* included in Clause 4 (1), , does not apply to such regulations.

Belgian legislation allowed the lengthening of the temporary status of part-time temporary university staff compared to the conditions of full-time temporary university staff, since, unlike these staff, they were not guaranteed that, upon reaching a certain seniority, was hired permanently. Well, ECJ, in its judgement of 5 May 2022, *Universiteit Antwerpen*²⁸, has considered that it is contrary to the Agreement a national regulation by virtue of which a member of the academic staff who teach full-time will be appointed on a permanent basis, while a member of the academic staff who teaches part-time will be appointed on a permanent or temporary.

1.4 CONDITIONS OF PAYMENT OF OVERTIME WORKED

In the judgment of 29 July 2024, *IK & CM*²⁹, CJUE has been considered a “less favourable” condition of part-time workers, within the meaning of Clause 4 (1), , a situation in which payment of overtime supplements is provided, for part-time workers, only for hours worked in excess of hours of full-time workers.

The Court states that such situation cannot be justified by the pursuit, first, of the objective of deterring the employer from requesting to work overtime in excess of the hours individually agreed in their employment contracts and, second, of the objective of preventing full-time workers from being treated less favourably than part-time workers.

2. Different treatment for objective reasons (Clause 4 (1 in fine))

Breaking the dream of equality in which the general statement of Clause 4 (I) had plunged us, that same paragraph 1 *in fine* contains an exception to the prohibition of unequal treatment between comparable part-time and full-time workers when it states “unless different treatment is justified on objective grounds”. Here we find ourselves with one of the thorniest issues of the Agree-

²⁸ See *Universiteit Antwerpen*, cited *ut supra*.

²⁹ Judgement of 29 July 2024, *IK & CM* (C-184/22 & C-185/22, ECLI:EU:C:2024:637).

ment because the justifications are susceptible to resulting in greater precariousness of the part-time workers.

ECJ's first approaches this exception as can be found in two orders, both in relation to the same issue and with a peculiar litigation scenario: ECJ Order of 7 April 2011, *Dai Cugini*³⁰, and ECJ Order of 9 December 2011, *Yangwei*³¹. The disputes (which both come from Belgium) are not raised by workers who complain against their employers, but by employers who complain against an administrative sanction in relation to the obligation imposed on them to maintain employment contracts and the schedules of part-time workers. ECJ says nothing about this peculiar litigation scenario, so that there is nothing strange about the principle of equality being validly alleged by the employers.

Within this context, ECJ refers to the national court to verify whether such conservation obligations by the company constitute unequal treatment or are justified, although offering some decision criteria:

— Firstly, the exception must be based on objective reasons, and for these purposes ECJ accepts as objective reasons, in line with the assessments of the referring national body, the fight against clandestine work, and in line with the allegations of the Belgian Government, the reconciliation of worker protection with the flexibility of companies (so-called flexicurity).

— Secondly, the exception must be proportional in the sense that the means used allow the objectives pursued to be achieved, and do not go beyond what is necessary to meet them. Here the Belgian government's allegations highlight that the penalty has a maximum amount to which a correction factor is applied that allows said penalty to be graduated depending on the company's fault.

Later, ECJ analyses the scope of this exception in the Order of 15 October 2019, *AEAT*³². Curiously, this Order does not mention the previous precedents. Although it rejects the application to the case of the exception, it makes several considerations in connection with its scope:

— In a negative sense, the concept of "objective reasons" used by the Agreement does not justify a difference in treatment between part-time workers and full-time workers because it is provided for by a general and abstract national rule such as a law or a collective agreement.

³⁰ Order of 7 April 2011, *Dai Cugini*, C-151/10, EU:C:2011:223 (only available in Dutch and French).

³¹ Order of 9 December 2011, *Yangwei*, C-349/11, EU:C:2011:826 (only available in French).

³² See *AEAT*, cited *ut supra*.

— In the affirmative sense, said concept requires that the disputed inequality of treatment be justified by the existence of precise and concrete elements that characterize the employment condition at stake, in the specific context in which it is framed and in accordance with objective criteria and transparent, in order to verify whether said inequality responds to an authentic need, if it allows the pursued objective to be achieved and if it is indispensable for this purpose. Such elements may have their origin, in particular, in the special nature of the tasks for which part-time contracts are concluded and in characteristics inherent to them or, possibly, in the pursuit of a legitimate social policy objective by part of a Member State.

3. Pro rata temporis (Clause 4 (2))

According Clause 4 (2), “where appropriate, the principle of *pro rata temporis* shall apply”. Here is another of the thorny issues of the Agreement to the extent that an extensive application of the *pro rata temporis* would lead to unjustified inequalities. For this reason, and from the guarantee perspective that inspired them, the directive proposals of the early eighties enumerated a list of conditions to which the equation between part-time workers and comparable full-time workers would be applied, and limited the application of proportionality to remuneration and compensation. While the Framework Agreement, from a more flexible perspective, has led to a very open and indetermined legal concept to specify when the *pro rata temporis* is applied: “when appropriate”.

3.1 REMUNERATION CALCULATION

This is the most typical case in which the *pro rata temporis* principle must be applied as a general rule, which does not prevent, in relation to certain remuneration items, there from being exceptions in favour to equalization.

ECJ has faced some dubious cases in which it has applied proportionality without concessions. Thus, ECJ, in judgement of 5 November 2014, *OG*³³, was questioned about a supplement for dependent children established in the collective agreement for employees of the Austrian banking sector. ECJ expands on the consideration that we are dealing with remuneration borne by the employer, and not with a public social security benefit (invoking constant

³³ Judgement of 5 November 2014, *OG* (C-476/12, EU:C:2014:2332).

case law issued in this regard within the scope of the principle of equal pay for men and women) to deduce that “the supplement for dependent children, as it forms part of the benefits paid in cash to the worker, is a divisible benefit”.

Perhaps the solution of the *OG* case is the most correct. But our concern arises from the danger of uncritically extending the argumentation used in *OG* to other conditions of employment of a remunerative nature or conciliatory purpose similar to the nature or purpose of the complement examined in that judgement.

— Firstly, the argument is presented in such a way that, as long as the at stake is remunerative, proportionality apparently applies, and this seems very debatable in many cases. Perhaps the clearest examples in which it should not be applied are extra-salary perceptions. It is not logical that if you work on a custom-made base you are not entitled to more than half, to give some examples, of extra clothing, or subsistence allowances or travel, when clothing is required to carry out the work, or the subsistence allowance or travel originates due to the work performed, in both cases on the same terms in which clothing is required or the subsistence allowance or displacement arises for a comparable full-time employee.

— Secondly, and although in principle the argument refers only to remuneration conditions, the fact that a part-time worker only has the right to a supplement per child as (to put it illustratively) if he only had half a child, It raises concerns about whether, in relation to other rights linked to childcare, similar solutions could be reached (for example, one would only have the right to half leave).

3.2 SENIORITY PREMIUM CALCULATION

Despite the forcefulness of the Order of 15 October 2019, *AEAT*³⁴, the Judgment of 7 July 2022, *Ville de Mons - Zone de secours Hainaut-Centre*³⁵ has admitted the application of *pro rata temporis* principle in the calculation of remuneration linked to seniority by concluding that the Framework Agreement does not preclude national regulations that, for the purposes of calculating the remuneration of professional firefighters hired full-time, computes, as salary seniority, the services previously provided part-time, as volunteer fire-

³⁴ See *AEAT*, cited *ut supra*.

³⁵ Judgment of 7 July 2022, *Ville de Mons - Zone de secours Hainaut-Centre*, C-377/21, EU:C:2022:530.

fighters, according to the principle of *pro rata temporis*, that is, based on the services actually performed.

We can admit that the *Ville de Mons* case is an exception to the equalization criterion of the *AEAT* case (or, in other words, it is a different case), supporting that exception (or justifying the difference) in the requirement of experience as justification of the remuneration of a professional firefighter since the experience would be acquired by the actual time of service as a volunteer firefighter rather than by the duration of the period of service in such condition.

However, the ECJ does not reason the *Ville de Mons* case in terms of exception or difference with the *AEAT* case but, avoiding the citation of the *AEAT* case, and invoking an Order of 3 March 2021, *JL*³⁶, referring to a case, analysed from the sexist anti-discrimination regulations, where the application of proportionality would be correct when referring to the amount of a limitation on differential salary guarantee benefits depending on whether it is a part-time or full-time worker, reaches the overwhelming ruling stated above, which is the cause of a certain perplexity because it makes a clean slate between what are the conditions of access to a right (subject to equalization, except for objective reason, which in the case would exist) and its quantity (subject to *pro rata temporis*).

The praetorian reasoning of the ECJ makes it difficult to conclude whether the *Ville de Mons* case is an exceptional or different case with respect to the *AEAT* case, or if there is a change in criteria. We are inclined to think that the first would turn out to be the most logical.

3.3 BENEFITS OF PROFESSIONAL REGIMES CALCULATION

To the extent that the benefits of professional regimes are also remunerative conditions, the submission of the rules for calculating their amount to the application of the *pro rata temporis* principle is evident. Now, with two clarifications. One of them is not to confuse the rules for calculating the amount with the conditions of access to the right to benefits from professional regimes, which are subject to the principle of equalization (*Bruno* and *Pettini*, mentioned *ut supra*).

The other clarification is that the calculation of the amount of the benefit in question may contain elements of complexity with respect to which it is not always easy to conclude whether proportionality or equalization should be

³⁶ Order of 3 March 2021, *JL*, C-841/19, (EU:C:2021:159).

applied. In the judgment of 13 July 2017, *Kleinstauber* C-354/16³⁷ we find a good example of the complexities of calculating certain occupational pensions where ECJ answers two calculation questions that refer to part-time work.

— The first questions a rule for calculating a professional retirement pension that aims to adjust its amount as best as possible to the last salaries received, hence establishing differentiated coefficients depending on whether the salaries are lower or higher than the maximum contribution base of compulsory retirement insurance, presenting the coefficients applicable to higher remunerations with a greater impact on the professional retirement pension since said higher remunerations are not considered when calculating the retirement paid by compulsory insurance. Should the coefficients be applied taking the remuneration actually received, as the employer has done, or taking the hypothetical remuneration that a part-time worker would have if he worked full-time, as the worker argued? ECJ understands that “the objective of the split formula, which aims to take into account the difference of cover needs for the remuneration tranches below and above the contributions calculation ceiling, is an objective reason” which excludes the violation of the principle of equality and, therefore, the existence of sexist discrimination.

— The second questions another rule for calculating an occupational retirement pension according to which, in the case of accrual of periods of full-time and part-time work, a uniform activity rate is considered for the entire duration of the employment relationship, which ECJ also does not consider it discriminatory as long as this method of calculating the retirement pension does not infringe the *pro rata temporis* rule. In this case, ECJ recognizes the lack of factual data to determine whether the joint consideration of the periods violates proportionality compared to their fragmented consideration (as stated by Ms. Kleinstauber) and, having greater knowledge of the matter, refers the evaluation to the national court.

3.4 VACATION CALCULATION, OR BETTER COULD SAY ITS REMUNERATION?

Given that, unlike the directive proposals of the early eighties, the Agreement does not limit the possible application of the *pro rata temporis* to remuneration and compensation, we cannot be surprised that ECJ has applied said principle to non-remunerative conditions without any questioning. This has

³⁷ Judgment of 13 July 2017, *Kleinstauber*, (C-354/16, EU:C:2017:539).

happened with vacations, which, even though we are alerted to the possibility of applying proportionality to non-remunerative or compensatory conditions, continues to surprise us because we do not fully understand how the right to rest can be enjoyed proportionally without defrauding the purpose of physical and mental recovery after completing work. But ECJ has been insistent on this application, having ruled in this sense up to four resolutions of reiterated doctrine, from which it is not only deduced that annual vacations are subject to this principle, but also intends to detail with some precision how they are. This principle must be applied in cases where there is a change in the working day during the annual vacation accrual period, giving rise to extensive jurisprudence, when, in our opinion, denying the application of proportionality would undoubtedly be I could reach much simpler conclusions without the need for so much trouble.

(1) In the judgment of 22 April 2010, *ZLT Tirols*³⁸, ECJ states that “it is indeed appropriate to apply the principle of *pro rata temporis* ... to the grant of annual leave for a period of employment on a part-time basis”, hence it is appropriate to apply the *pro rata temporis* principle to the granting of annual leave for a period of part-time work”, hence “the reduction of annual leave by comparison to that granted for a period of full-time employment is justified on objective grounds”³⁹.

Now, this statement is accompanied by two qualifications aimed at preventing unjustified results from being achieved through the application of proportionality.

Firstly, “that principle cannot be applied *ex post* to a right to annual leave accumulated during a period of full-time work”⁴⁰.

Secondly, and although it is recognized that “national legislation may provide, among the conditions for the exercise of the right to paid annual leave, for the partial loss of the right to leave accumulated over a reference period”, ECJ specifies that “nevertheless this conclusion must be reached only when the employee has not actually had the opportunity to exercise that right”⁴¹.

For this reason, ECJ considers as contrary to EU law a rule of the Austrian Land of Tyrol according to which in the event of a modification of an employee’s working day, the part of the vacation not yet taken must be adapted proportionally to the new day of work, with the consequence that an employee

³⁸ Judgment of 22 April 2010, *ZLT Tirols* (C-486/08, EU:C:2010:215).

³⁹ See *ZLT Tirols*, cited, paragraph 33.

⁴⁰ See *ZLT Tirols*, cited, paragraph 33.

⁴¹ See *ZLT Tirols*, cited, paragraph 34.

whose working day is reduced from full-time to part-time sees his right to acquired paid annual leave diminished, without having had the opportunity to enjoy it, during the time in which he worked full-time. complete, or from now on he or she will only be able to enjoy vacations with reduced pay as a part-time employee.

(2) Judgment of 8 November 2012, *Heimann and Toltschin*⁴², with a reminder of the *ZLT Tirols* Judgment, does not take much trouble in considering valid those “national legislation or practice, such as a social plan agreed between an undertaking and its works council, under which the paid annual leave of a worker on short-time working is calculated according to the rule of *pro rata temporis*”.

(3) With the same reminder of the *ZLT Tirols* judgement, ECJ issues an Order (here it does not even bother to issue a judgement) of 13 June 2013, *Brandes*⁴³, considered contrary to European Union Law “national provisions or a national practice, such as those at issue in the main proceedings, under which the number of days of paid annual leave which a full-time worker was unable to exercise during the reference period is, due to the fact that that worker moved to a scheme of part-time work, subject to a reduction which is proportional to the difference between the number of days of work per week carried out by that worker before and after such a move to part-time work”.

(4) Faced with the two previous cases (which ECJ resolves with hardly any argumentative effort other than reiterating the *ZLT Tirols* doctrine), ECJ confronts itself in judgement 11 November 2015, *Greenfield*⁴⁴, to greater factual complexity given that Ms. Greenfield is subject to continuous shift changes during the vacation accrual period. In these cases, the application of *pro rata temporis* to holidays would be facilitated if the obligation to recalculate the holidays every time the day is changed was imposed on the employer, and ECJ recognizes that Member States and the social partners can impose that obligation as a more favour provision. But even so, the answer to the question posed is that “in the event of an increase in the number of hours of work performed by a worker, the Member States are not obliged to provide that the entitlement to paid annual leave already accrued, and possibly taken, must be recalculated retroactively according to that worker’s new work pattern”.

Now, the application of proportionality to vacations necessarily requires (and this is recognized by ECJ) to “the number of units of annual leave accumulated in

⁴² Judgment of 8 November 2012, *Heimann and Toltschin* (C-229/11 and C-230/11, EU:C:2012:693).

⁴³ ECJ Order of 13 June 2013, *Brandes* (C-415/12, EU:C:2013:398).

⁴⁴ ECJ judgement of 11 November 2015 (*Greenfield*, C-219/14, EU:C:2015:745).

relation to the number of hours worked must be calculated separately for each period”⁴⁵. All of this leads to ECJ’s ruling in the Judgment that “a new calculation must ... be performed for the period during which working time increased”.

Furthermore, ECJ, answering another question, states that “the calculation of the entitlement to paid annual leave is to be performed according to the same principles, whether what is being determined is the allowance in lieu of paid annual leave not taken where the employment relationship is terminated, or the outstanding annual leave entitlement where the employment relationship continues”.

In view of these four resolutions, ECJ, in our opinion, confuses the vacation (which should not be subject to *pro rata*) with the right to its remuneration (which should be subject to *pro rata*). I will explain myself with two extreme examples. A part-time worker for 364 days becomes a full-time employee on day 365, and another full-time employee for 364 days becomes a part-time employee on day 365. With the logic of *pro rata temporis*, the first would have earned half month of vacation that he would enjoy full-time, which would mean that he would exhaust it in half a month, while the second would have earned a month of vacation that he would enjoy part-time, which would mean that he would exhaust it in two months. If we follow the logic of equality, both would enjoy a month of vacation, although the first would be paid only half a month, while the second would be paid for the full month. That is, it is not the vacation, but its remuneration, which must be subject to *pro rata temporis*. If this is not done, ECJ is forced to make various clarifications on ex post application, partial losses, recalculations and separation of periods that should never affect the rest time, and that would be solved much more easily taking into account the accrual criteria of remuneration.

Is a change in sight in the judgement of 7 April 2022, *Ministerio della Giustizia*⁴⁶? In this case, ECJ resolves the contradiction with several European regulations (including clause 4 of the Framework Agreement on part-time work) of a national regulation that does not establish for the peace judge the right to enjoy even thirty days of paid annual leave like career judges, provided that the peace judge is included in the concept of part-time worker and is in a situation comparable to that of a career judge. And the fact is that the precision that the vacation must be thirty days (not one day more, not one day less than the career judge) makes us think that ECJ recognizes that the duration of the vacation is not prorated and, consequently, we understand that what is prorated is their remuneration.

⁴⁵ See *Greenfield*, paragraph 42.

⁴⁶ See *Ministerio della Giustizia*, cited *ut supra*.

4. Arrangements for the application (Clause 4 (3))

According Clause 4 (3): “The arrangements for the application of this clause shall be defined by the Member States and/or social partners, having regard to European legislation, national law, collective agreements and practice”. This is an abstruse rule that has not yet been subject to interpretation by ECJ. The intention is probably to enable a progressive application of the principle of equal treatment. Now, this authorization, in our opinion, could not be unconditional and unlimited, so that the temporary maintenance of discriminatory situations could not go beyond what is necessary to meet objective reasons, such as the viability of the company, which could justify reasonable periods until equality is achieved, but not the *sine die* maintenance of inequality. With this restrictive interpretation, this paragraph 3 of Clause 4 would be a mere application of its paragraph 1 *in fine*, which allows exceptions for objective reasons.

5. Opting-out specific clause (Clause 4 (4))

According Clause 4 (4): “Where justified by objective reasons, Member States after consultation of the social partners in accordance with national law, collective agreements or practice and/or social partners may, where appropriate, make access to particular conditions of employment subject to a period of service, time worked or earnings qualification. Qualifications relating to access by part-time workers to particular conditions of employment should be reviewed periodically having regard to the principle of non-discrimination as expressed in Clause 4.1”. This is a special opting-out clause different from the general one in Clause 2 (2). Here, an opting-out is allowed for any class of part-time workers (unlike the general one that only allows it for casual workers), but only allows a partial opting-out respect to particular conditions of employment subject to a period of service, time worked or earnings qualification (and this marks another difference with the general release clause, that allow a total opting-out).

IV. PRINCIPLE OF VOLUNTARINESS (CLAUSE 5)

1. Review obstacles (Clause 5 (1))

According to Clause 5 (I): “In the context of Clause 1 of this Agreement and of the principle of non-discrimination between part-time and full-time workers:

(a) Member States, following consultations with the social partners in accordance with national law or practice, should identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them;

(b) the social partners, acting within their sphere of competence and through the procedures set out in collective agreements, should identify and review obstacles which may limit opportunities for part-time work and, where appropriate, eliminate them”.

ECJ has interpreted this rule on three occasions. In the judgement of 24 April 2008, *Michaeler* and others⁴⁷, decides that a national rule that requires a copy of employment contracts to be notified to the Administration within 30 days from its conclusion is not in accordance with European laws on part-time work. To reach this conclusion, the Court notes that Italian legislation does not require an equal obligation for full-time employment contracts, that the obligation and its sanction are disproportionate for the purposes of the fight against black work and that this obligation particularly affected to small and medium-sized businesses. The Court draws attention to the fact that Clause 5.1 connects with the promotion of part-time work that the Agreement recognizes, in its Clause 1 as one of its objectives.

In ECJ judgement of 10 June 2010, *Bruno* and others⁴⁸, after considering that the national rule being judged may be incompatible with the principle of non-discrimination (Clause 4 (1)), decides that “if the referring court reached the conclusion that the national legislation at issue in the main proceedings is incompatible with Clause 4 of the Framework Agreement, Clauses 1 and 5 (1) of the agreement would have to be interpreted as also precluding such legislation”. It thus seems that the violation of Clause 4 (1), will always entail that of Clause 5 (1). Not in vain, ECJ says, the existence of discrimination “tend to make part-time work less attractive for that category of workers”⁴⁹.

In ECJ judgement 14 April 2014, *Cachaldora*⁵⁰, however, it is denied that possible inequalities derived from a public pension are considered as obstacles to part-time work within the meaning of the Clause 5.1 because this rule does not imply that Member States be forced to adopt, outside the area of employment conditions, measures relating to a pension such as that at issue in the case.

⁴⁷ ECJ judgement of 24 April 2008, *Michaeler* and others, C-55/07 and 56/07, EU:C:2008:248.

⁴⁸ See *Bruno* and *Pettini*, cited *ut supra*.

⁴⁹ See *Bruno* and *Pettini*, cited, paragraph 80.

⁵⁰ ECJ judgement 14 April 2014, *Cachaldora*, C-527/13, EU:C:2015:215.

2. Retaliation (Clause 5 (2))

According to Clause 5 (2): “A worker’s refusal to transfer from full-time to part-time work or vice-versa should not in itself constitute a valid reason for termination of employment, without prejudice to termination in accordance with national law, collective agreements and practice, for other reasons such as may arise from the operational requirements of the establishment concerned”.

This clause has been interpreted by the important (and as we will see quite disappointing) ECJ judgement of 15 October 2014, *Mascellani*⁵¹.

Ms. *Mascellani* was a three-day, part-time employee of the *Ministerio della Giustizia*. Applying a 2010 law, the *Ministerio* proceeded to re-examine Ms. *Mascellani*’s part-time scheme, and she was imposed a full-time job spread over six days. ECJ concludes that it is not contrary to European regulations for a Member State to allow the transformation of a part-time employment contract into a full-time one without the employee’s agreement. This statement is based on two arguments:

(1) First of all, regarding the meaning of Clause 5 (2), of the Agreement, ECJ states that “it is clear from that clause that it does not require the Member States to adopt rules making the conversion of a worker’s part-time employment relationship to a full-time employment relationship subject to his consent. That provision seeks merely to exclude the refusal of a worker, as regards such a conversion of his employment relationship, from being the only reason for the termination of his employment in the absence of other objective reasons”⁵². Consequently, ECJ deduces “that Clause 5.2 of the Framework Agreement does not preclude legislation which allows an employer to order, for such reasons, the conversion of a part-time employment relationship into a full-time employment relationship without the consent of the worker concerned”⁵³.

But if this is so, the worker remains in a legal limbo: his employer transforms his part-time contract into a full-time contract, securely for a business reason; if the worker uses the right to oppose is not protected against dismissal bases on business reasons; consequently, effectiveness of Clause 5.2 is practically void.

(II) Secondly, following the opinion of the Advocate General, ECJ states that “a situation in which a part-time employment relationship is converted into a full-time employment relationship without the consent of the worker concerned and a situation in which a worker has his full-time employment relation-

⁵¹ ECJ judgement of 15 October 2014, *Mascellani*, C-221/2013, EU:C:2014:2286.

⁵² See *Mascellani*, cited, paragraph 23.

⁵³ See *Mascellani*, cited, paragraph 24.

ship converted into a part-time employment relationship contrary to his wishes cannot be regarded as comparable because the reduction of working time does not involve the same consequences as an increase, in particular, as regards the worker's remuneration, which constitutes consideration for the work carried out"⁵⁴. And if we read the opinion of the Advocate General, he said that: "For the sake of argument, it is at any rate doubtful whether the situation of a part-time worker who faces the risk of having to work full-time against his will is, in fact, comparable to that of a full-time worker who risks having to work part-time. Being told to work more is not the same as being told to work less - at least from the point of view of a worker's livelihood. It is therefore open to debate whether a comparable full-time worker exists"⁵⁵. Thus, the conversion of a part-time contract to a full-time contract is in accordance with European regulations, while the reverse option would not be when there is a comparable full-time worker. But even then, we would not be applying Clause 5, but rather Clause 4, which, also from this perspective, would produce a very important emptying of Clause 5.

Critical voices have been raised against the position of ECJ and the arguments of the Advocate General, highlighting the departure of his decision from the sociological basis of the part-time contract, its feminization and its dimension of reconciling family and work life. From this perspective, if the employer can force the worker to convert his part-time employment contract into a full-time one, it is possible that the peremptory nature of family responsibilities will force him to withdraw from the employment contract. ECJ also forgets that the part-time contract may be the formula desired by the worker (especially the youngest ones) to make work and training compatible (which may force them to abandon their studies or give up work if the employer is allowed to unilaterally impose a full-time contract); or to make two jobs compatible (thus forcing you to choose one of the two).

The final situation is disappointing, and can be summarized as follows: Clause 5 (2), does not protect part-time workers from the business decision to convert them to full-time, nor (at least in our opinion) full-time workers versus the business decision to convert them to part-time; Clause 4 allows full-time employees to be protected against the decision to convert them to part-time but only if there is a comparable full-time worker; Clause 4 never allows part-time workers to be protected against the business decision to further reduce their working hours because the comparable worker contemplated in such clause is a full-time worker, but not another part-time worker; Ultimately, both workers

⁵⁴ See *Mascellani*, cited, paragraph 27.

⁵⁵ Opinion of Advocate General Wahl, delivered on 22 May 2014, paragraph 51.

can oppose the business decision only if it is not based on business reasons, since the protection against dismissal of Clause 5 (2), only allows them to successfully oppose if the business decision is not motivated.

We will always have Paris. European equality law between man and woman may cover in part all this deficient protection against the dismissal, if this dismissal is discriminatory on ground of sex.

3. **Mobility (Clause 5 (3))**

According to Clause 5 (3), “as far as possible, employers should give consideration to:

- a) requests by employees to transfer from full-time to part-time work that becomes available in the establishment;
- b) requests by workers to transfer from part-time to full-time work or to increase their working time should the opportunity arise;
- c) the provision of timely information on the availability of part-time and full-time positions in the establishment in order to facilitate transfers from full-time to part-time or vice versa;
- d) measures to facilitate access to part-time work at all levels of the enterprise, including skilled and managerial positions, and where appropriate, to facilitate access by part-time workers to vocational training to enhance career opportunities and occupational mobility;
- e) the provision of appropriate information to existing bodies representing workers about part-time working in the enterprise”.

This is the longest paragraph of the Agreement, which, however, does not have subjective rights. This is why there is no ECJ doctrine about this paragraph.

V. **TECHNICAL CLAUSES (CLAUSE 6)**

To finish the analysis of the European Framework Agreement we must mention its technical clauses, contained in Clause 6, as follows:

- (1) minimum clause and possibility of establishing more beneficial rules in domestic laws (paragraph 1)⁵⁶;

⁵⁶ “Member States and/or social partners may maintain or introduce more favourable provisions than set out in this agreement”.

- (2) stand-still clause, given that its adoption does not constitute a valid justification for a regressive national policy (paragraph 2)⁵⁷;
- (3) safeguard clause regarding the right of the social partners to conclude, at the appropriate level, including European level, agreements adapting and/or complementing the provisions of the Agreement (paragraph 3)⁵⁸,
- (4) non-affect clause of specific Community provisions, and, in particular, those relating to equality between men and women (paragraph 4)⁵⁹;
- (5) venue and applicable law clause (paragraph 5)⁶⁰;
- (6) (unfulfilled) review clause after five years (paragraph 6)⁶¹.

⁵⁷ "Implementation of the provisions of this Agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of this agreement. This does not prejudice the right of Member States and/or social partners to develop different legislative, regulatory or contractual provisions, in the light of changing circumstances, and does not prejudice the application of Clause 5.1 as long as the principle of non-discrimination as expressed in Clause 4.1 is complied with".

⁵⁸ "This Agreement does not prejudice the right of the social partners to conclude, at the appropriate level, including European level, agreements adapting and/or complementing the provisions of this Agreement in a manner which will take account of the specific needs of the social partners concerned".

⁵⁹ "This Agreement shall be without prejudice to any more specific Community provisions, and in particular Community provisions concerning equal treatment or opportunities for men and women".

⁶⁰ "The prevention and settlement of disputes and grievances arising from the application of this Agreement shall be dealt with in accordance with national law, collective agreements and practice".

⁶¹ "The signatory parties shall review this Agreement, five years after the date of the Council decision, if requested by one of the parties to this Agreement".

CHAPTER 20

TEMPORARY EMPLOYMENT AGENCIES (DIRECTIVE 2008/104/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 19 NOVEMBER 2008)

CAROLINA SAN MARTÍN MAZZUCCONI

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I. REGULATORY FRAMEWORK

Since its beginnings, the activity of temporary work has been accompanied by the spectre of abuse of rights. So much so that for a long time it was banned in Spain and the rest of Europe, being classified as illegal labour trafficking. Today things have changed, but this has not completely dispelled the mistrust of this activity, and even today it is still possible to find citizens who are convinced that it is inherent to temporary work agencies to withhold part of their salary from workers.

But this is a problem of misinformation on the street; in the rules, the situation is intended to be very different. After the aforementioned first prohibitive stage, the perspective changed at the end of the 1960s in the central countries of what is now the European Union: assignment of temporary work began to be considered as an effective way of conducting a significant volume of employment, both because of its specialization and immediate response, and because of the attractiveness of a low-risk formula for user undertakings to solicit workers. From this perspective, a regulation of the phenomenon was perceived as necessary which, while recognising its legality, would allow sufficient control of its development, in order to avoid possible abuses of temporary workers' rights.

Beyond the admission of temporary work in each State, the European Union was concerned to regulate the phenomenon, which, more or less indirectly, was already the subject of attention in certain Community legislation. In particular, this is the case of Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-term employment relationship or a temporary employment relationship, as well as Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services. Both of these legal instruments were - and are - applicable to temporary-work agencies. But the fact is that there was a lack of a regulation of the phenomenon in a general way, which unified national legislation when it came to basic issues of temporary agency work. This was acknowledged in the preamble to the Framework Agreement on fixed-term work concluded on 18 March 1999, in which the signatory parties showed their intention to consider the need for a similar agreement on temporary agency work. However, the negotiation was not peaceful and it took almost a decade since this last assessment that Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work finally came into force. As summarized by the ECJ in Judgment of 5 October 2022, *TimePartner Personalmanagement* (Case C-311/21, EU:T:2022:600), it is clear from its recitals that the Union is home to a great diversity of legal situations, statutes and working conditions of temporary agency workers, and that, in such a scenario, the Directive “aims to establish a non-discriminatory, transparent and proportionate framework of protection for those workers, while respecting the diversity of labour markets and industrial relations”. All this on the premise that temporary agency work “meets not only undertakings’ needs for flexibility but also the need of employees to reconcile their working and private lives, contributing to job creation and to participation and integration in the labour market”.

II. ANALYSIS OF DIRECTIVE 2008/104/EC

1. Preliminary remarks

The Directive has 14 articles structured in three chapters, preceded by 23 recitals. Chapter I (Articles 1 to 4) contains the “General Provisions” and covers the scope of the Directive, its aim, definitions and the review of prohibitions or restrictions. Chapter II (Articles 5 to 8) is devoted to “Employment and Working Conditions”, ruling the principle of equal treatment, access to employment, common facilities and vocational training, representation of temporary agency workers and information of workers’ representatives. Chapter III (Articles 9 to 14) contains the “Final Provisions”, concerning the consideration of the content of the European standard as a minimum level of protection, its future revision¹, sanctions, transposition, entry into force and addressees.

Two preliminary remarks should be made first:

- Community law exclusively regulates the employment relationship provided by temporary agency workers (Article 1(1)). Therefore, adjacent and prior issues such as the authorization mechanisms for temporary-work agencies, the commercial relationship between temporary-work agencies and user undertakings, including the cases in which temporary work can be provided, and the conditions applicable to structural workers, fall outside its scope (remaining strictly within the scope of national legislation).

- A general criticism can be made of the Community legislator’s legal technique, which in some respects is somewhat obscure and convoluted. As is often the case, the legislator’s intention is positive, but the way in which it is expressed could be improved.

2. Keys to regulation

Recital 23 of the Directive states that the purpose of the directive is to “establish a harmonised Community-level framework for protection for tem-

¹ Pursuant to Article 12 of the Directive, by 5 December 2013 the Commission would review the application of the Directive with a view to proposing, if necessary, appropriate amendments. However, in 2014, the *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work* (COM (2014) 176 final, Brussels, 21/3/2014) was published, concluding that no time enough had elapsed to determine whether amendments were necessary. It should be noted that, as stated in the report, at the date of its conclusion, no judgments from the Court of Justice of the European Union on the Directive have been rendered yet.

porary agency workers”. Article 2, dedicated to the “Aim”, adds the enigmatic mission of “improving the quality of temporary agency work”. Clearly, this is not a regulation with a commercial or business content, so that the quality of the agencies, or even of the service they provide, is not relevant for these purposes. Rather, the aim is to improve the quality of the work provided through temporary-work agencies, and specifically, as Article 2 goes on to say, the improvement is to take place “by ensuring that the principle of equal treatment (...) is applied to temporary agency workers, and by recognising temporary work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working”.

What is certain is that a careful analysis of the regulation allows us to consider that, despite the wording of Article 2 and its heading, the *aim* of the Directive is the one mentioned in the recitals: to establish a framework of protection for temporary agency workers. Equal treatment is, in fact, its inspiring *principle*, and the positioning of temporary work agencies in job creation, its *justification*.

It should also be noted that the role of temporary work agencies in employment policy is enshrined at Community level. It can be said that the Directive is intended to mark a decisive step in the regulatory evolution of temporary agency work. Having overcome the absolute prohibition and having admitted its legality under certain conditions as a “lesser evil” in times of high unemployment, temporary work agencies cease to be an unavoidable pathological instrument and become useful and structural tools for the promotion of job creation and recruitment. This positive and uncomplicated view of temporary agency work is corroborated, as will be seen in this chapter, by the Directive’s mandate to remove restrictions on temporary agency work as far as possible.

In a way, the EU regulation summarizes the principles of flexicurity: temporary work agencies embody a flexible way of creating employment - even if it is mostly of a fixed duration - while at the same time providing a dose of protection, seeking equal treatment of the workers concerned. In this respect, the European Commission argues that temporary agency work “...will not be able to provide a permanent source of jobs unless it is sufficiently attractive for workers and jobseekers, i.e. if it does not offer quality jobs despite its temporary nature”².

² Proposal for a Directive of the European Parliament and of the Council on working conditions for temporary agency workers (COM (2002) 149 final, 20/3/2002, p. 5).

3. Scope of the Community rule

Article 1 of the Directive states that it applies, on the one hand, “to workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user undertakings to work temporarily under their supervision and direction” and, on the other hand, “to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain”.

For the purposes of this rule, the notion of “worker” seems to be left to the definition made by each State legislator, as it is deemed to be “any person who, in the Member State concerned, is protected as a worker under national employment law”. Within that notion, the Directive is particularly interested on employees who are assigned by temporary-work agencies, i.e. any “worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction”. Again, it does not interfere with what is to be understood, in each Member State, by an employment contract or employment relationship.

However, Judgment of 17 November 2016, *Betriebsrat der Ruhrlandklinik* (C216/15, EU:C:2016:883), sets a very important interpretation: in particular, it states that the mere fact that a person is not linked to a temporary-work agency by an employment contract or employment relationship under national law does not simply exclude that person from the scope of application of the Directive. The Community legislation does not intervene in the internal effects of the concept of worker used by each State, but in no way waives the right to determine the scope of such concept within the meaning of Directive 2008/104, and thus to determine the scope *ratione personae* of that directive. In the end, notwithstanding the competence of Member States as regards the determination of the persons covered by the concept of ‘worker’ within the meaning of national law, the Community lawmaker has not entrusted the States with the task of unilaterally defining that concept, but has chosen itself to define its boundaries.

In line with the above, the Court points out that, according to its settled case-law, the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration, and neither the legal classification under national law, nor the form of that relationship, nor the nature of the legal relationship existing between those two persons, are decisive in that regard (Judgment of 11 November 2010, *Danosa* (C232/09, EU:C:2010:674).

In the *Betriebsrat der Ruhrlandklinik* case, the member of a not-for-profit association is assigned to a user undertaking in order to carry out, as his main occupation and under the direction of that user undertaking, work in return for remuneration, even though that member does not have the status of a worker under national law because he has not entered into a contract of employment with that association. It therefore appears that the relationship between the person and the association is not substantially different from that between employees of a temporary-work agency and the latter.

As regards the consideration of the association as a temporary-work agency, the Court again proposes a broad reading, as it considers that what defines it is that the assignment to the user undertaking is carried out by an undertaking carrying out an “economic activity”. And it turns out that, according to the settled case law of the Court of Justice, any activity consisting of offering goods or services on a given market has an economic character (Judgments of 18 June 1998, *Commission v Italy* C35/96, EU:C:1998:303; 6 September 2011, *Scattolon* C108/10, EU:C:2011:542; 23 February 2016, *Commission v Hungary*, C179/14, EU:C:2016:108). The association meets this profile, as it provides services on the market for the assignment of nursing staff to health care establishments in Germany, in return for financial compensation covering staff and administrative costs. This is notwithstanding its legal form and the fact that it is a not-for-profit entity.

In short, even if there were no formal temporary-worker agency as such, nor were we dealing with a worker within the meaning of national law, we may find ourselves within the scope of application of the Directive at hand as long as there is an undertaking which offers temporary agency services and the temporary workers carry out an employment activity - understood in the European sense above described - under the direction of the user undertaking (Judgment of 24 October 2024, *Omnitel Comunicaciones* C-441/23, EU:C:2024:916).

This broad and inclusive interpretation opens the door to the question of whether the application of the Directive could be extended to contractor’s workers providing labour-intensive services on the premises of the principal undertaking, when the exercise of managerial power by the assignor is blurred. It would be necessary for the ECJ to identify the boundaries of the concept of assignment, in order to conclude whether it only applies when the worker is directly integrated into the organization managed and controlled by the principal, or also when the assignor makes a team of workers available to the assignee, including a manager who reports to the latter.

In addition to what has just been stated with regard to the subjects of the assignment referred to in the Directive, the European Court specifies that there

must be an element of purpose: it is necessary that, both at the time the worker is hired and at the time of the effective assignment, the employer intends to place that worker at the disposal of a user undertaking, which is not the case in the assignment resulting from a transfer of undertakings (judgment of 22 June 2023, ALB FILS Kliniken (C-427/21, EU:C:2023:505).

On the other hand, a further question arises. Given that the Directive refers only to temporary assignments, does this mean that assignments made for an indefinite period would fall outside its scope - and would only be subject to national law? The European Court has ruled on this point (judgments of 17 March 2022, Daimler, C-232/20, EU:C:2022:196; 22 June 2023, ALB FILS Kliniken (C-427/21, EU:C:2023:505), indicating that the expression “temporarily assigned” does not characterise the post to be occupied or the nature of the work, but rather the modalities of the provision of a worker. Thus, the Directive does not require that temporary agency work be exclusively for posts which are not of a permanent nature or which are to be filled as a replacement, but it does require that the posting must always be temporary.

The Court accepts that States may fix a maximum period of assignment, and that sectoral collective bargaining may envisage exceptions to these maximum periods. But it warns that a succession of assignments of a worker for the same job position at the user undertaking may entail an abuse if the addition of such assignments exceeds what could reasonably be described as temporary, depending on the particularities of the sector (for example, in the case examined in Daimler, for 55 months).

On the other hand, the judgment of 13 October 2022, Raad van bestuur van de Sociale verzekeringsbank (C-713/20, EU:C:2022:782) states that, when a person carries out her activity through a temporary-work agency and on the basis of a fixed-term temporary employment contract containing a clause under which the employment relationship was to commence upon the actual commencement of her activity and end when that activity ceased, during the intervening periods between her temporary work assignments, there is no employment relationship.

4. Equal treatment yes, but how far?

4.1 THE GENERAL RULE

According to Article 5 of the Directive, equal treatment means that temporary agency workers, during their assignment, shall have at least the same “basic working and employment conditions” as if they had been recruited directly by

the user undertaking for the same job. Turning to Article 3, which contains the “Definitions”, we find that “basic working and employment conditions” are “

Working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to: a) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays, b) pay³.

In short, beyond the initial tautology, the EU legislator is telling us that temporary agency workers should be treated as well - if not better - than directly employed workers in terms of working time and remuneration for their services.

Two important clarifications of these conditions are of interest in Judgment 22 February 2024, *Randstad Empleo and Others* (C-649/22, EU:C:2024:156). On the one hand, it states that they also include protection of health and safety at work, so that a temporary agency worker must be treated, in this respect, for the duration of the assignment, in the same way as workers employed directly by the user undertaking. On the other hand, it is held that the concept of remuneration is to be understood in a broad sense, including the compensation to which temporary workers are entitled in the event of total permanent incapacity to carry out their usual occupation as a result of an accident at work occurring in the user undertaking.

With regard to the time scope of protection, although it is true that Article 5(1) of the Directive refers to equal treatment during the assignment in the user company, the European Court has clarified that this time frame must be interpreted extensively. Thus, since paid annual leave is part of the equal “basic working and employment conditions”, the compensation payable by the employer on termination of the contract worker’s employment relationship for unused paid annual leave and the corresponding holiday allowance is also covered. If the principle of equal treatment were to cease to apply from the moment the temporary worker’s contract is terminated by a temporary-work agency, this would encourage termination of such contracts, which would be contrary to the objective pursued by the Directive (Judgment of 12 May 2022, *Luso Temp* (C-426/20, EU:C:2022:373).

³ The Community legislator has already provided us with a selection, if not of essential terms and conditions of employment, then at least of “essential elements of the employment contract or employment relationship”. Indeed, in addition to pay and working time, the repealed Directive 91/533/EEC of 14 October included under this category several additional matters, and its successor, the current Directive 2019/1152 of 20 June, increased the list – and hence included, for assigned workers, the identity of the user undertakings. It does not seem appropriate to automatically extend the requirement of equal treatment to all these additional matters, as they are Community provisions with different objectives, with no cross-references between them and, furthermore, it could be understood that Directive 2008/104 is a special rule for these purposes.

On the other hand, in addition to the basic working and employment conditions, Article 5 of the Directive seems to indicate, in a poor wording, that “the rules in force in the user undertaking on: a) protection of pregnant women and nursing mothers and protection of children and young people; and b) equal treatment for men and women and any action to combat any discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation” must also apply to temporary agency workers.

And if we continue reading the Directive, we find that Article 6(4) recognises temporary agency workers the right to enjoy access to the facilities or common services of the user undertaking, in particular canteen, nursery and transport services under the same conditions as workers employed directly by that company.

It could be said, then, that the rule is that temporary workers will have the same or better working time and remuneration regime, and will enjoy under equal conditions the common services and collective facilities in the user company, as well as the protective rights for certain specific groups: pregnant or breastfeeding women, young people and children. The obvious shortcomings of this formula (parents are not protected; other forms of reconciling work and family life are excluded; what does it mean to protect children in an employment relationship; etc.) are addressed by referring to the prohibition of discrimination on grounds of sex and other traditional grounds.

The question is: Is equality restricted to these aspects? In other words, is unequal treatment possible in relation to any other employment status, and is the Community legislator accepting that the status of temporary agency worker is sufficient justification for this? It is not appropriate to answer these questions categorically: it would have to be analyzed, in each case, whether the status of temporary worker is an objective circumstance that reasonably justifies different treatment. This is what the Directive itself does through a large number of exceptions to this general principle of equality, as will be seen immediately.

However, the aforementioned exceptions to equal treatment apply both to the so-called basic working and employment conditions, as well as to those outside this category. This obviously diminishes the initial demand for an equal treatment as refers to the first ones.

4.2 EXCEPTIONS

As mentioned above, there are exceptions to the general rule of equal treatment in terms and conditions of work and employment. So much so that

it has been said that the aforementioned principle suffers real restrictions in this Directive .⁴

If one looks at Recital 15 of the European standard, one might think that the exceptions are intended for cases of contracts of indefinite duration between employees and temporary-work agencies, since “in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking”. However, this idea is not subsequently reflected in the wording of the Community legislation save for one specific exception - it may apply to the remuneration of temporary agency workers during the period between assignments. Therefore, the other exceptions would apply to all employment relationships between temporary-work agencies and temporary agency workers, regardless of the duration of their contracts .

Double standards of terms and conditions in collective bargaining - Recitals 16 and 17 of the Directive state that, in the interests of flexibility, States may allow the social partners to define the terms and conditions of employment of temporary agency workers, and may even, under certain circumstances, agree at national level to deviate from the principle of equal treatment. Thus, Article 5(2) of the Directive provides for the possibility for States, after consultation with the social partners, to exempt the equal pay principle for workers employed by the temporary agency under a permanent contract of employment for periods of time between the execution of two assignments. And, with somewhat confusing wording, paragraph 3 indicates that states may offer the social partners the option to collectively negotiate differences in working and employment conditions for assigned workers. All this while respecting “the overall protection of temporary agency workers”.

It is therefore permitted to exempt the application of equal treatment through collective bargaining, but with limits: as we have just seen, the rule refers to the requirement to respect in any case the overall protection of temporary workers, and the aforementioned Recitals also mention the unavoidable maintenance of “the overall level of protection”, to offer “an adequate level of protection”. But nothing is said as to what this basic protection of a imperative

⁴ The European Economic and Social Committee itself, in its opinion on the proposed directive - which contained a few more exceptions than the approved version - considered that the principle of equality and non-discrimination was neutralised or at least eroded by the exceptions provided for (*Opinion of the Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council on working conditions for temporary agency workers’*, Brussels, 19 September 2002). Brussels, 19 September 2002).

relative right consist of⁵ and whether it necessarily includes the basic working and employment conditions.

Having said so, this regulatory gap pertaining the “overall protection” that must be guaranteed in any case has been filled by Judgment of 15 November 2022, *TimePartner Personalmanagement* (Case C-311/21, EU:C:2022:983). It states that temporary agency workers who suffer disadvantages resulting from the relevant collective agreement - both temporary and permanent - must be granted, in return, advantages in their basic working and employment conditions aimed at compensating for the effects of that difference in treatment. And the adequacy of such compensation, which is subject to judicial review, must be assessed in a concrete manner, comparing, for a given post, the basic working and employment conditions applicable to workers hired directly by the user undertaking with those applicable to temporary agency workers.

Public training, integration and retraining programmes - Article 1 states that the Directive applies to public and private undertakings which are temporary work-agencies or user undertakings, regardless of whether they are profit-making or not. However, it is allowed for States, after consultation with the social partners, to provide that the Directive does not apply to employment contracts concluded in the framework of a public (or publicly supported) vocational training, integration or retraining programme. It should be noted that the use of temporary-work agencies is not being prevented in these cases, but that it is said that it is possible for a State to derogate from the application of the Directive. Bearing in mind that one of the basic postulates of Community law is equal treatment in the above terms referred, this would be a new way of circumventing it, this time only with the requirement of consulting social partners instead of demanding the agreement derived from collective bargaining.⁶

Access to collective services: A final exception to equal treatment is found in the aforementioned Article 6(4) of the Directive, which, after recognising the right of temporary workers to have access to the facilities or com-

⁵ The lack of specificity of the formula was criticised at the time by the European Economic and Social Committee: “An “adequate level of protection” is not sufficiently well defined, and (...) could only be defined in the final analysis by the Court of Justice or the European Court of Human Rights, which would involve temporary workers and employers in the vagaries of procedures which could take many years” (*Opinion of the Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on working conditions for temporary workers*. Brussels, 19 September 2002).

⁶ The European Economic and Social Committee had suggested, unsuccessfully, an increase in the level of involvement of the social partners on this point, replacing the reference to consultation with a requirement for agreement (*Opinion of the Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on working conditions for temporary workers*. Brussels, 19 September 2002).

mon services of the user undertaking under the same conditions as directly employed workers, allows for different treatment provided that there are objective reasons to justify it.

5. Elimination of superfluous restrictions

After almost two decades of controlled operation of temporary-work agencies, it has long been clear that the risks of abuse of rights are no longer particularly present in this type of relationship, which is perfectly circumscribed and regulated.

Thus, and consistent with the aforementioned structural role that the Community legislator grants to temporary work agencies in employment policy, Recital 18 of the Directive warns that improving the protection of temporary workers must go hand in hand with “a review of any restrictions or prohibitions which may have been imposed on temporary agency work”. Such restrictions or prohibitions are only allowed in the general interest. Article 4(1) of the Directive justifies preventing temporary agency work “only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented”.

Once again, the wording is somewhat confusing. On the one hand, it is clear from the use of the word “only” that the Community legislator wants restrictions to be reduced to the minimum necessary to guarantee the general interest, but on the other hand, when it comes to specifying exactly what this strict general interest means, it uses an open formula, in which only what is included “in particular” is emphasised. The result could then be that states would be empowered to broaden the cases covered by the notion of general interest so as to restrict or prohibit the use of temporary agency work.⁷

Although the door cannot be closed to this interpretation, it is not clear that this was the intention of the EU legislator, given that Article 2 of the Directive highlights the role of temporary-work agencies as effective contributors to job creation and the development of flexible forms of work.

⁷ The European Economic and Social Committee warned at the time that “it should be possible not only to lift such restrictions, but also to impose new ones if the particular conditions require it in certain areas of economic activity” (*Opinion of the Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on working conditions for temporary agency workers*. Brussels, 19 September 2002).

In this context, Judgment of 17 March 2015, AKT, (C533/13, EU:C:2015:173), far from shedding light, confuses us a little more. It rules on the question referred for a preliminary ruling by a Finnish court concerning Article 4(1) of the Directive, in a dispute between a trade union, on the one hand, and an employers' association and an aviation company, on the other, concerning temporary agency workers employed by the aforementioned company. In particular, while Finnish law did not provide for any restriction or prohibition, the collective agreement applicable to the case did, restraining the possibility of using temporary agency work only in periods of work overload or for other tasks which were limited in time or nature and which, for reasons of urgency, limited duration, professional skills, the use of specialised tools or for other similar reasons, could not be carried out by their own workers.

The Court sets the following guidelines:

- The Directive only addresses the competent authorities of the Member States, requiring them to review their national legislation - which they had to do by 5 December 2011 - in order to verify whether any prohibitions and restrictions on the use of temporary agency work are justified.

- But States are free “either to remove any prohibitions and restrictions which could not be justified under that provision or, where applicable, to adapt them in order to render them compliant, where appropriate, with that provision”.

- Therefore, Article 4(1) of the Directive “must be understood as restricting the scope of the legislative framework open to the Member States in relation to prohibitions or restrictions on the use of temporary agency workers” and does not require “any specific legislation to be adopted in that regard”.

- The Directive does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on grounds of general interest within the meaning of Article 4(1) of the Directive.

In short, the Court states that the only ones called upon to review restrictions to check whether they are justified are “the competent authorities of the Member States”, excluding the courts from this notion. It does not rule on whether or not the contractual clause is valid; we only know that the national court may not disapply it on the grounds that it is contrary to the Directive. It even seems that the Court leaves the latter completely out of the equation, closing the door to the possibility of a preliminary ruling on these restrictions

and shifting the problem to the infringement procedure for defective transposition that could be initiated, if necessary, by the European Commission .⁸

6. Calculation of assigned workers for the purpose of collective representation

One of the main new features of the Directive is the one envisaged under its Article 7, which refers to the calculation of assigned temporary agency workers for the purposes of setting up representative bodies. What happens is that, once again, the wording of the provision raises interpretative questions.

The first paragraph of the provision states that such workers “shall count” for the calculation of the threshold above which bodies representing workers must be set up at the temporary-work agency. The second paragraph states that the Member States “may provide” that temporary agency workers are taken into account for the same purposes at the user undertaking. Finally, according to the third paragraph, States which make use of the latter option (temporary workers counted in the user undertaking) “shall not be obliged” to apply the provisions of the first paragraph.

According to the terms of Article 7 of the Directive, it hence seems that the general rule is that temporary workers are considered in the temporary-work agency, but it is up to the Member States to establish that they may be counted in the user undertaking, in which case it is also up to the Member States to decide that they do not count for the temporary-work agency. In short, they could perfectly well be counted in both companies. Is this what the Community legislator really wanted? It is hard to believe that this is the case, and it is logical to assume that these are “two alternative solutions to be chosen by the Member States” .

7. Other issues

Apart from the basic aspects analysed so far, it is worth noting other provisions contained in the Directive that deserve attention, even briefly.

Information obligations - Article 6(1) of the Community law recognises the right of temporary agency workers to be informed of vacancies in the user

⁸ However, the level of complexity increases when the unjustified restriction resides in a collective agreement, as the infringement procedure is directed against the State, which would have to act against the will of the social partners.

undertaking, so that they have “the same opportunity as other workers in that undertaking to find permanent employment”. Does this mean that the corresponding employer’s obligation is reduced to communicating vacancies for indefinite employment, excluding alternatives of direct temporary employment? This seems to be the meaning of the rule, although it was clearer in the initial version of the Directive, where the heading of the provision referred to “access to *permanent* quality employment”⁹.

Moreover, Article 8 of the Directive provides for an obligation on the user undertaking to “provide suitable information” to the workers’ representative bodies on the use of temporary agency work.

Nullity of clauses that prevent direct hiring - Article 6.2 of the Directive requires States to establish mechanisms to declare the nullity of clauses that prohibit or prevent the conclusion of an employment relationship between the user company and the temporary agency worker.

Prohibition of charging workers - Article 6(3) of the Directive prohibits temporary-work agencies from requiring workers to pay fees in exchange for arranging their recruitment on assignment or for concluding a direct contract with the user undertaking at the end of the assignment.

Access to training and promotion - Article 6(5) of the Directive requires Member States to adopt measures (or promote collective agreements) to improve temporary workers’ access to training, both in the user undertaking and in the temporary agency. With the same objective of “enhance their career development and employability”, the Member States are also mandated to promote or encourage temporary agency workers’ access to childcare facilities in temporary work agencies (it should be reminded that Article 6(4) of the Directive already recognises their right to benefit from the common services in the user undertaking, including child-care facilities).¹⁰

Although it is not expressed as clearly as would be desirable, it is logical to understand that during assignments the worker should have access to the user undertaking’s own training and childcare services, and in the intervening periods to those of the temporary-work agency. In light of its wording, it is arguable whether the temporary-work agency’s non-structural workers have

⁹ Proposal for a Directive of the European Parliament and of the Council on working conditions for temporary agency workers. Brussels, 20 March 2002 [COM (2002) 149 final].

¹⁰ In view of provisions such as this one, together with the reference to pregnant and breastfeeding workers in Article 5(1) of the Directive, one can try to infer what the Community legislator meant when, under Recital 11, it is enigmatically stated that “Temporary agency work meets not only undertakings’ needs for flexibility but also the need of employees to reconcile their working and private lives”. In any case, it is clear that the wording is flawed, because it is not the temporary agency work that enables reconciliation, but rather the way in which such agency work is regulated.

the right to access its childcare facilities in the periods between assignments, if they are not participating in training activities (offered by their employer or even, in a broad interpretation, external to the latter).

It is striking, moreover, that the Directive does not limit itself to providing the means for such access, but calls for the “improvement” of such access. This means that, in principle, the transposition of the Community rule is not limited to establishing the mechanisms for the worker to benefit from training and childcare in both companies; these mechanisms must be improved. However, after imposing such a mandate, the Community legislator omits any kind of specification as to what this obligation to improve translates into. Perhaps what is really intended is that the Member States should promote the provision of training and childcare facilities in companies, so that they can also be made available to temporary workers. But this is a free interpretation.

Sanctions: Article 10 of the Directive requires States to establish penalties for temporary-work agencies and user undertakings that fail to comply with the provisions of the Directive and the national provisions adopted in its implementation; these sanctions must be “effective, proportionate and dissuasive”.

The European Court states that, in the absence of a provision of national law penalising non-compliance with the Directive, a temporary agency worker cannot derive from EU law an individual right to the establishment of an employment relationship with the user undertaking (Judgment of 17 March 2022, *Daimler* (C-232/20, EU:C:2022:196).

III. REFERENCE TO DIRECTIVE 91/383/EEC ON HEALTH AND SAFETY AT WORK

One of the weaknesses of temporary work is that the excessive rotation of temporary workers often leads to increased vulnerability to occupational hazards. Assignment to different companies can make it difficult for temporary agency workers to assimilate properly the specific features of a particular job position, which in some cases leads to an increase in the level of occupational accidents among temporary agency workers .

In line with the above, Directive 91/383/EEC of the Council of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship is based on the conviction that, in general, these workers are more exposed than other workers in certain sectors to the risk of accidents at work or occupational diseases.

As far as it is concerned, this Directive applies to “temporary employment relationships between a temporary employment business which is the employer and the worker, where the latter is assigned to work for and under the control of an undertaking and/or establishment making use of his services” (Article 1). Its purpose is to ensure that workers are afforded the same level of protection in terms of health and safety at work as other workers in the user undertaking (Article 2). In this regard, it is worth recalling the Judgment of 22 February 2024, *Randstad Empleo and Others* (C-649/22, EU:C:2024:156), which declares that the protection of health and safety at work is one of the conditions in respect of which the principle of equal treatment enshrined in Directive 2008/104 operates.

Directive 91/383 provides, in addition to the provisions of the frame Directive 89/391, for information obligations on the employer (Articles 3 and 7), the need to provide training for workers (Article 4) , or the employer’s responsibility for the conditions of performance of the contract with regard to health and safety at work (Article 8). On the other hand, States are given the power to prohibit the use of temporary agency workers to carry out certain work that is particularly dangerous to their safety or health, leaving it up to the national legislator to define the latter (Article 5).

IV. CONCLUSIONS

Directive 2008/104 fulfils the commendable task of staging the European Union’s commitment to assignment of workforce through temporary-work agencies; a commitment that further underpins the necessary change in attitude towards this activity, to conceive it as an ally in the promotion of hiring .

However, despite the Community rule sets up a homogeneous regulatory framework, its real impact on the regulation of the matter depends on the previous situation in each State . And, in general terms, it can be said that it is a less ambitious instrument than others in which atypical recruitment is also present, since, on the one hand, it contemplates limits to equal treatment and, on the other, although it aims to normalise the use of temporary-work agencies, it does so by means of rather vague formulas. To this must be added the sparing view of the Court of Justice of the European Union, of which Judgment of 17 March 2015, *AKT*, (C533/13, EU:C:2015:173) is the main exponent. It is not surprising, therefore, that this ruling confirms that the impact of the Directive on the regulation of temporary agency work is certainly limited.

In 2014 the Commission reviewed its content but, given that at that time there was still no case law on its application, it was logical to conclude that no amendments seemed necessary. Moreover, it was considered that the time that had elapsed since the end of the transposition period was too short to be able to properly assess the extent to which the objectives of the regulation had been achieved¹¹. Perhaps today, a decade later and with the precedents of the Court of Justice of the European Union that have been analysed, it might be worth considering the advisability of clarifying certain points.

Besides, the Directive poses a scenario that could be very useful if its keys were extended to other types of inter-company phenomena in which the lack of a regulatory framework encourages fraud and abuse of rights, such as multi-service companies. Judgment of 17 November 2015, *Betriebsrat der Ruhrlandklinik* (C216/15, EU:C:2016:883), provides interesting elements to advance in this sense, and we will undoubtedly have more answers when the ECJ resolves the preliminary question posed by the High Court of Madrid (Spain) regarding the applicability of the Directive to contractor companies.

¹¹ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of Directive 2008/104/EC on temporary agency work (COM (2014) 176 final, Brussels, 2132014).

CHAPTER 21

PUBLIC EMPLOYMENT

LAURENTINO J. DUEÑAS HERRERO

INDEX: I. Freedom of movement for workers and public employment. II. Public administration and its employees. III. Public employment excluded from free movement. IV. The point time of the requirement of non-discrimination on grounds of nationality in the civil service. V. The regulatory reception of Article 45(4) TFEU in Spanish law. Bibliography.

I. FREEDOM OF MOVEMENT FOR WORKERS AND PUBLIC EMPLOYMENT

The right to free movement of workers is closely related to the right to the prohibition of any kind of discrimination on grounds of nationality and, in the second place, it should be recalled that Article 45(2) TFEU states that freedom of movement for workers requires the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. That provision is given specific expression in Article 7(2) of Regulation No 492/2011 which states that a worker who is a national of a Member State is to enjoy, in the territory of the other Member States, the same social and tax advantages as national workers¹. No mat-

¹ Judgment of 28 April 2022, *Gerencia Regional de Salud de Castilla y León v Delia* (C-86/21, EU:C:2022:310, paragraph 29).

ter of labour content falls within the scope of the EU's exclusive competences, except for the regulation of the freedom of movement for workers. The main transformations of the principle of freedom of movement for workers were integrated into the citizenship of the European Union in 1992 following the Maastricht Treaty. From the intervention of the Commission and the ECJ, the primacy of the principle to freedom of movement for workers emerges and its essential foundation lies in the fact that "*the worker is more than just a worker; he is an embryonic Community citizen*" (Handoll, 1988, p. 240). The freedom of movement for workers has been gradually introduced in three different ways: 1) secondary legislation; 2) the case law of the ECJ; and 3) the partial integration of the right of free movement into the citizenship of the European Union.

The freedom of movement for workers is a pillar of the European labour market (Articles 45-48 TFEU) and non-discrimination on grounds of nationality in access to employment is another of the structural principles of this market, but there is a substantial right to exclusion from free movement in access to public administration jobs (Article 45(4) TFEU). The existence of genuine movement of workers also in the public sector is a desirable objective that will contribute to the consolidation of true European citizenship. Access to public employment and equal working conditions for public employees are examples of the principle of freedom of movement, which are closely linked to the necessary coordination of the social protection to be granted to Community workers. On the other hand, no discriminatory measures regarding working conditions are possible after having joined the administration, much less on grounds of nationality, because Article 45(4) TFEU cannot justify the adoption of discriminatory measures against workers regarding pay or other working conditions after they have joined the administration². It should also be recalled that the principle of equal treatment laid down in both Article 45 TFEU and Article 7 of Regulation No 492/2011 prohibits not only direct discrimination on the ground of nationality but also all indirect forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result³.

² See Commission Communication 2002/694 final/EC of 11-12-2002 on "Free movement of workers - achieving the full benefits and potential", in particular pp. 23-25. The Court has already established that provisions of national law which prevent account being taken of previous periods of employment in the public administration of other Member States constitute unjustified indirect discrimination, for example in relation to access to the public sector, citing p. I-505, "Judgment of 23 February 94, *Scholz* (C-419/92, EU:C:1994:62). Judgment of 12 February 1974, *Sotgiu* (C-152/73, EU:C:1974:13, nr. 4); and judgment of 16 June 1987, *Commission v Italy* (C-225/85, EU:C:1987:284, nr. 11). Also, judgment 20 December 2017, *Vega González* (C-158/16, EU:C:2017:1014), which considers interim civil servants and career civil servants as workers, to whom the Framework Agreement on fixed-term work is fully applicable.

³ Judgment of 28 April 2022, *Gerencia Regional de Salud de Castilla y León v Delia* (C-86/21, EU:C:2022:310, paragraph 30).

We are dealing with a concept of Community scope and “the reciprocity rule is incompatible with the principle of equal treatment” and, therefore, in accordance with the exception in Article 45(4) of the TFEU, “any national of a Member State has the right of access to such employment, without any discrimination on grounds of nationality”. As the ECJ itself recalls, “it follows from final case law that compliance with the obligations which the Treaty or secondary legislation imposes on the Member States cannot be made subject to a condition of reciprocity”⁴. The twofold purpose of the ECJ’s ruling on the mobility of workers has been: a) to derive from the principle of freedom of movement subjective rights that can be invoked by the migrant worker against the authorities before the courts of the State; and b) to ensure uniform application of Community legislation and, in this way, to eliminate the abundant direct and indirect discrimination established by the legislation and administrative practice of the States. To achieve the former goal, the ECJ recognised the direct effectiveness of the current Article 45 TFEU and numerous provisions of the directives regulating the matter; to avoid the latter, the ECJ granted itself a kind of “hermeneutic monopoly” and decided that the definition of key concepts could not be left to the national legislator, but had to be elaborated at the Community level (Mancini, 1993, pp. 805-806). Furthermore, it should be recalled that Article 45(2) TFEU states that freedom of movement for workers requires the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment⁵.

The interpretative problems require delimiting the scope of the terms: “public employment” and “public administration”. The initial approach must revolve around the clear “joint” considerations of the Commission and the ECJ: Article 45(4) TFEU is directly applicable, does not require secondary legislation and the exception provided for requires a restrictive interpretation because it derogates from the principle of free movement of workers. The nature of the employer is irrelevant, therefore *public servants* are assimilated to workers, so that, once the non-application of the exception has been delimited, the rule of non-discrimination on grounds of nationality applies in full and in respect of all working conditions (Handoll, 1988, p. 227-228). In sum, the handling of the notion of public employment, the criteria of analysis, the restrictive interpretation of the exception to the free movement of workers, the

⁴ Judgment of 30 September 2003, *Colegio de Oficiales de la Marina Mercante Española* (C-405/01, EU:C:2003:515, paragraph 61).

⁵ Judgment of 15 June 2023, *Ministero dell’Istruzione, dell’Università e della Ricerca-MIUR* (C-132/22, EU:C:2023:489, paragraph 27).

non-discrimination on grounds of nationality in access to public employment, and the fixing and guaranteeing of working conditions in the public sector as in the private sector, ensure equal treatment of both migrant workers and nationals, insofar as it protects them from the risk that the former do not have lower wages and working conditions than those established in local law (Mancini, 1993, p. 805-806)⁶. The conciseness and laconicism of the normative diction of Article 45(4) TFEU has been gradually unravelled by the ECJ and it is difficult to systematise its jurisprudence due to its excessive casuism, both on the legal content of the right to free movement of workers and on the exclusion of employment in the public administration.

The ECJ did not succeed in overcoming, except in “low-ranking jobs”, the resistance of states to the employment of foreigners in their administrations, also because in many of them the reservation of jobs in the public administration only to nationals is imposed by the Constitution itself, or is rooted in “xenophobic feelings, perhaps not proclaimed”, which is why the Commission at some point proposed to develop paragraph 4 by means of a directive, but this could have been used by the states to restrict the right of movement and reduce the jurisprudential *acquis* to zero. Nevertheless, it is better that the matter remains entrusted to the Court of Justice and that the political bodies of the Community work on the creation of a “Europe of the citizens” (Mancini, 1993, p. 815-816). Finally, it should be remembered that Article 45(4) TFEU is directly applicable in the Member States and legislative action conceals the danger of the reintroduction of the institutional interpretative criterion to the detriment of the functional criterion followed by the ECJ. On the other hand, the principle to freedom of movement for workers must be able to evolve rapidly in line with the progress of European unity without being limited or held back by legal rules, which are essentially slower to adapt. Unlike the exceptions, the limitations provided for in Article 45(3) TFEU have been developed in legislation.

II. THE PUBLIC ADMINISTRATION AND ITS EMPLOYEES

The legal regime of the civil service and the organisation of public administrations are exclusive competences of the Member States, but they cannot impose limitations or exceptions to the free movement of workers established in Article 45(1) TFEU because it is a competence of the European Union, even for civil serv-

⁶ Thus, in Judgment of 04 April 1974, *Commission v France*, (C-167/73, EU:C:1974:35, paragraph 45).

ants or staff in the service of national public administrations⁷. The Member State's decision to require national status in order to obtain access to a specific post is subject to double supervision. On the one hand, individuals may file a complaint before the Commission, which then conducts an investigation; and, on the other hand, they may bring an action before the courts directly invoking Article 45(4) TFEU, which may lead to a preliminary ruling to the ECJ (Jaeger, 1990, p. 801). In the treatment of public employment, we have to dispense with the criteria provided by national legislations and try to find an autonomous concept created from the Treaty on the Functioning of the European Union.

The concept of public employment is of a “flexible nature”, with an “instrumental character” and therefore a restrictive interpretation of the exception clause of Article 45(4) of the TFEU must be made. Unlike the concepts of worker and activity as an employed person, which according to the ECJ must be construed broadly, the exceptions or derogations from the principle to freedom of movement must be interpreted restrictively (Da Rocha Brandao, 2015, p. 90). The starting point is the consideration of this paragraph 4 as a type of complex legal rule, so that the principle of equal treatment (Article 20 of the Charter of Fundamental Rights of the European Union) and its specific manifestation, the principle of non-discrimination (Article 21(1) of the EU Charter on Fundamental Rights of the European Union), as well as the principle of freedom of movement of workers, have a general scope and cannot be interpreted restrictively, while the exceptions must be interpreted strictly in order not to undermine the objectives pursued by the general principles. The strict interpretation defended by the ECJ is compatible with the doctrine and case law in international law, which admits that when an international treaty contains an article that introduces an exception to a general provision of the same treaty, this exception is interpreted restrictively. This prevents the broad interpretation of the exception from emptying the treaty of its substance (Jaeger, 1990, p. 789-790).

Are public employees special workers for the purposes of free movement? Does the nature of the legal relationship between the employee and the administration make no difference as regards access to employment in the public administration?⁸ In other words, what are the posts in public employment that Member States may reserve for their nationals?⁹ Within the same public employment, can

⁷ “Member States’ authorities have a dual role in the field of free movement of workers in the public sector. They are regulators as well as employers and in both functions they have to comply with EU law”, *Commission staff working document SEC 2010/1609 final/EU of 14-12-2010, Free movement of workers in the public sector*, p. 10.

⁸ Judgment of 12 February 1974, *Sotgius*, (C-152/73, EU:C:1974:13, paragraph 6).

⁹ And this is the question to be answered: “Which posts do Member States reserve for nationals? The following examples illustrate the types of posts which are reserved for nationals in many Member States:

there be some functions where nationality is required by the States and others where free movement of workers fully applies?¹⁰ One of the cornerstones on which the freedom of movement of Community workers is built is the delimitation of its application, and the ECJ has declared that it only becomes effective when a Community national exercises his or her right by moving to another Member State other than that of origin. It therefore goes beyond the so-called “purely internal situations”¹¹, which is why “Euro-officials”, who enjoy an autonomous status closer to that of traditional international organisations than to the status of national employees, are left out of the scope of this study. This has sometimes led to the view that, if the employee has only worked for the European Commission and not for an administration or public service of a Member State, they have been excluded from certain benefits, e.g. they are not allowed to practise law¹².

The absence of a concept of public service in the Community text has led the ECJ to establish the interpretative guidelines for Article 45 of the TFEU. If the concept of public administration were to remain confined to the internal sphere of the States, the free movement of workers would be excluded from all public employment, which is why the ECJ sought a procedure similar to that followed for the defense of the Community nature of the concept of worker, and concluded that the delimitation of the concept should not be left “entirely” in the hands of the Member States¹³. The basis for the derogation in Article 45(4) TFEU lies in the fact that employment in the public administration is not strictly subject to an economic purpose. In another sense, “a body which operates under normal market conditions, is profit-oriented and bears the losses arising from the

- posts in the judiciary, public prosecutors, prison staff; - posts in the police and border control services, firemen, security guards; - military and civilian posts in the army; - posts in the intelligence service; - posts in the diplomatic service. Several Member States seem to still reserve all posts in specific ministries for nationals: e.g. foreign affairs, budget, defence, economy, interior, justice, finance including tax authorities. In a number of Member States many posts at high and middle management level of the government and administration are reserved as well. Several Member States reserve all civil/public servant posts for their own nationals”, *Commission staff working document* SEC 2010/1609 final of 14-12-10, *Free movement of workers in the public sector*, footnote 40 on p. 15.

¹⁰ See, Judgment of 18 October 2017, *Kalliri*, (C-409/16, EU:C:2017:767). For example, in the exercise of police functions, nationality may be required for the protection of persons and property, the arrest and custody of perpetrators and preventive patrols; but not for other police functions, such as citizen assistance or traffic regulation. Therefore, setting an identical minimum physical height for all candidates, male or female, for access to the police constitutes indirect discrimination for nationals in the first case and for any EU citizen with regard to the duties to be performed, in the second case.

¹¹ Judgment of 28 March 1979, *Saunders* (C-175/78, EU:C:1979:88, paragraphs 10 and 1): “Consequently, the Treaty provisions on freedom of movement for workers cannot apply to situations which are purely internal to a Member State, i.e. where there is no connection with any of the situations covered by Community law”.

¹² See, Judgment of 17 December 2020, *Onofrei* (C-218/19, EU:C:2020:1034).

¹³ Judgment of 26 May 1982 and 17 December 1980, *Commission v Belgium*, C-149/79, EU:C:1982:195 and EU:C:1980:297.

exercise of its activity, is not to be considered a “body governed by public law”, since the needs in the general interest which it was created to meet, or which it has been charged with meeting, may be regarded as having an industrial or commercial character”¹⁴. It is true that for the purposes of the application of Article 45 TFEU, what is required is that the activity be of an “economic nature”, that it actually have the character of paid employment, whatever the field in which it is carried out¹⁵, but the ECJ has considered that activities provided “under a public law status” cannot be denied an “economic nature”¹⁶. This means that many persons who are civil servants under Spanish law are considered to be workers for the purposes of EU law, in order to promote the free movement of workers. Moreover, if one of these civil servants brings a claim before the Employment Court, he or she will not be a worker under national law but will be a worker for the purposes of EU law. In the TFEU, civil servants are considered to be employees. The wording of Article 45(4) of the TFEU excludes from its scope of application jobs in the public administration, without distinguishing between those occupied by civil servants and those occupied by other agents, which shows that civil servants are included among employees¹⁷. Already in the ECJ “*Sotgiu*” (judgment of 12 February 1974, *Sotgiu* C-152/73, EU:C:1974:13) - and in other subsequent judgments - the ECJ made it clear that the nature of the legal link between the worker and the employer, whether a public law statute or a private law contract, is irrelevant for the application of Article 45¹⁸. Furthermore, it is apparent from the case-law that, where a public body of a Member State, in recruiting staff for posts which do not fall within the scope of Article 45(4) TFEU, provides for account to be taken of candidates’ previous employment in the public service, that body may not make a distinction according to whether such employment was in the public service of that particular Member State or in the public service of another Member State¹⁹.

In this situation, it has been preferred to use the concept of “public authority”, rather than public administration, because it is more useful and practical from a Community perspective to explain the scope of the exclusions from free movement provided for by the Treaty. The ECJ has stated that the

¹⁴ Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC (paragraph 10).

¹⁵ Judgment of 12 December 1974, *Walrave and Koch*, C-36/74, EU:C:1974:140, paragraph 1405. Judgment of 31 May 1989, *Bettray*, C-344/87, EU:C:1989:226.

¹⁶ Judgment of 12 February 1974, *Sotgiu*, C-152/73, EU:C:1974:13, paragraph 153. Judgment of 3 July 1986, *Lawrie-Blum*, C-66/85, EU:C:1986:284, paragraph 20.

¹⁷ Judgment of 24 March 1994, *Van Poucke*, C-71/93, EU:C:1994:120.

¹⁸ Judgment of 3 July 1986, *Lawrie-Blum*, C-66/85, EU:C:1986:284, paragraph 20.

¹⁹ Judgment of 15 June 2023, *Ministero dell’Istruzione, dell’Università e della Ricerca-MIUR*, C-132/22, EU:C:2023:489, paragraph 24.

exception rule contained in the current Article 45(4) of the TFEU “only covers posts which involve actual participation in the exercise of public authority, i.e. which involve a power of decision over individuals or which affect the national interest, and in particular those concerning the internal and external security of the State”. Moreover, such jobs imply the existence in their holders of a particular relationship of solidarity with the State, as well as the reciprocity of rights and obligations that are the basis of the bond of nationality²⁰.

The notion of public authority is relative and legally indeterminate, there is no legal concept either in domestic or European law, and in reference to the “public agent” it is even more relativised, since authority can be exercised permanently or occasionally. In short, the exception provided for in Article 45(4) TFEU must be linked to the so-called “higher public function”, which is the bureaucratic power exercised by senior civil servants who actually hold the exercise of an actual power of authority. The legal-practical scope of the exception is very narrow indeed. In other words, the excluded public employment is that which requires public authority for its exercise because it is carried out directly or indirectly with public authority, otherwise it is as if we were dealing with a relationship between private individuals for the purposes of the application of Article 45(4) TFEU. The expression “activities connected with the exercise of official authority” should be given a Community legal content because this concept must be given the same definition throughout the Community, in such a way that “public authority is that which derives from sovereignty, from the *imperium* of the State; and implies for the person exercising it the power to use prerogatives which go beyond ordinary law, privileges of public authority, coercive powers imposed on citizens”. For example, referring to the exception to freedom of establishment, the ECJ said that it referred to activities which “in themselves involve a direct and specific connection with the exercise of official authority”²¹. And the most typical activities of the legal profession, such as legal advice and assistance, as well as representation and defense of parties before the courts, cannot be considered as participation in the exercise of official authority²².

The ECJ held that if a company was not part of the public administration, the exception of Article 45(4) TFEU²³ should not apply to it. The introduction of this controversial “exclusivity” criterion whereby activities existing in the pri-

²⁰ Judgment of 26 May 1982 and 17 December 1980, *Commission v Belgium*, C-149/79, EU:C:1982:195 and EU:C:1980:297, paragraphs 7 and 10.

²¹ Opinion of the Advocate General of 28 May 1974, *Reyners*, C-2/74, EU:C:1974:59.

²² Judgment of 21 June 1974, *Reyners* (C-2/74, EU:C:1974:68, paragraphs 52, 53 and 54).

²³ Judgment of 29 October 1998, *Commission v Spain* (C-114/97, EU:C:1998:519, paragraphs 33).

vate sphere were considered not to be “specific” to the Administration was introduced in the judgment of 17 December 1980, *Commission v Belgium* (C-149/79, EU:C:1980:297) where the fact that they were not a “specific activity of the public administration”²⁴, because they were not vested with the exercise of public authority or the responsibility for safeguarding the general interests of the State²⁵, was identified as a key element of differentiation. This exclusivity criterion means that activities that exist in both the private and the public sector are not covered by Article 45(4) TFEU. Examples include: education, public medical and hospital services, as well as commercial activities of the State. In 2003, the ECJ gave a further interpretation of the application of Article 45(4) TFEU and considered that the exception should only apply to private sector posts to which the State regularly assigns the functions of public authority²⁶. In short, in order to consider when we are dealing with an act of public authority, what is decisive is to decide whether a body is endowed with exorbitant powers with respect to the rules applicable to relations between private individuals.

III. PUBLIC EMPLOYMENT EXCLUDED FROM FREE MOVEMENT

There is no single concept of civil servant in Community law, but it should be recalled that according to the case law of the ECJ, civil servants are considered to be employees, for example for social security purposes²⁷. On other occasions it has been made clear that the definition covers all workers, without differentiating between the application of the rule on the basis of the

²⁴ Judgment of 26 May 1982 and 17 December 1980, *Commission v Belgium* (C-149/79, EU:C:1982:195 and EU:C:1980:297, paragraph 12).

²⁵ Judgment of 03 June 1986, *Commission v France* (C-307/84, EU:C:1986:222). See in *Commission staff working document* SEC 2010/1609 final/EU of 14-12-10, *Free movement of workers in the public sector*, footnote 40 at p. 11, where it is stated that the ECJ confirmed that the two criteria, *exercising of powers conferred by public law and safeguarding general interest* are not alternative but cumulative.

²⁶ Judgment of 30 September 2003, *Colegio de Oficiales de la Marina Mercante Española* (C-405/01, EU:C:2003:515), and Judgment of 30 September 1993, *Anker and others* (C-47/02, EU:C:2003:516). See, Judgment of 07 November 2019, *Cafaro* (C-396/18, EU:C:2019:929): Even the public security exception can save equal treatment in employment and occupation. This is the case where national legislation provides for automatic termination of employment upon reaching the age of 60 for pilots employed by a company operating aircraft, in the context of activities related to the protection of the national security of a Member State, provided that such legislation is proportionate and necessary for public security.

²⁷ Judgment of 13 November 1997, *Grahame and Hollanders* (C-248/96, EU:C:1997:543, paragraph 28). In the Judgment of 24 March 1994, *Van Poucke* (C-71/93, EU:C:1994:120, paragraphs 17 and 18), it is expressly stated that the fact that civil servants are mentioned in a different letter of paragraph 2 of Article 13(2) of this Article, letter d), does not deprive them of their status as employees for the application of Regulation EEC/1408/71.

public or private nature of the employer²⁸. In any case, when Article 45(4) of the TFEU excludes jobs in the public administration from the scope of application of free movement, it does not distinguish between those occupied by civil servants and those occupied by other categories or groups of personnel, “which shows that civil servants are considered to be employees or salaried workers; that is, for EU law they are salaried workers” (Da Rocha Brandao, 2015, p. 174). Therefore, “civil servants” within the meaning of Article 4(4) of Regulation No1408/71 are “all those employees of a public administration for whom the legislator has provided a social security scheme of their own, to which they must be affiliated; and there is another concept of “civil servants” for whom the exception laid down in Article 45(4) TFEU applies. Civil servants in the Regulation are all those employees of a public administration for whom the national legislator has provided a separate social security scheme to which they must be affiliated; however, civil servants for the purposes of the Treaty derogation are jobs involving the exercise of public authority, with this exclusion applying only to access to certain public jobs and not to persons already working in the public administration²⁹.

The legal delimitation of work in the public administration that falls within the scope of the exception in Article 45(4) TFEU because it entails the effective exercise of public authority is a *quaestio facti* to be resolved in each specific case, which obliges the highest European jurisdiction to resort to a jurisprudential reasoning based on a pragmatic type of argumentative technique that is applied on a case-by-case basis. The Court of Justice adopted early on a jurisprudence that considerably reduced the cases in which it was possible to exclude jobs from the effects of the common market. The jobs excluded are “only” those which, in view of the tasks and responsibilities inherent in them, may have the characteristics of the specific activities of the administration in the areas of participation in the exercise of official authority and in

²⁸ Judgment of 06 July 2006, *Adeneler and others* (C-212/04, EU:C:2006:443, paragraph 56), on the concept of worker in fixed-term contracts according to Clause 3 of the Framework Agreement annexed to Directive 1999/70/EC, which is applicable in the field of labour relations as well as in the field of civil service and statutory relations. In a broad sense, holders of public office are treated as employees of the public administration and general salary reduction measures apply to them, linked to imperative requirements of the elimination of the excessive budget deficit and to an EU financial assistance programme; such a measure applies *inter alia* to members of the Court of Auditors and to judges and magistrates, because such a salary reduction does not conflict with the principle of judicial independence (Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117, paragraph 52)).

²⁹ See the Opinion of the Advocate General of 01 June 1995, *Vougioukas* (C-443/93, EU:C:1995:159). And this is taken up by the Judgment of 22 November 1995, *Vougioukas* (C-443/93, EU:C:1995:394), with reference to the amended and updated version of the Rgto CEE/2001/83, which refers to all civil servants employed by a public administration and assimilated personnel, and not only to civil servants to whom the exception established in Article 45(4) of the TCEE applies.

the performance of tasks whose purpose is to safeguard the general interests of the State. This means that the tasks performed must not simply constitute an “auxiliary function” to other tasks which fall within the scope of the exception, e.g. security staff in relation to the tasks reserved for the State security forces³⁰. A Member State cannot be allowed to exclude an entire sector of activity - in this case private security³¹ - and, even less so, by invoking the general exclusion on the grounds of Article 45(3) TFEU, as there must be “a danger” to public order, public security or public health³². The “exception” of public order, public security and health is a reserve of internal sovereignty, but it requires adequate justification in each case because restrictions are made to the exercise of a right directly derived from the Treaty, which is why the Member States cannot invoke the exceptions contained in this clause in general and without specific justification to limit the exercise of the right to free movement³³. In any case, Article 45(3) TFEU is aimed at a smaller number of persons than the exception in Article 45(4) TFEU, which has a potential application to all migrant workers (O’Keeff, 1982, p. 53).

The ECJ has clarified that the requirements analysed above are “very strict” and has pointed to specific activities where such requirements do not apply: trainee teachers (Judgment of 3 July 1986, *Lawrie-Blum* C-66/85, EU:C:1986:284); and it seems clear that the tasks of the members of the National Research Council of the Republic of Italy do not show that the researchers “are entrusted with the exercise of the prerogatives of public authority or are responsible for safeguarding the general interests of the State. Only the functions of directing or advising the State on scientific and technical matters could be classified as public administration jobs within the meaning of Article 45(4) of the Treaty, but it has not been demonstrated that the researchers are “entrusted with the exercise of prerogatives of public authority or are responsible for safeguarding the general interests of the State”. of the Treaty, but it has not been demonstrated that these functions were carried out by CNI researchers” (judg-

³⁰ For example, according to article 5 *bis* of loi no. 83634, portant droits et obligations des fonctionnaires (Law no. 83634, portant droits et obligations des fonctionnaires) of 13 July 1983, “nationals of Member States of the European Community or of another State party to the Agreement on the European Economic Area other than France shall have access, under the conditions laid down in the general statute, to the bodies, scales and posts [of the Administration]. However, they shall not be eligible for posts whose powers either cannot, in themselves, be separated from the exercise of sovereignty, or which involve direct or indirect participation in the exercise of the prerogatives of the public authority of the State of other public entities.

³¹ Not even on the grounds of a real and sufficiently serious threat, as the Commission argued in Judgment of 29 October 1998, *Commission v Spain* (C-114/97, EU:C:1998:519, paragraph 21).

³² Judgment of 29 October 1998, *Commission v Spain* (C-114/97, EU:C:1998:519, paragraphs 38, 39, 41 and 42), with reference to Judgment of 07 May 1986, *Gül* (C-131/85, EU:C:1986:200, paragraph 17).

³³ Judgment of 03 July 1980, *Regina v Pieck* (C-157/79, EU:C:1980:179, paragraph 9).

ment of 16 June 1987, *Commission v Italy* C-225/85, EU:C:1987:284, nr. 9). 9); readers of foreign languages (judgment of 30 May 1989, *Allué and Coonan* C-33/88, EU:C:1989:222); secondary school teachers (judgment of 27 November 1991, *Bleis* C-4/91, EU:C:1991:448); public sectors in research, education, health, land transport and post and telecommunications, and in water, gas and electricity distribution services (judgment of 2 July 1996, *Commission v Luxembourg* C-473/93, EU:C:1996:263; judgment of 2 July 1996, *Commission v Belgium* C-173/94, EU:C:1996:264). Nor do the activities of medical specialists fall within the scope of Article 45(4) of the Treaty³⁴. In the same way that it has been required of certain activities, such as that of notaries, their connection with the exercise of public authority in order for freedom of establishment to be restricted for foreign nationals. And notaries have no direct and specific involvement with the exercise of public authority³⁵. Ultimately, non-discrimination on the basis of nationality must allow the activity of any worker recognised as such in the Member States. For example, EU law does not preclude the requirement that port work in one state be carried out only by those who are recognised as professionals in the sector, having passed the psycho-physical and technical tests in that state or in any of the EU states³⁶.

The exclusion of the specific activities of the national civil service covered by the derogation from free movement in Article 48(4) of the Treaty (now 45(4) TFEU) are: the armed forces, the police and other forces of law and order; the judiciary; the tax administration and diplomacy; and other similar bodies. On the basis of this Communication 88/C72/02/EC, the ECJ declared that the Hellenic Republic had failed to comply with the principles to freedom of movement for workers and equal treatment in access to employment in the public sectors of water, gas and electricity distribution, in the operational public health services and in the sectors of public education, urban and regional public transport, civil research and postal services, telecommunications and radio and television, as well as in the Athens Opera and municipal orchestras³⁷. The catalogue of excluded activities indicated in this Communication aims to “limit the scope of the Commission’s own function outside the activities traditionally connected with the hard core of the Administration, i.e. with the most direct and obvious samples of State sovereignty, and which do not raise doubts

³⁴ Judgment of 15 January 1998, *Schöning-Kougebetopoulou* (C-15/96, EU:C:1998:3, paragraph 25).

³⁵ Judgment of 15 March 2018, *Commission v Czech Republic*, C-575/16, EU:C:2018:186, as it had already ruled in a number of cases brought by the Commission in 2008; for example, see Judgment of 24 May 2011, *Commission v Belgium*, C-47/08, EU:C:2011:334.

³⁶ Judgment of 11 February 2021, *Port undertakings v Belgian State*, C-407/19 and 471/19, EU:C:2021:107.

³⁷ Judgment of 02 July 1996, *Commission v Greece*, C-290/94, EU:C:1996:265.

as to the immediate application of the reservation . The ECJ has justified the fact that public administration jobs may, under certain conditions, be reserved by the Member State to its own nationals if these jobs imply “on the part of their holders, the existence of a special relationship of solidarity with the State, as well as a reciprocity of rights and duties which are the basis of the nexus of nationality”³⁸ . Specifically, jobs within the meaning of Article 45(4) TFEU “are those which relate to the specific activities of the public administration as the depositary of the exercise of public authority and of the responsibility for safeguarding the general interests of the State, to which the interests of public bodies, such as, for example, municipal administrations, must be equated”³⁹ .

The application of a functional criterion requires taking into account the nature of the tasks and responsibilities of the post; and it should not be forgotten that nationals of other Member States who wish to access these posts must meet all the requirements of the selection procedure, in particular those relating to training, experience and language skills, in exactly the same way as nationals of the country concerned⁴⁰ . The functionalist conception is the official position of the ECJ and has a solid basis because it respects the principles of the effectiveness of the treaties and the uniform application of Community rules, correcting any discriminatory inequalities that may arise; and, on the other hand, it is a manifestation of the interpretative coherence of considering the exception to the general principle of freedom of movement for workers in a restrictive manner. The weak point of this conception is the difficulty of specifying an indeterminate legal concept such as that of public authority or one that is difficult to juridify such as the relationship of solidarity with the State, and because this approach requires an assessment “*on a case-by-case basis and not on a sector basis*”. The ECJ has been forced to rule on factual issues and a case-by-case determination offers less real protection than if there were Community legislation, which would allow for *prima facie* recognition of substantive rights. “*From the point of view of the migrant worker, this is regrettable*” (O’Keeffe, 1982, p. 59). The ECJ has not handled the institutional and functional approaches cumulatively, but alternatively in favour of the latter, so there is a danger of introducing the institutional approach by the back door, for example, if a generous interpretation is made to include relatively senior positions within the exception to the detriment of

³⁸ With reference to Judgment of 26 May 1982 and 17 December 1980, *Commission v Belgium*, C-149/79, EU:C:1982:195 and EU:C:1980:297; and Judgment of 3 July 1986, *Lawrie-Blum*, C-66/85, EU:C:1986:284.

³⁹ With reference to Judgment of 26 May 1982 and 17 December 1980, *Commission v Belgium* (C-149/79, EU:C:1982:195 and EU:C:1980:297, paragraph 6).

⁴⁰ Judgment of 02 July 1996, *Commission v Luxembourg* (C-473/93, EU:C:1996:263, paragraphs 27 and 35).

other occupations (Handoll, 1988, p. 234-236). And more in line with the institutional approach is the cumulative requirement of participation in the exercise of public authority and the safeguarding of general interests, because this would be more in line with the restrictive interpretation that the Court has adopted to specify the content of Article 45(4) TFEU. Moreover, it would have the advantage of considerably reducing the number of jobs in the public administration reserved for nationals and would increase the possibilities of limiting it uniformly in the Member States to the strict core of the public administration that participates, directly or indirectly, in the exercise of public authority and the protection of general interests (Jaeger, 1990, p. 794).

Access to certain posts may not be restricted by the fact that in a Member State the persons occupying those posts are governed by a statutory regime which confers on them the status of permanent staff. The application of Article 45(4) TFEU cannot depend on the legal nature of the relationship between the staff member and the administration, as this would in fact allow Member States to extend the number of posts subject to this exception at will⁴¹. Not even the recurrent invocation by the public officer of protecting a general interest, defended by means of public organisational powers (efficient management) is, for the ECJ, a legitimate reason to justify discrimination⁴². It may also happen that the State itself outsources or entrusts work to private companies that entail participation in the exercise of public powers or the exercise of functions attributed to public officials, with hardly any control over the activity entrusted, both of which are serious anomalies, especially when the real reason for outsourcing turns out to be the non-existence or under-staffing of the workforce within the specific public administration. ECJ In another way, some references can be used to understand that public employment subject to the requirement of nationality and exempted from free movement is that which, in turn, the Member States exempt from “privatisation” in their reductionist processes; thus, in Italy: “ordinary, administrative and account magistrates, State lawyers and solicitors, military personnel and State police forces, diplomatic and political career personnel (Article 3.1 Legislative Decree no. 165, of 30 March 2001, amended by Law no. 19, of 27 February 2017; in Spain, the Spanish postal civil service declared “extinguished”; or the “standardised” Dutch civil service, which is practically the entire civil service, with the understandable exceptions of judges and prosecutors, military and police. In short, these civil service positions will in no case be subject to a nationality requirement.

⁴¹ Judgment of 03 June 1986, *Commission v France* (C-307/84, EU:C:1986:222, paragraph 11).

⁴² Auto of 09 February 2017, *Rodrigo Sanz* (C-443/16, EU:C:2017:109).

The free movement of workers in the EU has two practical dimensions: one is the prohibition of discrimination on grounds of nationality and the other is that no national rules may have a disincentive effect on the free movement of workers. Non-discrimination on grounds of nationality is a severe restriction on the ability of Member States to reserve jobs for their nationals in the administration, according to the settled case law of the ECJ, the Community scope of the very concept of “exercise of official authority” is intended to ensure that unilateral provisions adopted by the Member States do not undermine the effectiveness of the Treaty, either in terms of freedom of establishment or freedom of movement.

Ensuring the free movement of workers within the Union (Article 45(1) TFEU), integrates the “abolition of any discrimination on grounds of nationality between workers of the Member States” (Article 45(2) TFEU). It is clear from the case law of the ECJ that the exception provided for in Article 45(4) TFEU is limited to providing for the possibility for Member States to prevent nationals of other Member States from having access to certain functions in the public administration⁴³. Therefore, reference should be made to Commission Communication 88/C72/02/EC, where it is stated that the derogation in Article 45(4) TFEU is limited to the possibility for Member States to prevent nationals of other Member States from having access to certain posts in the public administration. The Article 45(4) TFEU refers to the specific functions of the State and of the authorities which may be assimilated to it (regional or local), such as the armed forces, the police and other forces of public order, the judiciary, the tax administration and diplomacy, at State, regional or local level; and public services of a commercial nature (transport, gas and electricity, post and telecommunications, radio and television), health, education and civil research services, as well as access to junior posts in the Administration, should be excluded from the exception. Consequently, and in the light of the case law of the ECJ, apart from the exceptions referred to, “nationals of other Community States not only have access to public employment in Spain, but also have the right to do so on equal terms with Spaniards, without being subject to discrimination on the grounds of their nationality”. A manifestation of this is that the experience of a candidate in the administration of another EU member state should be subject to the same assessment in the selection procedure as the experience of nationals in their own administration

⁴³ Judgment of 22 November 1995, *Vougioukas* (C-443/93, EU:C:1995:394, paragraph 19). Also, Judgment of 13 November 1997, *Grahame and Hollanders* (C-248/96, EU:C:1997:543, paragraph 32).

IV. THE POINT TIME OF THE REQUIREMENT OF NON-DISCRIMINATION ON GROUNDS OF NATIONALITY IN THE CIVIL SERVICE

The protection of the “right to work” enshrined in Article 15 of the Charter of Fundamental Rights of the European Union must be effective not only at the genetic moment of connection with the labour market, but must also be extended, at the dynamic moment, during the development of the employment relationship already established. Even in the case of employment in the public administration, within the meaning of Article 45(4) TFEU, this provision cannot justify, once certain workers from other Member States have been admitted to occupy these jobs, discriminatory measures with respect to them in terms of pay or other working conditions”⁴⁴. As already mentioned, this provision - as regards the exception to the application of freedom of movement - “cannot justify the adoption of measures discriminating against workers as regards pay or other working conditions after they have entered the administration”⁴⁵, unless justified by overriding reasons of general interest⁴⁶. So, if the requirement nationality requirement was not required for entry by virtue of the application of the free movement of workers, such a situation will remain throughout the life of the contract, regardless of the circumstances or vicissitudes that befall the public employee.

Article 45 TFEU prohibits any discrimination on grounds of nationality in access to the civil service and after access in all working conditions between those who occupy a post. The exception provided for in Article 45(4) TFEU excludes from free movement only at the moment of access to certain public jobs and not to persons who are already working in the public administration. Sequentially:

1. If a State has not made use of the derogation under Article 45(4) TFEU at the time of access, “it may not subsequently invoke it to restrict the conditions for the exercise of employment”. Furthermore, and for the purposes

⁴⁴ Judgment of 16 June 1987, *Commission v Italy*, C-225/85, EU:C:1987:284, paragraph 11.

⁴⁵ Judgment of 12 February 1974, *Sotgiu*, C-152/73, EU:C:1974:13.

⁴⁶ Thus, EU law precludes a maximum total of three years’ total remuneration for a migrant teacher from being taken into account for the determination of her initial salary only in respect of her previous periods of activity for a different employer in another Member State, where that activity is equivalent to the activity which the worker is obliged to carry out in both States, in this case in the context of her teaching duties. Such a restriction may make freedom of movement less attractive, is not suitable to ensure the attainment of the objective pursued (loyalty of workers to their employers) and is only valid if it pursues one of the legitimate objectives set out in the TFEU or is justified by overriding reasons in the general interest (Judgment of 23 April 2020, *WN-Land Niedersachsen*, C-710/18, EU:C:2020:299).

of both access and promotion, when a public body of a Member State intends, when recruiting staff to fill posts that do not fall within the scope of Article 45(4) TFEU, to take into consideration the previous professional activities pursued by candidates in a public administration, “that body may not distinguish between Community nationals on the basis of whether such activities were pursued in the Member State to which that body belongs or in another Member State”⁴⁷. Similarly, if a national of a Member State (of Spanish nationality in this case), by virtue of having habitually resided in the territory of another Member State and having acquired professional qualifications there, is in a situation comparable to that of a migrant worker in relation to the Member State of origin, he must also enjoy the rights and freedoms conferred by the Treaty⁴⁸.

2. On the basis of Article 45(4) TFEU, it is not possible to justify discriminatory measures with regard to pay or other working conditions once certain workers from other Member States have been admitted. This exception does not allow unequal treatment - once they have already been employed - as regards working conditions, pay and social security. Article 45(4) TFEU does not justify discriminatory measures with regard to pay or other working conditions against workers once they have been admitted to the service of the administration. Thus, the ECJ in the “Sotgiu” judgment (ECJ 12-2-74, Sotgiu C-152/73), warns that “discriminatory measures regarding remuneration or other working conditions against workers, once they have been admitted to the service of the Administration, are not justifiable

3. However, it is possible to limit or restrict promotion or movement to “reserved” posts for reasons linked to the exercise of public authority or the safeguarding of general interests. This truncates the pursuit of an administrative career and the possibilities of promotion are reduced, due to the fact that the higher one moves up the career ladder, the more likely it is that the posts are linked to the exercise of public authority and the safeguarding of general interests. For the ECJ, such a limitation on promotion is preferable to a general restriction for all positions with the administration, and such discrimination “at the level of promotion has less effect on freedom of movement” (Jaeger, 1990, p. 791-792). In fact, the purpose of the exception, which allows Member States to limit the admission of foreign nationals to certain activities in the public administration, must not be exceeded (judgment of 12 February 74, Sotgiu C-152/73, EU:C:1974:13, par. 4), and this was the argument that gave rise to the position

⁴⁷ Judgment of 23 February 2006, *Commission v Spain* (C-205/04, EU:C:2006:137, paragraph 14).

⁴⁸ Judgment of 08 July 1999, *Fernandez de Bobadilla* (C-234/97, EU:C:1999:36, paragraph 30).

of France and the United Kingdom to prevent indirect entry into their public administration through promotion, because Article 45(4) TFEU does allow for post-entry discrimination on grounds of promotion, as the ECJ “*Sotgiu*” had stated that any discrimination in public employment permitted by Article 45(4) TFEU referred to initial recruitment, not subsequent ones (Wyatt, 1981, p. 461), provided of course that there is no discrimination in working conditions after entry)⁴⁹, nor that the effect of the exclusion of nationals of other Member States from certain promotions or transfers is made in a general way, but because the duties to be performed involve the exercise of public authority or the defence of the general interests of the State⁵⁰.

In conclusion, it will be possible to limit the administrative career of non-national public employees, since the exception of Article 45(4) of the TFEU only applies at the time of access to public employment, without this entailing discrimination in the conditions of access to employment on the basis of their nationality of origin. From the Community approach, the question does not arise in terms of insertion in the civil service or entry into a civil service career, but rather in terms of access to a specific job. Thus, the ECJ in the *Commission/Belgium* case C-149/79 “merely pointed out that further discrimination would occur even if access were completely denied from the outset”

V. THE REGULATORY IMPLEMENTATION OF ARTICLE 45(4) TFEU IN SPANISH LAW

A detailed analysis of Article 45 TFEU as a whole assures us that the free movement of EU workers does not allow any limitations other than those justified on grounds of public order, public safety and public health (paragraph 3), nor any exceptions to the application of free movement other than employment in the public administration (paragraph 4), with the extension given by the interventions of the European Commission and the ECJ. The process of Europeanisation has not moved towards the creation of a uniform model of public administration, but towards the adoption of common rules and standards. The so-called “European Administrative Space” (OECD, 1998) is probably the result of the convergence of tensions of accepting common rules and creating similar practices (Pravita, 2010, p. 21-22). The exception of Article 45(4) of the ECJ has been interpreted by the Court of Justice in a restrictive way and its

⁴⁹ See Judgment of 12 February 1974, *Sotgiu* (C-152/73, EU:C:1974:13).

⁵⁰ Judgment of 16 June 1987, *Commission v Italy* (C-225/85, EU:C:1987:284, paragraph 10).

jurisprudence has generated a harmonisation of social legislation in the Member States, resulting in more than a Community concept of *ad hoc* public administration, two types of public employees for the purpose, those who are exempted from free movement with nationality requirement for access to public employment and the rest of workers for the public administration.

In most European countries, the public administration, as an employer, presents a series of particularities because it has a complex legal nature and because it plays a role as a political subject and as a public authority responsible for the provision of certain public services by constitutional mandate (health, education and social protection, among others). A reading of the case law of the ECJ gives the impression that in many Member States, the rule of law deteriorates considerably when it affects the relationship between the authorities and their most direct servants. Contrary to the arguments of the Member States, the Court of Justice of the European Union considered it necessary to ensure that the effectiveness and scope of the Treaty provisions on the free movement of workers and equal treatment of nationals of all Member States were not limited by broad interpretations of the concept of public administration derived exclusively from national law, which would prevent the application of Community rules⁵¹. The position of the Member States presented serious difficulties in terms of achieving uniform application, the realisation of the principle of primacy and the direct effect of Community law on the free movement of workers. The ECJ feared the power of the Member States to extend the concept of public administration in an unlimited manner, thereby preventing the effectiveness of this freedom. For this reason, the ECJ soon opted for a restrictive interpretation based on three fundamental ideas that can be deduced from its first two cases (ECJ 12-2-74, *Sotgiu* C-152/73 and 26-5-82, *Commission/Belgium* C-149/79) and that are required of all States: 1. 2.- The exception in Article 45(4) TFEU deals with access to a post or job, but not with the conditions for exercising that job once entry has been gained. 3.- The “public administration” is understood from a functional approach so as not to create disparities in the different Member States. And Spain cannot ignore what the ECJ has been stating since its first pronouncements.

In any case, European legislation on unequal treatment clearly does not differentiate between the public or private nature of the employer, regardless of the qualification of the contract in domestic law.

⁵¹ Judgment of 26 May 1982 and 17 December 1980, *Commission v Belgium* (C-149/79, EU:C:1982:195 and EU:C:1980:297, paragraph 19).

In conclusion, EU regulatory instruments have contributed to the modernisation of Member States' provisions in this field. These developments have led to a wider opening of public sectors to migrant workers in the Member States and in some Member States the reform process is ongoing. In the end, national provisions and their application in practice should lead to the result that only jobs that meet the criteria of the ECJ case law will be reserved for nationals of the host Member State⁵².

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⁵² Commission staff working document SEC 2010/1609 final/EU of 14-12-2010, *Free movement of workers in the public sector*, p. 14-16.

CHAPTER 22

THE FRAMEWORK DIRECTIVE 89/391/EEC AS THE BACKBONE OF EU SOCIAL LAW ON OCCUPATIONAL RISK PREVENTION

JOSÉ LUIS MONEREO PÉREZ AND MARIA NIEVES MORENO VIDA

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I. THE LEGAL-POLITICAL CENTRALITY OF THE FRAMEWORK
DIRECTIVE 89/391/EEC: THE EUROPEAN PREVENTIVE MODEL.

1. **Harmonizing regulations aimed at seeking homogeneity in national laws**

The legal regulation of occupational risk prevention refers to the integrated set of statutory rules and principles aimed at eliminating or reducing the factors determining the production of occupational accidents or occupational diseases. Prevention typically acts on the "causes", as opposed to "repair", which primarily affects the consequences or effects of an actual risk (already produced). These objectives are served by the preventive organization of production processes, the determination of all the rights and duties of employers and workers, and the organization of public intervention in preventive matters. The right to work in conditions of safety, health and dignity is a right that enjoys *"multilevel" protection*.

The backbone of European occupational risk prevention legislation is Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work ("Framework Directive") and its specific directives. This Directive describes itself as a "Framework Directive" in the field of occupational safety and health, as it aims to establish the legal and institutional bases for the organization of the safety and health of workers in the workplace. It also serves as a reference for a series of specific directives to be approved in its development (art. 16), thus acting as a normative standard or EU ideal of preventive protection.

The Framework-Directive is based on a modern and broad conception of health and safety in the working environment, in the direction of granting integral protection to workers and even opening up the possibility of greater collaboration and integration between the "internal environment" (prevention of occupational hazards) and the "external environment" (environment and general environmental quality). The successive multiannual EU strategies for health and safety at work set specific objectives within a strategy of positive, proactive and integrative action for the prevention of occupational hazards. In addition, the adoption of a global approach to well-being at work and a new culture of risk prevention that permeates all the policies of the European Union is also being pursued.

The Framework Directive is intended to determine the basic legal structure -without prejudice to existing or future national and EU provisions, which may be more favorable- of all aspects related to risk prevention. In this way, it establishes general principles relating to the prevention of occupational risks and the protection of safety and health, as well as institutional aspects referring to the institutions for

the management and control of occupational risk prevention through the workers and their representatives by means of information, consultation and balanced participation. The aim is also to make all parties involved in prevention jointly responsible, to increase the participation of private parties (employers and workers and their representative organizations) and, at the same time, to reduce state intervention.

An important feature of the Framework Directive is its globalizing purpose, including in its scope of application all sectors of activity and all risks. Its purpose is to harmonize the minimum health and safety conditions to be applied by all Member States.

Despite the important legislative work done by the EU in the field of occupational safety and health, the application of this whole set of regulations has encountered major obstacles. Firstly, the need to define the notion of risk and the activities excluded from its scope of application; the specification of rules and principles that are sometimes ambiguously defined; and the determination of the indeterminate legal concepts that are frequently used. All these aspects have had to be delimited by the Court of Justice of the European Union. Secondly, the transposition work carried out by the Member States has often posed the difficulty of determining the minimum conditions established by the EU rules in relation to national legal systems that have undergone a strong process of devaluation of rights. And thirdly, the nature of the Directive as a flexible rule that requires its adequate transposition within the established deadline has also required an important task for the ECJ, not only to carry out the purely formal control of the transposition within the established deadline, but also, and especially, to carry out a quality control of the transposition rule. The ECJ itself has clearly indicated (Judgment of 9 October 2001, *Kingdom of the Netherlands v. European Parliament and Council of the European Union*, C-377/98, EU:C:2001:523) that the interpretative freedom and flexibility of transposition of directives into domestic law is not discretionary, but is conditioned by the duty to incorporate the full content of the rule being transposed, as well as the spirit and purpose of that rule. All this has led to the fact that the regulatory framework on occupational risk prevention has been accompanied by a very broad jurisprudential elaboration, addressing the most problematic aspects of practical application.

2. **Characteristic features of the *European social model of occupational risk prevention* since the Framework Directive.**

The Framework Directive represented a substantial change in perception and in the previous EU approach. Previously, a preventionist system was con-

figured, restrictively considered as the necessary social dimension of the European internal market and with a clear dominance of purely "instrumental" aspects (preference for economic rationality in risk prevention), "technical" and "regulatory" aspects (proliferation of precise and specific rules and preference for prohibitive mandates or rigid technical-administrative interventionism). Since the Framework Directive, the European social model of occupational risk prevention has been built on the basis of certain characteristic features:

a) The configuration of occupational health and safety as a fundamental *social right* of the worker within the framework of the employment relationship and the legislative requirement to draw up a public preventive policy relating to the working environment. This policy is a duty of the public authorities that requires the establishment of precise and adequate regulatory and organizational means to achieve these objectives.

b) The vocation of *systematic unity* of the whole normative, institutional and technical set, with the aim of linking it with environmental policy. Through the approval of the Framework Directive 89/391/EEC, the coordination and unification of the previous regulations was achieved, and it was configured as the "backbone of the EU system" of occupational risk prevention. Its "Framework" character determines that it focuses more on the institutional or legal aspects of occupational health and safety - defining rights and obligations and establishing rules for the organization of prevention in the company - than on the incorporation of preventive measures, since it refers technical matters to specific directives (Directive 89/391/EEC art.16).

Since the Framework Directive 89/391/EEC, a total of 19 specific directives plus additional supplementary directives have been adopted (altogether more than 25 daughter directives in different fields, many of which already have consolidated versions). The Framework Directive takes on a founding role with respect to those considered as "second generation directives". In addition, with the aim of harmonizing national legislation, a number of provisions have also been adopted to enable a comprehensive approach that takes into account the many factors involved in safety. These are the so-called "transversal instruments", which have covered subjects as diverse as display screens, workplaces and protective equipment. This extensive EU regulatory framework has driven processes of permanent renewal of the legal systems of the Member States.

c) The *guarantee of transparency* of an effective and efficient preventive policy. The entire preventive control cycle must be transparent and documented for the sake of legal certainty and as a measure to facilitate public and collective control. Thus, the occupational health and safety plan and the occu-

pational risk assessment must be planned, adequately documented and transparent (including due information on the subjects involved and addressees). The obligation to document the assessment must be guaranteed in all circumstances and in all companies, even if they have ten or fewer workers (Judgment of 7 February 2002, *Commission v. F. Germany*, C-5/00, EU:C:2002:81).

d) Principle of organization of *efficient preventive services*. The occupational risk prevention services, the so-called "Company Health Services", are, to a large extent, the key to the whole preventive system. The Framework Directive enshrines the general principle that preventive management must include the necessary planning and organization of preventive resources (human, material and economic resources and adequate technical knowledge), organized according to the characteristics, size and activity of the company and the magnitude of the risks detected. The Directive establishes a flexible system of organization, considering the prevention service not only as a body but also as a function or set of functions that can be carried out through different organizational formulas.

e) The integrated dimension of prevention. The Framework Directive establishes the *principle of integrated prevention* in the company's organization, so that preventive activity is conceived as an inseparable element of the company's own organizational and management activity. Hence the preference for internal prevention services over external prevention services (art. 7). However, this basic preventive principle is frequently disregarded by companies, and the States themselves have often admitted the externalization or outsourcing of preventive activity, through external or external prevention services. The ECJ has shown how these regulatory options favoring the externalization of preventive activity ("*commercialization*" of the company's preventive function) openly clash with European Union law.

f) The preventive system is based on the *participative management* of health and safety at work. The participation of workers and their representatives in the regulation and, above all, management of preventive action in the workplace is one of the principles established in the Framework Directive. It is a management logic based on cooperation and the search for consensus over unilateral demands and management.

Framework Directive 89/391/EEC provides for the active and wide participation of workers' representatives in this field, *through "information, consultation, (and) balanced participation in accordance with national laws and/or practices"*.

The Directive gives workers and/or their representatives the right to receive all necessary information concerning safety and health risks and protective or preventive measures and activities (art. 10). It also establishes the obligation of employers to consult workers and/or their representatives and to

allow their participation in matters affecting safety and health at work, which implies, according to Art. 11, the consultation of workers, the right of workers and/or their representatives to make proposals and balanced participation, in accordance with national laws and/or practices. All these rights are generally instruments of worker participation in the management of the company, relating to protection and prevention of occupational hazards, and therefore imply, to a greater or lesser degree, a limitation of company powers that can affect important aspects such as the introduction of new technologies in the company, the organizational system or working methods.

In particular, the Directive introduces the figure of the "workers' representatives with specific responsibility for the safety and health of workers", which it defines as "any person elected, chosen or designated in accordance with national laws and/or practices, to represent workers where problems arise relating to the safety and health protection of workers at work". It provides for the existence in the company of a workers' delegate(s) for problems related to safety and health protection but refers to national laws and regulations the system of determination (elected, appointed, or designated by one or another procedure) and the area in which it is carried out (company or workplace). This implies that these workers/representatives with a specific role in health and safety protection who, must enjoy a "specific, special position so far as concerns the consultation or balanced participation" in this area (Judgment of 6 April 2006, *Commission v. Republic of Austria*, C-428/04, EU:C:2006:238, paragraphs 76 and 77). EU case law has also made it clear that the employer's obligation to inform and consult employees or their representatives is not fulfilled by regulations that lay down general obligations without providing for the participation of employees with a specific role in risk prevention (Judgment of 6 April 2006, *Commission v. Republic of Austria*, C-428/04, EU:C:2006:238, paragraph 86).

g) Principle of integration of prevention within the framework of *corporate social responsibility*. The improvement of the "quality of life" in "working environments" is considered as an internal dimension of corporate social responsibility, both as a mechanism to reinforce compliance with legal norms through good practices, and to complement and improve legal standards. This cannot imply a devaluation of the existing regulatory framework and a renunciation of public control instruments.

h) Principle of *integral organization* of public prevention and environmental policies. Coordination is postulated between the prevention of occupational risks internal to the company and the external environmental policy, since it cannot be ignored that *the environment and the working environment*

are closely linked, both from the causal and functional point of view. This has led to one of the most important changes in occupational health and safety protection techniques with the incorporation of the "precautionary principle" (Communication from the Commission on the use of the precautionary principle, 2-2-00; CFI-EU 11-9-02, Pfizer Animal Health v. Council T-13/99, known as "*Virginiamycin*"). The application of this principle may entail, in exceptional circumstances, and in the hypothesis of potential risk, the suspension of the legal regime that would be applicable under normal conditions.

Although not expressly developed in the Framework Directive, the preventive perspective adopted in European Union legislation is "integrated safety". Integrated safety" comprises transversally the regulatory group regulating health and safety at work ("internal" environment) and the regulatory group aimed at health protection with respect to the "external" or natural environment.

This integrative and cooperative direction between the two sets of regulations is found in the Commission Communication on the EU Strategic Framework for Occupational Health and Safety at Work 2021-2027, "Occupational safety and health in a changing world of work", which sets out the priorities and key actions needed to improve the health and safety of workers in the coming years in the context of the ecological and digital transitions, economic and demographic challenges and the changing notion of the traditional working environment. The idea is to project the idea of sustainable development and the "common" principles of prevention, precaution or precaution and responsibility from an approach of collaboration and coordination between the respective environmental and occupational risk prevention regulations and actions.

II. SUBJECTIVE SCOPE OF APPLICATION OF DIRECTIVE 89/391/EEC

1. **The subjects of occupational safety and health: subjects subject to occupational safety and health regulations.**

The scope of application of the Directive is set out in Article 2, where, as a general rule, it is determined that "it shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.)". It is a Directive of *cross-industry scope* with the only exceptions being those contained in Art. 2.2.2 - certain specific activities in the public service (e.g. armed forces or police) or certain specific activities in the civil protection services, when their inherent particu-

larities oppose this - and Art. 3 (a), which excludes from the consideration of "worker" *for the instrumental purposes of the Framework Directive*, workers in the service of the family home.

The ECJ has repeatedly stated that it follows from Article 2(1) of the Directive that the scope of application of the Directive must be understood broadly. "The exclusions from its scope provided for in the first subparagraph of Article 2(2) of that article, must be interpreted restrictively" [Judgment of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:2004:584 , para 52; Judgment of 12 January 2006, *Commission of the European Communities v. Kingdom of Spain*, C-132/04, EU:2006:18 , para 22; Order of 14 July 2005, *Personalrat der Feuerwehr Hamburg*, C-52/04, EU:2005:467, para 42].

This subjective scope of protection against occupational risks to all sectors of activity, public and private, *with the only (and highly criticizable) generalized exclusion of independent or self-employed workers and workers in the family home* (and the for Member States to exclude under certain conditions certain activities of the public service), has led to the amendment of the legislation of many Member States which excluded certain types of jobs, workers or workplaces (such as public service workers, homeworkers, apprentices or agricultural workers) from occupational health and safety regulations. On the other hand, the Directive - by its nature as a harmonization rule "towards progress" - expressly provides that its regulation "does not affect national and EU provisions which are more favorable to the protection of the safety and health of workers at work". This is the case in Member States whose legislation provides for a wider scope of application than that of the Directive, including self-employed workers (Ireland and the United Kingdom), or even ensuring the protection of third parties against risks arising from occupational activities (Greece, the Netherlands and the United Kingdom).

Article 3 contains the definitions of worker and employer and *establishes a concept of employment relationship in a broad juridical-material and not juridical-formal sense*. In principle, the subjective scope of the Directive (Art. 2 and 3.a) maintains a universal vocation (still incomplete given the exclusions of a constitutive or declaratory nature), in a direction analogous to that of Art. 1 and 3.b of ILO Convention No. 155. A characteristic of the European risk prevention system is the claim to provide protection to all those workers (in the broad legal-material sense of the term) who provide professional services from which a risk to their safety and health may arise, without concern for the specific legal link through which this relationship of provision of services is formalized (whether ordinary or special employment relationships, whether contractual or statutory relationships). However, in most European countries, this

integrating purpose will have to coexist, for the time being, with the persistence of differentiated treatments, both in the subjective coverage and in the extent of the protection provided. The Framework Directive aims at a homogenizing harmonization of minimum standards and the convergence of national laws, but without seeking uniformity of regulations.

2. The concept of worker for the purposes of occupational safety and health standards.

2.1 BREADTH OF THE CONCEPT OF WORKER. THE INCOMPLETE RULE OF GENERALITY OR UNIVERSALITY.

With regard to health and safety, EU regulations refer in general to those who carry out a professional activity, regardless of their performance in the form of an employment contract. This is based on the practical criterion adopted by the European Union, which chooses not to make a precise legal configuration in view of the difficulties that this would entail given the diversity of legal systems existing in the Member States. In short, with regard to the protection of occupational risks, EU legislation does not take into account the legal-formal characterization of the work performed in order to predicate the occupational attribute of the risk.

As regards the *worker*, Article 3 a) of the Directive defines him/her as "any person employed by an employer, including trainees and apprentices but excluding domestic servants". For EU social law, in the expansive interpretation given by the Court of Justice (among others, Judgment of 11 November 2010, *Danosa v. LKG Lizing SIA*, C-232/09, EU:C:2010:674), the determining factor is that a real and effective paid activity is performed, involving work of economic value, under conditions of subordination and for consideration, regardless of the economic sector in question or the nature of public or private ownership. Therefore, from a EU perspective, the worker is defined as an employee, which implicitly excludes self-employed workers from the scope of application of the Framework Directive.

Traditionally, EU occupational health and safety regulations have referred to a *functional concept of worker* in relation to the risk they are intended to protect, such as the concept of "exposed worker" ("any worker who is wholly or partially in a hazardous area", or "any employed person exposed or likely to be exposed to one of these agents during work", for example). Framework Directive 89/391/EEC establishes a general definition of a worker as the sub-

ject of the obligations and rights set out therein, to which the specific directives refer. This is not a technical-legal definition, but a definition of general scope that can then be adapted to particular risks by means of specific directives.

2.1.1 *Civil Service*

The Framework Directive *extends its scope of application to the public employment sector and in particular to the civil service (civil servants)*. However, the Directive does not apply where the particularities inherent in certain specific activities in the public service, for example in the armed forces or the police, or certain specific activities in the civil protection services, conclusively preclude its application. In this case, care must be taken to ensure as far as possible the safety and health of workers, in accordance with the objectives of the Directive (Art. 2). The ECJ has specified that the exceptions provided for in Art.2.2 must be interpreted restrictively, since it refers not so much to the services mentioned, but exclusively to certain specific activities within these services. The Court of Justice has established that the exclusion can only apply in the case of exceptional events in which the proper implementation of measures intended to ensure the protection of the public in situations of serious collective risk requires that the personnel called upon to deal with such an event give absolute priority to the purpose pursued by those measures, which could not be done if all the rules laid down in the Directive were observed (Judgment of 5 October 2004, *Pfeiffer and others*, C-397/01 to C-403/01, EU:2004:584 ; Order of 14 July 2005, *Personalrat der Feuerwehr Hamburg*, C-52/04, EU:2005:467; Judgment of 12 January 2006, *Commission of the European Communities v. Kingdom of Spain*, C-132/04, EU:2006:18). The Judgment of 30 April 2020, *UO v. Készenléti Rendőrség*, C-211/19, EU:C:2020:344, sets out clear restrictions for exempting the application of occupational safety and health regulations (Art. 2.2) to police forces, in this particular case in relation to working time and rest periods under working time regulations (Art. 1.3 and 2.1 and 2 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003). The ECJ has stated that the exception provided for in Art. 2.2 must be given a restrictive interpretation, limited to what is strictly necessary to safeguard the interests that may be protected by the States [Judgment of 12 January 2006, *Commission v. Kingdom of Spain*, C-132/04, EU:2006:18, para. 23; Judgment of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:2004:584, para. 54; Order of 14 July 2005, *Personalrat der Feuerwehr Hamburg*, C-52/04, EU:2005:467, para. 44].

In Spain, the Law on Occupational Risk Prevention included the regulation contained in Article 2 of the Directive regarding the possibility of excluding certain specific activities of the civil service (police, security and customs protection; civil protection operational services). However, the total exclusion that was carried out in practice from the occupational risk prevention regulations with respect to these personnel led to a conviction of the Spanish State by the Court of Justice of the European Union. The Judgment of January 12, 2006, *Commission v. Kingdom of Spain*, C-132/04, EU:2006:18, convicted Spain for failing to comply with the transposition obligations by excluding from the scope of application of the Occupational Risk Prevention Law the non-civilian personnel of the Public Administrations, Armed Forces, Civil Guard and Police, and not only certain activities of these subjects which, depending on their specific nature, could justify such an exception, which made it necessary to amend the Law, adapting it to the interpretation of the Court of Justice.

2.1.2 *Self-employed workers*

The Framework Directive uses a concept of worker restricted to the field of employment ("any person employed by an employer"), although the legal-formal characterization of the worker is dispensed with. Thus, the subjective scope of protection for occupational risks that the Directive implements does not extend to *self-employed workers*. The exclusion of these workers is not absolute with respect to all EU regulations on occupational health and safety, since there are directives that refer to the broader concept of "*exposed worker*", but certainly from Directive 89/391/EEC onwards the concept of worker defined therein will serve as a general guideline in EU regulations on the prevention of occupational hazards.

This exclusion of self-employed workers does not fit in with the subjective scope of protection for occupational risks which, in the field of repair - proper to Social Security - is being generalized by EU rules. Thus Regulations EC/883/2004 and 987/2009, relating to the coordination of Social Security Systems, refer to both employed and self-employed workers; they disregard the legal-formal characterization of the work performed to focus their attention on the professional attribute of the risk.

In the current economic-productive system, there is no substantial difference between employees and self-employed workers in terms of their vulnerability to situations of occupational risk and the satisfaction of situations of

need that may arise as a result. The total exclusion of self-employed workers in the Framework Directive is therefore open to criticism. Moreover, the application to all workers of health and safety rules to prevent occupational accidents and diseases is becoming increasingly important in view of the emergence of new forms of work and the growing uncertainty and difficulties of delimitation between employed and self-employed workers. In any case, the Court of Justice has stated that the formal qualification as "self-employed" under national law does not preclude a person from being classified as a worker for the purposes of EU law if his independence is only fictitious, thus disguising an employment relationship (Judgment of 13 January 2004, *Debra Allonby*, C-256/01, EU:C:2004:18).

The Commission Communication "Safer and healthier work for all. Modernisation of the EU Occupational Safety and Health Legislation and Policy" of 10 January 2017 recalls that many self-employed workers (representing 16.4% of total EU employment) work in high-risk sectors such as agriculture, forestry, fisheries and construction and, therefore, Member States should promote the health and safety of self-employed workers and include them in the scope of their national law, as, regardless of whether they work alone or alongside employees, they may be subject to similar risks to those experienced by employees. The two occupational health and safety directives where such risks are most prevalent are Dir 92/57/EEC on construction sites and Dir 93/103/EC on work on board fishing vessels, the scope of which covers self-employed persons working alongside employees.

Differences existing in the member states on the status of employees or self-employed workers of people working through "digital platforms" and their impact on health and safety protection are also currently being raised. The Proposal for a Directive of the European Parliament and of the Council on improving working conditions at work on digital platforms [Brussels, 9.12.2021. COM(2021) 762 final], adopted by the European Parliament, provides that, in any case, digital work platforms shall: (a) evaluate the risks of automated monitoring and decision-making systems to the safety and health of platform workers, in particular as regards possible risks of work-related accidents, psychosocial and ergonomic risks; (b) assess whether the safeguards of those systems are appropriate for the risks identified in view of the specific characteristics of the work environment; (c) introduce appropriate preventive and protective measures. They shall not use automated monitoring and decision-making systems in any manner that puts undue pressure on platform workers or otherwise puts at risk the physical and mental health of platform workers (Art. 7.2).

2.1.3 *Workers in the service of the family household*

Regarding the exclusion of workers in the service of the family home, it is clear that the peculiarities of the place of service make it difficult to apply many of the occupational health and safety measures established by the Directive.

The Commission Communication "Safer and Healthier Work for All. Modernisation of the EU Occupational Safety and Health Legislation and Policy" of 2017 encourages Member States to ensure occupational health and safety policies for "persons employed for household work in private households" (an estimated 2.5 million in the EU). It is recognized that EU legislation does not oblige Member States to include persons performing household work in private households in the scope of their national occupational health and safety standards, and that not all preventive standards may be appropriate for these workers. However, ILO Convention No. 189 on Domestic Workers of 2011 states that every domestic worker has the right to a safe and healthy working environment, and that this principle should be applied with due regard to the specific characteristics of domestic work. The EU's objective is to achieve a high standard of health and safety at work for domestic workers in all Member States.

2.2 SPECIALLY PROTECTED GROUPS OR SPECIFIC GROUPS

The scope of application of the Framework Directive covers all workers in general, regardless of the degree of integration of the worker (temporary workers) or the particular link between the worker and the company (contractual arrangements) or the particularities deriving from certain relationships. However, Article 15 of the Directive refers to what it calls "risk groups". Under this provision "particularly sensitive risk groups must be protected against the dangers which specifically affect them".

This mandate leaves the Member States a wide margin to specify it in the various national laws, since a generic reference is made to the risk groups, without determining which these groups may be at risk. The European Union itself has adopted some measures relating to these special risk groups. In particular, Directive 92/85/EEC of 19 October 1992 on the improvement in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding has been adopted; Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment rela-

tionship or a temporary employment relationship; Directive 94/33/EC of 22 June 1994 on the protection of young people at work; and Directive 2008/104/EC of 19 November 2008 on temporary agency work.

In the first of these, women in situations of pregnancy, childbirth or breastfeeding are considered as a group exposed to particularly sensitive risks, so that it is necessary to adopt specific measures to protect their health and safety. The Directive establishes that alternative and gradual protection mechanisms must be adopted: modification of working conditions; change of functions; or, as a last resort, suspension of the employment contract for the duration of the situation that justifies it. In addition, measures relating to maternity leave or leave for prenatal examinations and the express prohibition of dismissal for reasons inherent to her condition are established. In the Judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, in the case of a breastfeeding worker who challenges before a national court the risk assessment of her job on the ground that it was not carried out in accordance with Directive 92/85/EEC, the Court of Justice declares that the absence of a risk assessment of the job of a breastfeeding worker, in accordance with the requirements of Directive 92/85/EEC, must be regarded as less favourable treatment of a woman linked to pregnancy or maternity leave and constitutes direct discrimination on grounds of sex within the meaning of Directive 2006/54/EC. In addition, the Court applies the doctrine on the facilitation of proof in the face of discriminatory actions or actions prejudicial to fundamental rights, so that it is up to the worker concerned to produce facts that may suggest that the assessment of the risks of her job was not carried out in accordance with the requirements of Directive 92/85/EEC and that allow the existence of direct discrimination on grounds of sex, within the meaning of Directive 2006/54/EC, to be presumed. Consequently, it will be for the defendant to prove that the risk assessment was carried out in accordance with the requirements of that provision and that, therefore, the principle of non-discrimination was not infringed.

The same doctrine is contained in the Judgment of 19 September 2018, *González Castro*, C-41/17, EU:C:2018:73, which also states that EU law on occupational safety of pregnant or breastfeeding women applies to shift workers and with one third of their activity during night time.

Particularly significant are the directives relating to fixed-duration or temporary agency workers because of the identification of these atypical forms of employment as a risk factor. Within the framework of Directive 89/391/EEC, the specific Directive on temporary workers has a particular impact in the field of training, information and medical surveillance of temporary workers, as well as on the liability of the employers concerned. Workers with tem-

porary or fixed-duration employment relationships, as well as temporary agency workers, must enjoy the same level of health and safety protection as the other workers in the undertaking in which they provide their services. However, Directive 2008/104/EC on temporary agency work has made it possible to limit the restrictions and prohibitions on the use of temporary agency work in relation to work that is particularly hazardous to health and safety: no entire sectors of activity are excluded, but rather particular activities, specific jobs or specific occupations.

3. The concept of employer

EU regulations on occupational risks prevention are generally not based on the legal concept of a company, nor on the economic concept of activity, but on the concept of occupational risk. The basis for its application is the presence in the workplace of any of the physical, chemical or biological agents subject to regulation or, in general, of any risk to the health and safety of workers. Consequently, all companies, whether public or private, civilian or military, individual or corporate, are included within the scope of application of the directives on occupational health and safety, except for those that are expressly exempted. It is the workplace, understood as the place of work where these risks may occur, which is the target of the technical safety and risk prevention measures provided for in the directives. References to the employer only appear when it is a question of establishing obligations related to workers or their representatives, in terms of surveillance, information or training on risks.

In the Framework Directive, the concept of employer is formulated in a broad and all-encompassing manner. For the purposes of health and safety regulations, *employer* (Art. 3) means "any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment".

The legal and/or economic structure of the company is therefore disregarded. This concept (Art. 3) must be interpreted systematically with Art. 6.4, which establishes that when workers from several companies are present in the same workplace, the employers must cooperate in the application of the provisions relating to safety, health and occupational hygiene, as well as coordinate with a view to the protection and prevention of occupational risks and inform one another of such risks. This makes it necessary to differentiate between the company-employer, holder of an employment relationship and also responsible for a business organization, and the company-non-employer who is also an

obliged subject and responsible for the application of the occupational safety and health measures established by the Directive, insofar as he is responsible for the company and/or establishment where services are provided.

The Framework Directive aims to determine the party responsible for the obligation to ensure the safety and health of workers and, therefore, the figure of the employer is of interest as the center of imputation of responsibility for the protection of occupational risks.

3.1 THE "GROUP OF COMPANIES" AS THE CENTER OF IMPUTATION OF THE SAFETY AND HEALTH RULES.

The Framework Directive does not make direct reference to the group of companies as an obliged subject or at least a responsible subject in terms of occupational risk prevention. However, regardless of the consideration of the group of companies in the different national systems of the Member States, the group of companies can and should be considered as a "functional subject" or "legal-instrumental reference center", giving it legal relevance for the purposes of occupational health and safety regulations, in many cases to ensure its effectiveness. The consideration of the group as a "functional subject" can allow the group as such to be obliged to adopt occupational health and safety measures, since it is normally the unitary management or decision-making center of the group that can control aspects as important for the health and safety of workers as the introduction of new technologies, the organizational structure of the company or the personnel policy. On the other hand, in subordinate groups, the controlling company is the ultimate recipient of the services provided by the workers legally and formally linked to the subsidiaries (even if there is no transfer of personnel between the various companies of the group) and, therefore, it could be held liable in the event of damages due to non-compliance by any of the subsidiaries with occupational health and safety measures. Finally, the consideration of the group as an obligated or responsible party for these purposes can be a guarantee of the effectiveness of the workers' rights to information, consultation and participation in occupational health and safety matters.

3.2 ADAPTATION TO THE SIZE OF THE COMPANY: THE "SMALL" COMPANY.

The application of the Framework Directive is not conditioned by the size of the company, so that it applies to both large companies and small and medi-

um-sized enterprises (SMEs) (Judgment of 6 April 2006, *Commission of the European Communities v. Republic of Austria*, C-428/04, EU:C:2006:238 , paragraphs 60, 61 and 62). However, Article 153.2 TFEU, in relation to the adoption of minimum requirements at EU level concerning the health and safety of workers, states that "Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings". This regulation is a consequence of the special attention of the European Union towards SMEs, establishing the principle of a differentiated and more flexible treatment for them.

Within this favorable treatment, it is considered necessary to recognize the existence of the special needs of small and medium-sized companies in the area of occupational safety and health, basically referring to the fact that an increase in economic costs and administrative and legal obstacles or requirements (which, ultimately, would also translate into business costs) would seriously affect the development and competitiveness of SMEs in the market. Framework Directive 89/391/EEC continues along the same lines by providing for the possibility for Member States to make certain modifications to the minimum occupational health and safety standards for small companies. In particular, regarding protective and preventive services (Art. 7.7); to the obligations of the employer (Art. 9.2); or to the obligations to inform workers (Art. 10).

However, an excessively unilateral configuration of SMEs is maintained, which ignores the existence, within this category, of companies with a small number of personnel but which can be of considerable importance due to their market penetration and their degree of rationalization and business consistency. On the other hand, it should be taken into account that within the problems and disadvantages of SME workers, occupational safety and health is included, highlighting that the working environment is more dangerous in small companies than in large ones and that in Europe, 82 % of occupational injuries and 90 % of fatal accidents occur in SMEs (Report IV of the International Labour Conference, 104th Session, 2015 "Small and medium-sized enterprises and decent and productive employment creation").

The need to help SMEs and micro-enterprises to comply with the legislative framework for occupational health and safety at work without reducing the level of protection of their workers is one of the objectives and lines of action proposed in the Commission Communication on the EU Strategic Framework for Health and Safety at Work 2021-2027 "Occupational safety and health in a changing world of work" (COM(2021) 323 final), which urges Member States to " Provide improved guidance and training for the risk-as-

assessment and prevention measures, in particular to micro enterprises and SMEs". It is considered that establishing exemptions for SMEs would reduce the level of protection of their workers, but compliance with preventive rules must be simpler and less costly, which requires specific measures to support SMEs and microenterprises (financial incentives, IT tools, clear and effective procedures, best practice guides, etc.).

3.3 DECENTRALIZATION OF PRODUCTION: COORDINATION OF PREVENTIVE ACTIVITIES

It is also necessary to adapt the requirements of occupational risk prevention to the subcontracting activity (which has now become a structural element of the organization of the production system). The Framework Directive has established in art.6.4 that "where several undertakings share a work place, the employers shall cooperate in implementing the safety, health and occupational hygiene provisions and, taking into account the nature of the activities, shall coordinate their actions in matters of the protection and prevention of occupational risks, and shall inform one another and their respective workers and/or workers' representatives of these risks" (obligation also established in art.17 of ILO Convention No. 155 on "Safety and Health at Work"). of ILO Convention No. 155 on "Occupational Safety and Health and the Working Environment"). The phenomenon of productive decentralization is contemplated in relation to the duty of prevention in matters of health and safety of workers not only from the "pathological" perspective -from the point of view of responsibilities in the event of non-compliance- but, fundamentally, from the preventive perspective, seeking to establish mechanisms to avoid occupational risks. In addition, the legal qualification of the existing relationship between the companies is avoided and the fact that workers from several companies concur in the same workplace is established as a determining criterion for the application of this rule.

These cases of productive decentralization constitute one of the main sources of risk in the workplace as a result of the dilution of preventive duties and, in many cases, the concealment of the employer's responsibilities. The basis of this responsibility lies in the fact that it is the main employer who controls the workplace and, therefore, who can and must control the safety and prevention measures both for his own workers and for workers outside the company who carry out their activity in the same workplace.

The aim is to establish shared obligations and responsibilities in occupational health and safety matters between the main employer and the contractor

or subcontractor, based on the fact that workers from several companies carry out their activities in the same workplace. This obligation of cooperation and coordination with respect to risk protection means that each of the companies has an objective duty of care not only with respect to its own workers, but also with respect to other workers.

The obligation to designate one or more safety coordinators and to draw up a safety and health plan is particularly important in the construction sector, without this obligation admitting of any exception, regardless of whether or not the work involves specific risks (Judgment of 7 October 2010, *Martha Nussbaumer*, C-224/09, EU:C:2010:594, para. 23). This is laid down in Council Directive 92/57/EEC of 24 June 1992 on the minimum safety and health requirements to be applied at temporary or mobile construction sites (eighth individual Directive). The safety coordinator must be established prior to the execution of the works and the health and safety plan must also be established regardless of the number of undertakings present on the site (Judgment of 7 October 2010, *Martha Nussbaumer*, C-224/09, EU:C:2010:594, paragraphs 24 and 28).

Apart from this, Article 6.4 of the Framework Directive contains other obligations, mainly referring to mutual information between companies on the possible risks to which workers may be subjected to and to internal information between each company and its own workers and/or their representatives.

III. THE RIGHTS AND OBLIGATIONS AND BASIC INSTITUTIONS OF THE PREVENTIVE MODEL.

1. The employer's duty of safety: scope and delimitation of its content.

Article 5.1 of the Framework Directive establishes a general duty of the employer to "ensure the safety and health of workers in every aspect related to the work". This provision obliges the employer to guarantee workers a safe working environment, the content of which is specified in Articles 6 to 12 of the Directive. The ECJ has established that this rule imposes a general safety obligation, but does not determine a strict liability of the employer (Judgment of 14 June 2007, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, C-127/05, EU:C:2007:338). The Court points out that this provision merely lays down the general safety obligation incumbent on the employer, without pronouncing on the specific form of liability incumbent on him. The fact that the employer cannot be exempted

from his responsibilities when he has recourse to outside expertise and also on account of the employees' obligations does not, according to the ECJ, allow the conclusion to be drawn that there is a specific form of liability in the event of accidents. However, Article 5.4 of the Directive provides that Member States may limit the liability of employers " where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care".

Specifically, Art. 6.1 determines the employer's obligation to take "the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organization and means". This employer's duty is specified in Articles 6 to 9 of the Directive in a set of general and specific obligations:

— The employer must ensure that these measures are adapted to changing circumstances (Art. 6.1) and must plan prevention as a coherent whole, integrating technology, work organization, working conditions, social relations and the influence of environmental factors at work (Art. 6.2).

— It must assess the risks to the safety and health of workers. Following this assessment, prevention activities must be integrated into all the activities of the company and/or establishment and at all hierarchical levels (art.6.2 and 6.3). The ECJ has stated that it is a clear breach of the obligations deriving from the Framework Directive if the domestic legislation of a Member State does not provide for an obligation on the employer to assess all risks to the safety and health of workers in the workplace (Judgment of 15 November 2001, *Commission v. Italy*, C-49/00, EU:C:2001:611, paras. 12 and 13).

According to EU case law, it follows from the Framework Directive that employers are obliged to assess all risks to the safety and health of workers, bearing in mind that the risks to be assessed are not definitively determined, but are constantly evolving in line, in particular, with the progressive development of working conditions and scientific research into occupational hazards.

The ECJ has established that, in the event of a breach by an employer of the obligations to assess the health of workers, the worker concerned must be able to require the employer to comply with those obligations, where appropriate, by contacting the national authority responsible for monitoring compliance with those obligations or, if necessary, by bringing an action before the competent courts to enforce them correctly. The exercise of the right to effective judicial protection can contribute to ensuring the effectiveness of the right

to health assessment enjoyed by a worker (Judgment of 20 June 2024, *EA and Artemis Security SAS*, C-367/23 , EU:C:2024:529, in relation to the failure to comply with the obligation to assess the health of night workers established by Directive 2003/88/EC concerning the organization of working time)

— Work must be adapted to the individual, particularly with regard to the design of workstations, as well as the choice of work equipment and work and production methods, with a view, in particular, to reducing monotonous and repetitive work and their effects on health.

The Judgment of 22 December 2022, *TJ e Inspectoratul General pentru Imigrări*, C-392/21 , EU:C:2022:1020, concerning the protection of the safety and health of workers working with equipment including display screens, in the framework of Directive 90/270/EEC, has stated that the obligation to provide the worker with protective equipment cannot be replaced by a general wage supplement.

— Preventive inter-company coordination mechanisms must be established (art. 6.4): Where workers from several undertakings are present at the same workplace, employers must cooperate in the application of provisions relating to safety, hygiene and health, as well as coordinate with a view to the protection and prevention of occupational risks, inform each other of such risks, and inform their respective workers and/or their representatives (Judgment of 7 October 2010, *Martha Nussbaumer*, C-224/09, EU:C:2010:594).

— As specific obligations, Art. 8 of the Directive stipulates that the employer must take the necessary measures for first aid, firefighting and evacuation of workers, adapted to the size and nature of the activities of the enterprise or workplace, taking into account the fact that other persons may be present. It must also organize the necessary relations with outside services, in particular for first aid, emergency medical assistance, rescue and firefighting.

The employer must, in particular, designate the workers in charge of first aid, firefighting and evacuation of workers. Such workers must be suitably trained, be sufficiently numerous and have the appropriate equipment, considering the size of the undertaking and the specific risks of the undertaking. The ECJ has specified that this obligation on the employer to designate is not conditioned or limited by the size or activities of the undertaking [Judgment of 6 April 2006, *Commission v. Republic of Austria*, C-428/04, EU:C:2006:238, paragraphs 60, 61 and 62]. Such circumstances may be considered in order to specify the necessary aspects or elements, but not to exclude *a priori* the designation of workers responsible for the protection and prevention activities in question. The ECJ specifies that, although small and medium-sized enterprises

have their own characteristics and needs which may influence the necessary measures to be taken, this does not eliminate the intrinsic level of risk existing in the enterprise. The tasks that these workers must perform are related to events that may occur in the workplace, regardless of the size of the company. This obligation must therefore also apply to small and medium-sized undertakings [Judgment of 6 April 2006, *Commission v. Republic of Austria*, C-428/04, EU:C:2006:238, paras 65 and 66].

— An obligation to train workers (Art. 12) and their representatives (Art. 12.3) is imposed on the employer. The duty of individual training cannot be borne by the workers or their representatives, must be carried out during working time (art.12.4), and must be ensured in particular in the event of new recruitment, change of functions or introduction of new technology. Such training must be adapted to the evolution of risks and the emergence of new risks.

The employer's duty of prevention is therefore configured as an integral, unrenounceable and dynamic duty, insofar as it applies to all aspects related to work (Art. 5.1 and 6.1), it must be subject to permanent adaptation to changing circumstances and constant improvement (art. 6.1), and the employer cannot be exempted from it, not even in the case of the use of external prevention personnel or services (art. 5.2) or of non-compliance with his obligations by the workers (art. 5.3).

2. Own prevention services and external prevention services: internalization versus externalization of the preventive organization.

The duty to guarantee the safety and health of workers in all aspects related to work imposes the obligation on the employer to organize preventive activity in the company through a set of human and material resources specialized in the prevention of occupational hazards. To this end, protection and prevention services must be set up (art. 7). The Framework Directive clearly opts for internal prevention services. To this end, it stipulates that the employer shall designate one or more workers to carry out activities related to the protection and prevention of occupational risks for the undertaking and/or establishment (art.7.1), even allowing the Member States to define the categories of companies (taking into account their activities and size) in which the employer may personally assume these functions if he has the necessary capacities (art.7.7).

Alternatively, if the competences of the company or workplace are insufficient to organize these protection and prevention activities, the employer may use external prevention services, using persons or services outside the company or workplace. In this case, the persons or services in question must be informed by the employer of the existing or probable risk factors and must have access to the corresponding information (art. 10.2: protection and prevention measures, risk assessment, etc.). The ECJ has considered that the obligations deriving from the Directive are not complied with when State legislation allows the employer to decide whether or not to use external prevention services when the company's internal resources are insufficient and when it does not define the capacities and aptitudes required of the persons responsible for preventive activities (Judgment of 15 November 2001, *Commission v. Italy*, C-49/00, EU:C:2001:611, para. 54).

However, the current regulatory model of preventive organization is based both on cost reduction and competition law, leaving aside the satisfaction of the expectations of "real quality of services" of prevention. There is thus a tendency towards the re-commercialization of the preventive management model, based on risk management as a cost to be reduced and externalized. The current economic-market analysis of occupational risk management emphasizes three aspects: organizational internalization versus outsourcing of management; prevention as a right versus prevention as a bureaucratic burden; coercive versus promotional function through voluntarily assumed rules.

As regards the first aspect (organizational internalization *versus* outsourcing), the EU model is not neutral but gives a strong preference to the creation of in-house resources. Only the insufficiency of in-house resources, due to the complexity of the preventive activity, will determine the possibility of using an outside prevention service. But this option is subsidiary, not principal or free choice, with respect to the first option. The Judgment of 22 May 2003, *Commission of the European Communities v. Kingdom of the Netherlands*, C-441/01, EU:C:2003:308, is unequivocal in this respect: it establishes that leaving the employer free to opt for an internal or external method is a breach of the obligations established in the Framework Directive, whose purpose is to integrate prevention in the company, giving preference to the internal organization. According to the ECJ, the Framework Directive establishes a hierarchy of preventive organization, imposing on the employer a "main" obligation, consisting of appointing one or more workers to take charge of the activity of prevention of occupational risks, the obligation to use services outside the company being "subsidiary". This option must only occur if the competences in the company and/or establishment are insufficient to organize such protection and prevention activities. It does not establish an unconditional

right of option for the employer, but rather the obligation to resort to its own resources, either by appointing one or more workers or by setting up its own prevention service, and it is only when these systems are insufficient that the use and intervention of an outside prevention service becomes legitimate. Therefore, regulations that allow the employer to choose without respecting the obligations imposed on employers by Article 7.1 and 3 of the Framework Directive are not admissible (Judgment of 6 April 2006, *Commission v. Republic of Austria*, C-428/04, EU:C:2006:238, paragraph 53). With this regulation, the emphasis is placed on the social reason as opposed to market reasons (prevention as an administrative burden and as a cost to be reduced).

3. Preventive obligations incumbent upon employees

The legal position of workers translates into a "pro-active" duty, which does not consider the worker as a simple passive agent with respect to the effective guarantee that the working environment and conditions are safe and do not present a risk to safety and health within his field of activity. The worker must ensure, according to his possibilities, his own safety and health, as well as those of other persons affected by his acts or omissions at work, in accordance with his training and the instructions given by his employer (art.13.1). This general obligation is specified in duties related to the use of work and protective instruments, and in the obligation to contribute to compliance with preventive regulations, including the obligation to report any work situation which, for a reasonable reason, he considers to represent a serious and immediate danger to safety and health (art.13.2). EU case law admits the diversity of regulations regarding these obligations on the part of the Member States as long as the intended objective is achieved (Judgment of 6 April 2006, *Commission v. Republic of Austria*, C-428/04, EU:C:2006:238, para. 100). However, it draws a distinction between the obligation to use protective equipment correctly and the obligation to put the equipment back in place after use, considering that both obligations must be ensured in the transposition of the Framework Directive (Judgment of 6 April 2006, *Commission v. Republic of Austria*, C-428/04, EU:C:2006:238, para. 105).

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-Judgment of 9 October 2001, *Kingdom of the Netherlands v. European Parliament and Council of the European Union*, C-377/98, EU:C:2001:523.

- Judgment of 15 November 2001, *Commission of the European Communities v. Republic of Italy*, C-49/00, EU:C:2001:611.
- Judgment of 7 February 2002, *Commission of the European Communities v. Federal Republic of Germany*, C-5/00, EU:C:2002:81.
- Judgment of 22 May 2003, *Commission of the European Communities v. Kingdom of the Netherlands*, C-441/01, EU:C:2003:308.
- Judgment of 13 January 2004, *Debra Allonby*, C-256/01, EU:C:2004:18.
- Judgment of 5 October 2004, *Pfeiffer and others*, C-397/01 to C-403/01, EU:2004:584.
- Act of 14 July 2005, *Personalrat der Feuerwehr Hamburg*, C-52/04, EU:2005:467
- Judgment of 12 January 2006, *Commission of the European Communities v. Kingdom of Spain*, C-132/04, EU:2006:18.
- Judgment of 6 April 2006, *Commission of the European Communities v. Republic of Austria*, C-428/04, EU:C:2006:238.
- Judgment of 14 June 2007, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, C-127/05, EU:C:2007:338.
- Judgment of 7 October 2010, *Martha Nussbaumer*, C-224/09, EU:C:2010:594.
- Judgment of 11 November 2010, *Danosa v. LKG Lizing SIA*, C-232/09, EU:C:2010:674.
- Judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789.
- Judgment of 19 September 2018, *González Castro*, C-41/17, EU:C:2018:736.
- Judgment of 30 April 2020, *UO v. Készenléti Rendőrség*, C-211/19, EU:C:2020:344.
- Judgment of 22 December 2022, *TJ e Inspectoratul General pentru Imigrări*, C-392/21, EU:C:2022:1020.
- Judgment of 20 June 2024, *EA and Artemis Security SAS*, C-367/23, EU:C:2024:529.

CHAPTER 23

SPECIFIC DIRECTIVES ON OCCUPATIONAL SAFETY AND HEALTH

FAUSTINO CAVAS MARTÍNEZ

INDEX: I. The connection of specific Directives with the framework Directive on occupational safety and health. II. Structure and content of specific Directives. III. Specific Directives on occupational safety and health in the jurisprudence of the Court of Justice of the European Union. 1. Sanctions for delays in the transposition of specific Directives. 2. Wrong adaptation of Directive 89/655/EEC as amended. 3. Directive 92/57/EEC: protection of Safety and Health in temporary or mobile construction sites. 4. Directive 2003/10/EC: scope of the obligation to protect employees from noise. 5. Directives 90/394/EEC and 89/655/EEC: obligation to assess risks from exposure to carcinogens and deadline for the adaptation of work equipment. 6. Directive 90/270/EEC: work with equipment that Includes display screens. 7. Directive 89/686/EEC of December 21, for the approximation of legislation on personal protective equipment.

I. THE CONNECTION OF SPECIFIC DIRECTIVES WITH THE FRAMEWORK DIRECTIVE ON OCCUPATIONAL SAFETY AND HEALTH

The legislative activity of the European Union in the field of occupational safety and health has been driven by successive action programs in occupational safety and health, which have set the objectives and the various stages of EU policy

in this area: (1) First EU Action Program of the European Communities on Safety, Hygiene, and Health at Work, approved by Resolution 29-6-78 (OJ C 165, 11-7-1978); (2) Second EU Action Program on Safety and Health at Work, approved by Council Resolution 27-2-84 (OJ C 67, 8-3-1984); (3) Third EU Action Program on Safety and Health at Work, approved by Council Resolution 21-12-87 (OJ C 28, 3-2-1988), under which the Framework Directive 89/391/EEC of June 12 and a significant number of specific directives (from Dir 89/654/EEC to Dir 90/679/EEC) were approved; 4) Action Program for the implementation of the CCDfT on health and safety protection at work, presented by the Commission in December 1989, under which eight other specific directives were passed (from Directive 91/383 on the protection of workers with a fixed-term employment relationship or in temporary employment agencies to Directive 93/103 on minimum safety and health requirements for work on board fishing vessels); 5) EU Strategy on Health and Safety at Work for the period 2002-2006 [COM (2002) 118], under which the legislative activity was mainly oriented to review and update existing directives to adapt them to scientific evolution and technical progress; 6) the EU Strategy on Health and Safety at Work (2007-2012) [COM (2007) 62 final], a continuation of the 2002 Strategy; 7) The EU Strategic Framework on Health and Safety at Work (2014-2020) [COM (2014) 332 final]; and the current stage, shaped by the EU Strategic Framework on Health and Safety at Work 2021-2027. Occupational safety and health in a constantly changing world [COM(2021) 323 final]. [18]

Under the first two EU action programs on occupational safety and health, numerous specific directives on the protection of workers against certain risks and in specific situations were enacted in the 1970s and 1980s, before the appearance of the Framework Directive 89/391, concerning the implementation of measures to promote the improvement of the safety and health of employees at work¹. Several of these specific directives (e.g., those related to chemical contaminants such as lead, vinyl chloride...) were later modified or assumed by specific directives issued under the authorization contained in Article 16 of the Framework Directive.

Article 16 of Directive 89/391, which, like any framework regulation, has a content of considerable extension and generality, establishes that, on a pro-

¹ E.g. Directive 78/610/EC on the approximation of the laws, regulations and administrative provisions of the Member States on the protection of the health of employees exposed to vinyl chloride monomer; Directive 80/1107 on the protection of employees from the risks related to exposure to chemical, physical and biological agents at work; Directive 82/605 on the protection of employees from the risks related to exposure to metallic lead and its ionic constituents at work; Directive 82/130 on the approximation of the laws of the Member States concerning electrical equipment for use in potentially explosive atmospheres in mines susceptible to firedamp; Directive 86/188 on the protection of workers from the risks related to exposure to noise at work or Directive 88/364 on the protection of employees by the prohibition of certain specific agents and/or certain activities.

posal from the Commission based on Article 118 A of the Treaty on European Union (TEU) – later Article 137 of the TEU and now Article 153 of the Treaty on the Functioning of the European Union (TFEU) – "the Council shall adopt specific directives relating, among other things, to the areas mentioned in the Annex." In the mentioned Annex, the following areas are mentioned, without being exhaustive, in which specific directives can be adopted:

- Workplaces.
- Work equipment.
- Personal protective equipment.
- Work with equipment provided with display screens.
- Manual handling of heavy loads that pose lumbar risks.
- Temporary and mobile construction sites.
- Fishing and agriculture.

As can be seen, only in two cases the scope of application of specific directives is outlined by reference to specific productive areas (mobile works, primary sector); in the remaining cases, they refer to areas defined by the presence and action of objective risks for occupational safety and health with transversal incidence. The annex does not refer to special risk groups or collectives as recipients of this vector of derived law -in occupational safety and health-, which has not prevented at least one directive of this type, Directive 92/85 on maternity protection, from being adopted under Article 16 of the Framework Directive.

Article 16 of the Framework Directive adds in its section 2 that specific directives could be modified in accordance with the procedure foreseen under Article 118 A of the TEU (nowadays, Article 153 of the TFUE²), without prejudice to the procedure mentioned in its Article 17 in relation to technical adaptations.

Lastly, in its section 3, the already mentioned Article 16 of the Framework Directive states that all provisions envisaged therein "will be fully applicable to all the scopes covered by the specific directives, without prejudice to most rigorous and/or specific contained in such specific directives". Thus, the Framework Directive is self-proclaimed as statutory minimum Law, which can be improved by the specific directives or particular ones that are agreed in accordance with its Article 16.

² Directives on occupational health and safety, together with their amendments, will be passed through ordinary legislative process, prior consultation with the Economic and Social Committee and Regions' Committee.

II. STRUCTURE AND CONTENT OF SPECIFIC DIRECTIVES

In total, nineteen (19) specific directives have been passed under Article 16 of the Framework Directive, as a specification and development of the general lines established in it. Some already have a codified version. All of them have an ordinal numbering and are of a mainly technical nature (a characteristic that only the Directive 92/85, on the protection of pregnant workers and mothers, deviates from). By the subject they deal with, we can classify them into four groups: 1) Directives on the protection of workers' safety and health against exposure to certain agents (chemical, physical, biological, carcinogenic...); 2) Directives on the conditioning of workplaces and work equipment as risk factors for employees' health and safety; 3) Directives on the protection of employees' safety and health employed in specific sectoral areas (construction, fishing); 4) Directives on the protection of the safety and health of particularly vulnerable groups or special risk groups (maternity).

Beyond their notable thematic plurality – dealing with various areas and aspects of the protection of safety and health at work – the structure of specific directives is very similar in all of them. Thus, after delimiting their object or functional scope of application and making the appropriate definitions, obligations for employers (risk assessment, thresholds or maximum exposure values, conditions that work equipment must meet, health surveillance...) are established, depending on the risk at stake, to then regulate the rights to training, information, participation, and consultation of employees, concluding with a block of various provisions (adaptation of annexes, transposition period...).

Specific directives undergo continuous amendments – due to the need to adapt them to technical progress – which require the publication of official consolidated texts of them (codified directives), with the consequent mismatch of dates in the series.

Following the chronological order of appearance, the following specific directives have been approved under Article 16 of the Framework Directive:

1. Directive 89/654/EC of the European Parliament and of the Council of 30 November 1989 concerning minimum safety and health requirements for workplaces (First Specific Directive under Article 16, paragraph 1, Dir 89/391³). It applies to workplaces located in company buildings, including other places within the company or establishment area to which the employee has access in the context of work; means of transport outside the es-

³ DO L 393, 30-11-89, page 1. Limit date for transposition 31 December 1992.

establishment, temporary or mobile construction sites, extraction industries, fishing vessels, and fields of cultivation, forests, and similar outside the built-up area are excluded. This Directive was amended by Directive 2007/30, which amends Directive 89/391, its specific directives, and Directives 83/477, 91/383, 92/29, and 94/3, to simplify and rationalize reports on their practical application⁴.

2. Directive 89/655/EC of the European Parliament and of the Council of 30 November 1989 concerning minimum safety and health requirements for the use of work equipment by employees at work (Second Specific Directive under Article 16, paragraph 1, Dir 89/391⁵). Its material scope includes the use (start-up processes, use, transport, repair, maintenance, including cleaning) of work equipment (machines, devices, instruments, installations). This Directive was amended three times: the first by Directive 95/63; the second by Directive 2001/45; and the third by Directive 2007/30. This succession of amendments led to its codification by Directive 2009/104, which repeals the previous directives on the subject (OJ L 260 3-10-09, page 5).

3. Directive 89/656/EC of the European Parliament and of the Council of 30 November 1989 concerning minimum safety and health requirements for the use by employees of personal protective equipment at work (Third Specific Directive under Article 16, paragraph 1, Directive 89/391)⁶. It was amended by Directive 2007/30, cited, and by Directive 2019/1832 of 24 October 2019, which amends its annexes I, II, and III regarding purely technical adjustment⁷s. Its provisions affect the selection, use, and maintenance of personal protective equipment at work, excluding work clothing not specifically intended to protect the employee's safety and health, rescue and salvage equipment, personal protective equipment (hereinafter PPE) of military, police, and similar, equipment on road transport means, sports and self-defense equipment, and portable devices for risk detection and signaling. Personal protective equipment must comply with the EU provisions on design and construction in terms of safety and health that affect it (see Directive 89/686) and meet the conditions listed in the directive. The employer must provide appropriate equipment free of charge and ensure its proper functioning and hygienic condition.

⁴ DO L 165, 27-6-07, page 21. Limit date for transposition date 31 December 2012. EU Strategy on Occupation Health and Safety (2002-2006) included among its action lines codifying the existing directives and drafting a sole application report that would substitute the specific reports foreseen in different directives.

⁵ DO L 393, 30-12-89. Limit date for transposition 31 December 1992.

⁶ DO L 393, 30-12-1989, page 1. Limit date for transposition 31 December 1992.

⁷ DO L 279, 31-10-2019, page 35. Limit date for transposition 20 November 2021.

4. Directive 90/269/EC of the European Parliament and of the Council of 29 May 1990 concerning minimum safety and health requirements for the manual handling of loads that pose risks, particularly thoracolumbar, for employees (Fourth Specific Directive under Article 16, paragraph 1, Dir 89/391)⁸. Manual handling of loads is understood as any operation of transporting or holding loads by one or more employees, such as lifting, placing, pushing, pulling, transporting, or moving, which due to its characteristics or unfavorable ergonomic conditions poses risks, particularly thoracolumbar, for employees. The employer will take appropriate organizational measures or use appropriate means, especially mechanical equipment, to avoid the need for manual handling of loads by workers. This standard was amended by Directive 2007/30, already mentioned.

5. Directive 90/270/EC of the European Parliament and of the Council of 29 May 1990 concerning minimum safety and health requirements for work with equipment that includes display screens (Fifth Specific Directive under Article 16, paragraph 1, Dir 89/391)⁹. Its provisions apply to workstations that have display screen equipment provided, where applicable, with a keyboard or data acquisition device and/or a program that ensures man/machine interconnection, optional accessories, attachments, including the disk drive unit, a telephone, a modem, a printer, a document holder, a chair, and a table or work surface, as well as the immediate work environment. There will be excluded those located in means of transport, portable, calculators, cash registers, and similar.

6. Directive 90/394/EC of the European Parliament and of the Council of 28 June 1990 concerning the protection of employees from the risks related to exposure to carcinogens at work (Sixth Specific Directive under Article 16, paragraph 1, Dir 89/391)¹⁰. It applies to activities where employees are or may be exposed to carcinogens as a result of their work. It does not apply to employees exposed only to radiation regulated by the TFUE establishing the European Atomic Energy Community. This Directive was amended twice to expand its scope and adapt it to technical progress: the first time by Directive 97/42; the second time by Directive 99/394. It was finally codified by Directive 2004/37, on the protection of employees from the risks related to exposure to carcinogens or mutagens at work¹¹; amended, in turn, by Directive 2014/27, which amends Directives 92/58, 92/85, 94/33, 98/24,

⁸ DO L 156, 21-6-1990, page 9. Limit date for transposition 31 December 1992.

⁹ DO L 156, 21-6-1990, page 1. Limit date for transposition 31 December 1992.

¹⁰ DO L 196, 26-7-1990, page 1. Limit date for transposition 31 December 1992.

¹¹ DO L 158, 30-4-2004, page 50.

and Directive 2004/37, to adapt them to Regulation (EU) no. 1272/2008 on classification, labeling, and packaging of substances and mixtures¹². Directive 2004/37 has undergone several changes in the period 2017-2022 to improve the protection of employees against cancer, in line with the broader commitment of the EU Commission to intensify the fight against this disease. Four amendments were adopted (Directive 2017/2398, Directive 2019/130, Directive 2019/983, and Directive 2022/431) that introduced stricter limit values for a series of widespread carcinogens.

Directive 2022/431 also included reproductive toxic substances within the scope of the Directive, changing the original title on the protection of employees from the risks related to exposure to carcinogens or mutagens at work to the protection of employees from the risks related to exposure to carcinogens, mutagens, or reproductive toxic substances at work. Directives must be transposed into national legislation by EU Member States.

7. Directive 90/679/EC of the European Parliament and of the Council of 26 November 1990 concerning the protection of employees from the risks related to exposure to biological agents at work (Seventh Specific Directive under Article 16, paragraph 1, Directive 89/391)¹³. Biological agents are considered microorganisms, including genetically modified ones, cell cultures, and human endoparasites, capable of causing any type of infection, allergy, or toxicity. Activities such as work in food production centers, agricultural work, activities in contact with animals or animal products, healthcare, clinical, veterinary, and diagnostic laboratories, waste disposal, and wastewater treatment plants are included. This Directive underwent four reforms to adapt it to technological progress: the first by Directive 93/88, which reviews the EU classification of dangerous biological agents; the second by Directive 95/30; the third by Directive 97/59; and the fourth by Directive 97/65. After this process of amendments, it was codified by Directive 2000/54, on the protection of employees from the risks related to exposure to biological agents at work, which codifies and repeals all previous directives on the subject¹⁴. Directive 2000/54 has been amended by Directive 2019/1833 of the European Parliament and of the Council of 24 October 2019, which amends annexes I, III, V, and VI of Directive 2000/54 regarding purely technical¹⁵ adjustments; and by Directive 2020/739 of the European Parliament and of the Council of 3 June 2020 which amends its annex 3 regarding the inclusion of SARS-CoV-2 in the list of bio-

¹² DO L 65, 5-3-2014, page. 1. Limit date for transposition: 1 June 2015

¹³ DO L 374, 31-12-1990, page 1. Limit date for transposition: 29 November 1993.

¹⁴ DO L 262, 17-10-2000, page 21.

¹⁵ DO L 279/54, 31-10-2019, page 54.

logical agents known to infect humans and amends Directive 2019/1833 of the Commission¹⁶.

8. Directive 92/57/EC of the European Parliament and of the Council of 24 June 1992 concerning minimum safety and health requirements to be applied in temporary or mobile construction sites (Eighth Specific Directive under Article 16, paragraph 1, Directive 89/391)¹⁷. Its provisions cover works in which construction or civil engineering works are carried out, including excavations, earthworks, building, assembly and disassembly of prefabricated elements, conditioning, transformation, rehabilitation, repair, maintenance, demolition, dismantling, conservation, painting, cleaning, and sanitation. It has the particularity of containing provisions directed at self-employed workers, surely due to the importance that self-employment has in this economic sector. Like other directives, it was amended by Directive 2007/30 already mentioned.

9. Directive 92/58/EC of the European Parliament and of the Council of 24 June 1992 concerning minimum requirements for safety and health signage at work (Ninth Specific Directive under Article 16, paragraph 1, Directive 89/391)¹⁸. This Directive establishes minimum requirements for safety and health signage at work and covers the location and identification of containers and pipes, fire-fighting equipment, obstacles and dangerous areas, and the marking of circulation routes, light and acoustic signals, as well as the establishment of verbal communication and hand signals. It repeals Directives 77/576 and 79/640. It has been amended by Dir 2014/27/EU cited.

10. Directive 92/85/EC of the European Parliament and of the Council of 19 October 1992 concerning the implementation of measures to promote the improvement of the safety and health at work of pregnant employees, employees who have recently given birth, or are breastfeeding (Tenth Specific Directive under Article 16, paragraph 1, Directive 89/391)¹⁹, amended by Directive 2014/27/EU cited. Its provisions are aimed at women employees during pregnancy, postpartum, and breastfeeding who notify their employer of their condition and include actions such as risk assessment and preventive measures, limitations on night work, maternity leave and prenatal check-ups, prohibition of dismissal, and rights inherent to the employment contract. Its detailed study is carried out elsewhere in this book.

11. Directive 92/91/EC of the European Parliament and of the Council of 3 April 1992 concerning requirements to improve the safety and health pro-

¹⁶ DO L 175/11, 4-6-2020, page 11.

¹⁷ DO L 245, 6-8-1992, page 6. Limit date for transposition: 31 December 1993.

¹⁸ DO L 393, 26-8-1992, page 23. Limit date for transposition: 24 June 1994.

¹⁹ DO L 348, 28-11-1992, page 1. Limit date for transposition: 19-10-1994.

tection of employees in the extractive industries through drilling (Eleventh Specific Directive under Article 16, paragraph 1, Directive 89/391)²⁰. It applies to extractive industries through drilling, including the extraction of mineral resources by drilling, both on land and at sea; prospecting for such extraction and preparation for the sale of extracted materials, excluding their transformation.

12. Directive 92/104 of the European Parliament and of the Council of 3 December 1992 concerning minimum requirements to improve the safety and health protection of employees in surface and underground extractive industries (Twelfth Specific Directive under Article 16, paragraph 1, Dir 89/391/EEC).²¹

13. Directive 93/103/EC of the European Parliament and of the Council of 23 November 1993 establishing the minimum safety and health requirements for work on board fishing vessels (Thirteenth Specific Directive pursuant to Article 16, paragraph 1, of Directive 89/391)²². Its provisions apply to work on board fishing vessels with a length of 12 meters or more.

14. Directive 98/24/EC, of the European Parliament and of the Council of 7 April 1998 concerning the protection of the health and safety of employees from the risks related to chemical agents at work (Fourteenth Specific Directive pursuant to Article 16, paragraph 1, of Directive 89/391)²³. It applies to all chemical agents at work. It integrates and repeals Directive 80/1107, on the protection of employees from the risks related to exposure to chemical, physical, and biological agents at work; Directive 82/605, on the protection of employees from the risks related to exposure to metallic lead and its ionic compounds at work; and Directive 88/364, on the protection of employees by prohibiting certain specific agents and/or certain activities. It amends Directive 83/477, on the protection of employees from the risks related to exposure to asbestos at work, and Directive 86/188, on the protection of workers from the risks due to exposure to noise at work. It keeps Directives 91/322 (establishment of indicative limit values) and 96/94 (second list of indicative limit values) binding.

Later, Directive 2000/39/EC was approved, establishing a first list of indicative occupational exposure limit values in application of Directive 98/24, followed by four other directives updating the said exposure limit values: Directive 2006/15 (second list), Directive 2009/161 (third list), Directive 2017/164 (fourth list), and Directive 2019/1831/EU (fifth list).

²⁰ DO L 348, 28-11-1992, page 9. Limit date for transposition: 3-11-1994.

²¹ DO L 404, 31-12-1992, page 10. Limit date for transposition: 31-12-1994.

²² DO L 307, 23-11-1993. Limit date for transposition: 5-5-2001.

²³ DO L 131, 5-5-1998, page 11. Limit date for transposition: 5-5-2001.

15. Directive 99/92/EC of the European Parliament and of the Council of 16 December 1999 concerning minimum requirements for improving the health and safety protection of employees potentially at risk from explosive atmospheres (Fifteenth Specific Directive pursuant to Article 16, paragraph 1, of Directive 89/391)²⁴, amended by Directive 2007/30. Its scope includes work where there may be exposure to explosive atmospheres (a mixture with air, under atmospheric conditions, of flammable substances in the form of gases, vapors, mists, or dusts, in which, after ignition, combustion spreads to the entire unburned mixture). It does not apply to areas used directly for the medical treatment of patients and during such treatment; the regulated use of gas appliances; the manufacture, handling, use, storage, and transport of explosives or chemically unstable substances; extractive industries covered by Directive 92/91; the use of land, sea, and air transport to which the relevant provisions of international agreements apply, except for transport designed for use in a potentially explosive atmosphere.

16. Directive 2002/44/EC of the European Parliament and of the Council of 25 June 2002 concerning the minimum health and safety requirements regarding the exposure of employees to the risks arising from physical agents (vibrations) (Sixteenth Specific Directive pursuant to Article 16, paragraph 1, of Directive 89/391)²⁵, amended by Directive 2007/30 and Regulation (EC) no.1137/2008. It applies to activities in which employees are or may be exposed to risks arising from mechanical vibrations as a result of their work.

17. Directive 2003/10/EC of the European Parliament and of the Council of 6 February 2003 concerning minimum health and safety requirements regarding the exposure of employees to the risks arising from physical agents (noise) (Seventeenth specific Directive pursuant to Article 16(1) of Directive 89/391)²⁶. It applies to activities in which employees are or may be exposed to risks arising from noise as a result of their work. It repeals Directive 86/188.

18. Directive 2004/40/EC of the European Parliament and of the Council of 29 April 2004, on the minimum health and safety requirements regarding the exposure of employees to the risks arising from physical agents (electromagnetic fields) (Eighteenth Specific Directive pursuant to Article 16(1) of Directive 89/391).²⁷ It applies to work with risks to the health and safety of employees arising or that may arise from exposure to electromagnetic fields with frequencies up to 300 GHz during work (known short-term adverse ef-

²⁴ DO L 23, 28-1-2000, page 57. Limit date for transposition: 30-6-2003.

²⁵ DO L 177, 6-7-2002, page 13. Limit date for transposition: 6-7-2005.

²⁶ DO L 42 de 15.2.2003, page 38. Limit date for transposition: 15-2-2006.

²⁷ DO L 159, 30-4-2004, page 1. Limit date for transposition: 30-4-2012.

fects on the human body caused by the circulation of induced currents and the absorption of energy, as well as contact currents). This Directive underwent two amendments (the first by Directive 2008/46 and the second by Directive 2012/11), until it was repealed and replaced by Directive 2013/35/EU, on the minimum health and safety requirements regarding the exposure of employees to the risks arising from physical agents (electromagnetic fields)²⁸, which addresses all known direct biophysical effects and indirect effects caused by electromagnetic fields (20th Specific Directive within the meaning of Article 16(1) of Directive 89/391/EEC). It does not address risks arising from contact with tension conductors.

19. Directive 2006/25/EC of the European Parliament and of the Council of 5 April 2006, on the minimum health and safety requirements regarding the exposure of employees to risks arising from physical agents (artificial optical radiation) (Nineteenth Specific Directive pursuant to Article 16(1) of Directive 89/391/EEC)²⁹. It includes protective measures against health and safety risks for employees due to harmful effects on the eyes and skin caused by exposure to artificial optical radiation.

If one examines the Annex of the Framework Directive 89/391/EEC, among the areas listed as potential recipients of specific regulation under the provisions of Article 16, the only one that currently does not have a directive of this nature is agriculture. However, it should be noted that, with very few exceptions, occupational health and safety directives do not organize their rules on a sectoral basis. Therefore, both the Framework Directive and, where applicable, the specific or particular directives on workplaces, exposure risks, equipment, etc., will apply to agricultural activities due to their transversal nature.

Alongside the Framework Directive and the specific directives issued under its Article 16, a third block of European Union law on occupational health and safety would be constituted by what can be termed "non-specific" particular directives. It has been rightly said that these can only be very hardly categorized within occupational risk prevention law, as they regulate aspects that have a more substantive labour nature rather than strictly preventive, such as directives concerning the protection of workers with fixed-term contracts and temporary agency work (Directive 91/383), the organization of certain aspects of working time (in general - Directive 2003/88 - or in mobile road transport activities - Directive 2002/15), or the protection of young people at work (Directive 94/33), whose treatment is addressed in other sections of this work.

²⁸ DO L 179, 29-6-2013. Limit date for transposition: 1-7-2016.

²⁹ DO L 114 de 27-4-2006, page 38. Limit date for transposition: 27-5-2010.

Outside the list of specific occupational health directives adopted under Article 16 of the Framework Directive 89/391, Directive 2009/148 of the European Parliament and of the Council, of 30 November 2009, on the protection of employees from the risks related to exposure to asbestos at work (Text with EEA relevance)³⁰, has been promulgated, with content clearly related to occupational risk prevention.

III. THE SPECIFIC DIRECTIVES ON HEALTH AND SAFETY AT WORK IN THE DOCTRINE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The transposition into the national law of the Member States of the European Union of directives related to health and safety at work, as well as their application by judicial bodies, has led to the processing of judicial proceedings before the Court of Justice of the European Union, either from infringement appeals brought by the Commission based on Articles 258 to 260 of the TFEU, or from preliminary rulings submitted by national courts for the resolution of disputes between employees and employers. All this has resulted in an interesting jurisprudence of the Court of Justice of the European Union regarding some aspects regulated both in the Framework Directive 89/391/EEC and in the specific directives³¹; here, only the case law generated by the lack of transposition or defective transposition into national law of the specific directives that we can characterize as "technical" will be addressed. The normative and jurisprudential analysis of the tenth specific Directive on maternity protection (Directive 92/85) is addressed in another section of this work.

1. Sanctions for delays in the transposition of Specific Directives

Regarding the transposition of directives on health and safety at work and the adaptation of the internal legal order to them, there have been frequent rulings by the Court of Justice of the European Union for non-compliance by Member States with the deadline granted to transpose the content of both the Framework Directive and the specific directives.

³⁰ DO L 330/28, 16.12.2009.

³¹ A systematic analysis of case law in GÓMEZ CABALLERO, P.: "Health and safety at work in the EU case law". *Temas Laborales* n° 130, 2015, pages 161-194.

Specifically, the States which have been held liable for exceeding the deadlines provided for transposition of specific directives on health and safety at work have been Austria³², Italy³³, Germany³⁴, Ireland³⁵, France³⁶, Luxembourg³⁷, and Spain³⁸.

2. Wrong adaptation of the Amended Directive 89/655/EC

The Court of Justice of the European Union condemned Spain at the time for defects in the transposition of the second specific Directive, 89/655 – amended by Directive 95/63 – on work equipment³⁹, carried out by Royal Decree 1215/1997, which establishes the minimum safety and health provisions for the use of work equipment by workers. The Court of Justice understood that the Kingdom of Spain had failed to fulfill the obligations arising from Article 4, paragraph 1, letter b), of the amended Directive 89/655, interpreted in relation to its Annex I, by inserting a single transitional provision, paragraph 1, in the aforementioned Royal Decree 1215/1997, providing for an additional adaptation period for work equipment that was already available to employees in the company or establishment before 27 August 1987 (the date of entry into force of the regulation), through the creation of Compliance Plans, which was not permitted by the Directive. The Court of Justice of the European Union understood that Royal Decree 1215/1997 lacked precision regarding the adaptation of national law, within the framework of said regime, to the minimum provisions of Annex I of the amended Directive 89/655/EEC, concerning work equipment that was already in service.

Likewise, the Court of Justice of the European Union also condemned the Republic of Italy at the time for failing to fulfill the obligations incumbent upon it under Article 4, paragraph 1, and Annex I, points 2.1, sixth sentence, 2.2, second sentence, 2.3, third and fourth sentences, and 2.8, second sentence, second to fifth indents, of Council Directive 89/655 of 30 November 1989, concerning the minimum safety and health requirements for the use of work

³² Judgment of 16 December 2004, *Commission/Austria* C-358/03; Judgment of 27 October 2005, *Commission/Austria* C-377/04.

³³ Judgment of 21 September 1999, *Commission v Italy* (C-362/98, EU:C:1999:441).

³⁴ Judgment of 28 October 2004, *Commission v Germany* (C-16/04, EU:C:2004:689).

³⁵ Judgment of 27 October 1998, *Commission v Ireland* (C-364/97, EU:C:1998:512).

³⁶ Judgment of 24 June 2004, *Commission v France* (C-269/02, EU:C:2004:387).

³⁷ Judgment of 9 December 2004, *Commission v Luxembourg* (C-333/04, EU:C:2004:79).

³⁸ Judgment of 26 September 1996, *Commission v Spain* (C-79/95, EU:C:1996:360).

³⁹ Judgment of 14 September 2004, *Commission v Spain* (C-168/03, EU:C:2004:525).

equipment by employees (Second specific Directive within the meaning of Article 16(1) of Directive 89/391/EEC), as amended by Directive 95/63 of 5 December 1995, by failing to adopt the necessary legal and regulatory provisions to adapt its national law to certain binding minimum provisions of said Directive⁴⁰.

3. Directive 92/57/EC: Protection of safety and health on temporary or mobile construction Sites

The Court of Justice of the European Union has ruled on two occasions issues related to the transposition into national law of Directive 92/57, concerning safety and health requirements on temporary or mobile construction sites (the Eighth Specific Directive).

The Court, responding to a complaint filed by the Commission against the Republic of Italy, considered that Italy had not correctly adapted Article 1(3) of Directive 92/57/EEC. The Court understood that the obligation imposed by this provision on the owner or the project manager to appoint one or more coordinators for safety and health, far from being a mere administrative formality, constitutes "an imperative necessity to ensure the safety and health of workers in an industry that places them at particularly high risk and therefore must be considered a central obligation of the objective pursued by this Directive, to combat the increasing number of work accidents on temporary or mobile sites." EU jurisprudence interprets that the obligation to appoint a safety coordinator in this type of work is inexcusable, and the argument of the Republic of Italy regarding its high cost cannot prevail, nor the fact that Italian law only opens the possibility of annulling the obligation to appoint one or more safety and health coordinators "only in very residual cases of limited scope," since in Article 3(1) of Directive 92/57 "the wording is clear and precise, there are no exceptions to this requirement."⁴¹

In a second ruling, now arising from a request for a preliminary ruling submitted by an Italian court (the Tribunale di Bolzano), the Court of Justice insists on the mandatory nature of appointing a safety coordinator as required by Article 3 of Directive 92/57, an obligation that cannot be waived under the pretext of the low complexity of the work. Specifically, the aforementioned provision opposes national legislation such as the Italian Legislative Decree

⁴⁰ Judgment of 10 March 2003, *Commission v Italy* (C-65/01, EU:C:2003:22).

⁴¹ Judgment of 25 July 2008, *Commission v Italy* (C-504/06, EU:C:2008:444).

81/08, which, in relation to a project involving private work not subject to a building permit and where several companies are present, allows for exceptions to the obligation incumbent on the owner or project manager to appoint a safety and health coordinator during the project design phase or, in any case, before the execution of the work; and it also opposes the same national legislation limiting the obligation to establish a safety and health plan—which falls on the project execution coordinator—only to the mere case of several companies being involved in a project of work not subject to a building permit, and not adopting as a criterion for this obligation the specific risks as listed in Annex II of the Directive⁴².

4. Directive 2003/10/EC: scope of the obligation to protect employees from noise

The Court of Justice of the European Union has ruled, in response to preliminary questions raised by the High Court of Justice of Castilla y León, on the scope of the obligations established by Articles 5.2, 6, and 7 of Directive 2003/10 for the protection of employees from noise⁴³. These provisions set out a series of obligations that the employer must fulfill if, as a result of the risk assessment, the upper exposure action values are exceeded.

The Court of Justice of the European Union declares that Directive 2003/10, as amended by Directive 2007/30, establishes a hierarchy among the obligations incumbent on the employer:

- a) First, the employer is obliged, pursuant to Article 5, paragraph 2, of the Directive, to implement a program aimed at reducing noise exposure when employees are exposed to a noise level exceeding 85 dB(A), measured without taking into account the effects of the use of individual hearing protectors.
- b) Secondly, only to the extent that this program does not reduce noise exposure, Article 6 of the Directive establishes the supplementary obligation to provide employees with individual hearing protectors.
- c) In the third and final place, Article 7 of the Directive establishes specific obligations for the case where the use of individual hearing protectors does not prevent the exposure limit values from being exceeded.

⁴² Judgment of 7 October 2010, *Nussbaumer* (C-224/09, EU:C:2010:59).

⁴³ Judgment of 19 May 2011, *Barcenilla Fernández* (C-256/19, EU:C:2020:523).

From the provisions of the Directive, it follows that the company is primarily obliged to address the exposure of employees to a noise level exceeding 85 dB(A) by implementing a program of technical and organizational measures that collectively reduce such exposure level, and only if this proves ineffective, it will be complemented by providing workers with individual protective equipment. The company must adopt specific measures in case the use of individual hearing protectors also does not prevent the exposure limit values from being exceeded. Therefore, it should be interpreted that an employer in whose company the daily noise exposure level of workers exceeds 85 dB(A), measured without taking into account the effects of the use of individual hearing protectors, does not comply with the obligations derived from said Directive by simply providing workers with hearing protectors that allow reducing the daily noise exposure to a level below 85 dB(A). Instead, this employer is obliged to apply a program of technical or organizational measures aimed at reducing the noise exposure to a level below 85 dB(A), measured without taking into account the effects of the use of individual hearing protectors.

On the other hand, the Court of Justice reasons that Directive 2003/10 should be interpreted in the sense that it does not require an employer to pay a salary supplement to employees who are exposed to a noise level exceeding 85 dB(A), measured without taking into account the effects of the use of individual hearing protectors, for not having applied a program of technical or organizational measures aimed at reducing the daily noise exposure level.

However, and according to reiterated EU jurisprudence, Member States must ensure the full effectiveness of the directive in question, in accordance with the objective pursued by it, as well as ensure, in the case that the directive aims to create rights among individuals, that they are in a position to invoke them, if necessary, before national courts. Hence, national law must establish adequate mechanisms to ensure that an employee exposed to a noise level exceeding 85 dB(A), measured without taking into account the effects of the use of individual hearing protectors, can invoke the employer's compliance with the preventive obligations established in Article 5, paragraph 2, of said Directive.

5. Directives 90/394/EEC and 89/655/EEC: obligation to assess risks from exposure to carcinogens and deadline for the adaptation of work equipment

In answer to a question referred for a preliminary ruling from an Italian court (Tribunale di Genova), the Court of Justice has interpreted the scope of

the obligations on employers laid down in Articles 3, 4 and 5 of Directive 90/394 on the protection of employees from the risks arising from exposure to carcinogens at work⁴⁴. The dispute arose because the company "Italiana petroli" considered that it was unable to comply with Borsana's request to supply it with fuels with the lowest possible benzene content and with systems for the recovery of gases and vapors at the time of distribution, because of alleged divergences between the provisions of Legislative Decree No 626/94, in particular Articles 62 and 63 thereof, and Directives 90/394 and Directives 90/394 and 89/655, as regards the assessment of the risk of exposure to carcinogens and the time limits granted to employers for the adaptation of work equipment.

Article 3.2 of Directive 90/394 requires the nature, degree and duration of exposure of employees to carcinogens to be determined for any activity likely to involve a risk of exposure, in order to assess the risks to their safety or health and to determine the measures to be taken. Article 4 of the Directive requires the employer to reduce the use of the carcinogenic agent at the workplace or to replace it by a non-hazardous or less hazardous agent, as far as technically possible, without making such an obligation conditional on the results of the assessment referred to in Article 3. Finally, if a risk to the safety or health of workers has been identified under Art. 3, Art. 5 of the Directive obliges the employer to prevent the exposure of workers to the carcinogen or to reduce the level of exposure to a value as low as technically feasible, an obligation which is expressly made conditional on the results of the assessment.

Article 62 of Legislative Decree No. 626/94 obliges the employer to reduce employees' exposure to the carcinogenic agent "to a value as low as technically possible" under any circumstances and regardless of the risk assessment. On the other hand, Article 36.8 of the same Legislative Decree provides, unlike the four-year transitional period provided for in Article 4.1 of Directive 89/655, that the provisions relating to work equipment will come into force three months after the publication of the Decree, even threatening non-compliant employers with criminal penalties that can reach imprisonment from three to six months.

In this context, the Court of Justice of the European Union considered that a national provision (such as Legislative Decree No. 626/94 of the Republic of Italy) that obliges the employer to reduce employees' exposure to the carcinogenic agent, regardless of the risk assessment, is not contrary to the mentioned Directive, "since it constitutes a measure of greater protection

⁴⁴ Judgment of 17 December 1998, *IP* (C-2/97, EU:C:1998:613).

of working conditions authorized by Article 118 A(3) of the TUE and by Directive 90/394/EEC," as the obligations contained therein are of a minimum nature.

Furthermore, the Court of Justice of the European Union understands that Article 4 of Directive 89/655/EEC does not prohibit a Member State from setting a deadline for the adaptation of existing work equipment, which expires before 31 December 1996, provided that such a deadline is not so short as to prevent employers from making such an adaptation or does not impose on the said employers a manifestly excessive cost compared to what they would have borne if the deadline had been longer.

6. Directive 90/270/EEC: Work with display screen equipment

The Court of Justice of the European Union has issued several rulings interpreting Directive 90/270/EC concerning the minimum safety and health requirements for work with display screen equipment.

Article 9.1 of Directive 90/270 establishes that employees shall be entitled to an appropriate eye and eyesight test, carried out by a person with the necessary competence: before commencing work with display screen equipment; at regular intervals thereafter, and if they experience visual difficulties which may be due to working with display screen equipment. Regarding the subjective scope of this right, the Community jurisprudence understands that this provision applies indiscriminately to all employees included within the scope of the Directive.⁴⁵

On the other hand, the Court of Justice of the European Union considers that Article 9.2 of Directive 90/270/EEC should be interpreted to mean that the right of employees to benefit from an ophthalmological examination, when the results of the test referred to in paragraph 1 make it necessary, is established without any restriction.⁴⁶

Articles 4 and 5 of this Directive establish obligations for the employer regarding the timing of the application of the minimum requirements set out in the Annex to the Directive, depending on whether the workstations are being used for the first time or were already in use. The Court of Justice of the European Union considers that the obligation established by these provisions applies to

⁴⁵ Judgment 12 December 1996, X C-74/95, EU:C:1996:491 (criminal proceedings).

⁴⁶ *ibidem*

all workstations, as defined in Article (2)⁴⁷(b), even if they are not occupied by employees in the sense of Article (2)(c), and that the workstations must be adapted to all the minimum requirements listed in the Annex to the Directive.

Ruling on the preliminary questions raised by the *Arbeitsgericht Siegen*, the Court of Justice has clarified that the concept of "graphic screen," within the meaning of Article 2.a), of Directive 90/270, should be interpreted to include screens that display film recordings in analog or digital format; and that the concept of "machine control position" referred to in Article 1 (3) of the Directive does not include a workstation where analog or digital images are produced with the help of technical devices and/or computer programs to create television programs.⁴⁸

The Republic of Italy was condemned for not having adequately transposed Article 9.3 of Directive 90/270, which establishes that workers are entitled to special corrective devices if the results of eye and vision examinations or ophthalmological examinations show that they are necessary, by not having defined the conditions under which special corrective devices should be provided to the workers concerned for the purpose in question.⁴⁹

Recently, the Court of Justice of the European Union has declared, in response to a preliminary ruling question raised by the High Court of Cluj (Romania), that Article 9.(3) of Directive 90/270/EEC should be interpreted to mean that the "special corrective devices" provided for in this provision include provision glasses that specifically serve to correct and prevent vision disorders related to work performed with equipment that includes a display screen. On the other hand, these "special corrective devices" are not limited to devices used exclusively in the professional field. Furthermore, the Court of Justice of the European Union holds that Article 9 (3) and (4) of Directive 90/270/EEC should be interpreted to mean that the employer's obligation to provide affected employees with a special corrective device as provided for in this provision can be fulfilled either by the direct delivery of such a device by the employer or by reimbursing the expenses that the employee has had to incur, but not by paying the employee a general salary supplement.⁵⁰

⁴⁷ Article 2(b) of Directive 90/270/EEC defines a workstation as: a workstation consisting of display screen equipment with, where appropriate, a keyboard or data acquisition device and/or software for human/machine interface, optional accessories, attachments including a floppy disk drive, a telephone, a modem, a printer, a document holder, a chair and a desk or work surface, and the immediate working environment.

⁴⁸ Judgment of 6 July 2000, *Dietrich* (C-11/99, EU:C:2000:368).

⁴⁹ Judgment of 24 October 2002, *Commission v Italy* (C-455/00, EU:C:2002:612).

⁵⁰ Judgment of 22 December 2022, *TJ e Inspectoratul General pentru Imigrări* (C-392/21, EU:C:2022:1020).

7. Directive 89/686/EEC, of December 21, for the approximation of the laws of the Member States relating to personal protective equipment

In this case, we are not dealing with a specific directive on occupational health and safety as provided for in Article 16 of Directive 89/391/EEC. Directive 89/686/EEC does not establish minimum safety and health requirements for the use of personal protective equipment by workers, as this is the responsibility of Directive 89/656/EEC [which is the third specific Directive under Article 16, paragraph 1, of the Framework Directive], but rather aims to establish rules for the approximation of the laws of the Member States relating to personal protective equipment, taking into account the recognition of the free movement of goods within the European Union. However, it is cited here due to its evident connection with the matter of occupational risk prevention.

The Court of Justice of the European Union has ruled on the strict nature and limitations that Member States have when transposing Directive 89/686 into national law, regarding its scope of application⁵¹, considering that it is a directive adopted under Article 100 of the TUE to achieve the objective of ensuring the free movement of equipment among Member States.

The ruling was issued in response to a complaint filed by the Commission against the Federal Republic of Germany, arguing that Germany had failed to fulfill its obligations under Articles 1 and 4 of the "Equipment Directive" by establishing, in the regulations of some Länder, additional requirements for the personal protective equipment of firefighters, despite these equipment meeting the requirements of Directive 89/686/EEC and being CE marked.

The Court of Justice of the European Union held that additional requirements for the personal protective equipment of firefighters were not admissible, as the equipment of this group falls within the scope of the Directive, and not within the equipment excluded in its Annex I. The equipment included in the exclusion from the scope of the Directive must have been specifically designed and manufactured for the armed forces or public order forces. The Court of Justice of the European Union notes that the exception established in Article 1.4 of the Directive is an exception to the principle of free movement of goods and must be interpreted restrictively. Therefore, Member States cannot exceed the limits of the exception, as while it is true that "they can define the missions and tasks assigned to the public order forces and decide the level of their protection, this does not imply that they are also empowered to use

⁵¹ Judgment of 22 May 2003, *Commission v Germany* (C-103/01, EU:C:2003:301).

their own definitions of personal protection equipment for the application of the referred exception."

Furthermore, the Court reasons that while Directives 89/391 and 89/656 contain minimum provisions that can be improved by Member States, which can establish more favorable provisions to protect the safety and health of workers, this principle of improvability does not apply to Directive 89/686/EEC, whose objective is to ensure the free movement of personal protection equipment among Member States, so "this Directive must prevent them from prohibiting, restricting, or hindering the marketing of those equipment that comply with its provisions and are CE marked."

CHAPTER 24

RECONCILIATION OF WORK AND FAMILY LIFE

JAIME CABEZA PEREIRO

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I. FRAMEWORK: FROM PARENTAL LEAVE TO A DIVERSITY OF MEASURES TO RECONCILE WORK AND FAMILY LIFE

The first approaches of the EEC to this topic date back to the 1980s, when the Equal Opportunities Action Program for the period 1982-1985¹ was launched. Within this context, a parental leave for caring purposes was pro-

¹ No. 9. 41/X/82/EN. Par. (18): 'Legal measures in other areas of social policy, designed to improve living and working conditions, have an important indirect role to play in promoting equality in employment. An example of this is the extension of opportunities for leave from work, particularly parental leave and leave for family reasons'.

posed. The Commission drew up a draft of Directive which took account of the wide disparity in national legislations in this area. Needless to say that those deep disparities affected the functioning of the common market. Therefore, the Community Charter of the Fundamental Social Rights of Workers 1989 included in its number 16 –equality of treatment between men and women– a statement expressing that “measures should also be developed enabling men and women to reconcile their occupational and family obligations”. Although the Charter was not a binding piece of legislation, it has been given persuasive value by the ECJ².

The Charter of Fundamental Rights of the European Union also recognises rights linked with parental leave. In particular, its Art. 33, in the chapter on ‘solidarity’ and under the heading ‘family and professional life’ guarantees protection to family in legal, economic and social fields. Moreover its second paragraph expresses the right of every person to “reconcile family and professional life”. In this regard, “everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child”³. Likewise, Art. 23 –equality between men and women– is often taken into account in proceedings under the ECJ related to parental leave⁴.

As for the TFEU, Art. 151 makes reference to the improvement of living and working conditions and art. 153 involves the EU on, among other fields, on working conditions and equality between men and women. Both topics are frequently quoted in cases related to reconciliation of work and family life as well⁵.

Without prejudice to all these texts, it must be emphasized the leading role played by social partners, whose negotiations led to the conclusion of two successive framework agreements, the first one in 1995 and the second (revising the previous one), in 2009, which were incorporated respectively in Directive 96/34/CE and in Directive 2010/18/EU. On the 1995 agreement, which was the first piece of legislation passed following the procedure of Art. 4(2) of the Social Policy Agreement of the Treaty of Maastricht, the ECJ remembers that it entailed a commitment by the signing entities to establish a common

² As it has been recognized by the ECJ. In this regard, judgment of 22 December 2009, *Meerts*, (C-116/08, EU:C:2009:645), judgment of 16 September 2010, *Chatzi* (C-149/10, EU:C:2020:534), judgment of 27 February 2014, *Lyreco Belgium* (C-588/12, EU:C:2014:99) and judgment of 16 July 2015, *Maïstrel-lis* (C-222/14, EU:C:2015:241).

³ Also referred in many cases ruled by the ECJ. For instance, judgment of 16 of July 2015, *Maïstrel-lis*, C-222/14, EU:C:2015:241.

⁴ Referring to both articles of the Charter, judgment of 7 September 2017, *H. and Land Berlin* (C-174/16, EU:C:2017:637).

⁵ Judgment of 7 September 2017, *H. and Land Berlin* (C-174/16, EU:C:2017:637).

field of measures aimed at, on the one hand to promote equality of treatment between men and women and, on the other, to enable both genders to conciliate their professional and family obligations⁶. Particularly, their considerations 7 and 8 appealed to the promotion of the entrance and maintenance of women in the labour market and to the need of fostering men to assume their household responsibilities in terms of equality with women⁷.

Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 ‘on work-life balance for parents and carers and repealing Council Directive 2010/18/EU’ has been the last step of EU legislation on this subject. The deadline for its transposition in each Member State finished the 2nd of August 2022⁸. It has produced a major step forward, at least from a qualitative perspective, due to the diversity of working conditions and measures that have been included in this piece of legislation.

However, it has departed from the paths followed by the two former Directives because it is not the outcome of an agreement between social partners. As it is acknowledged in Recital 14, ‘The Commission has consulted management and labour in a two-stage process with regard to challenges related to work-life balance, in accordance with Article 154 TFEU. There was no agreement among the social partners to enter into negotiations with regard to those matters, including with regard to parental leave’.

The Recitals of the 2019 Directive show its main features. Making more emphasis than the two former agreements on parental leave, it focuses its objectives on gender equality, full participation of women in the labour market, balanced sharing of responsibilities with men in the care of family and overriding inequalities in incomes and wages. Particularly, it pays attention to demographic changes and the ageing of population that increase the necessity of non-professional care which must be facilitated and promoted by rules that conceive of it as a worker’s right.

The reference to the European Pillar of Social Rights approved at the Goteborg Summit of 2017 places the Directive in the context of social policy reforms initiated in the second half of the last decade. The Recitals refer to Directive 2003/88/EC on working time whose consequences in female em-

⁶ Judgment of 22 December 2009, *Meerts* (C-116/08, EU:C:2009:645) and judgment of 27 February 2014, *Lyreco Belgium* (C-588/12). Likewise, judgment of 20 June 2012, *Riežniece* (C-7/12, EU:C:2013:410) and Judgment of 13 February 2014, *Terveys-ja* (C-512/11 and C-513/11, EU:C:2014:73).

⁷ As it is pointed out in judgment of 16 July 2015, *Maistrellis* (C-222/14, EU:C:2015:241).

⁸ Art. 20(1) However, as regards to payment or allowance corresponding to the last two weeks of parental leave as provided for in Article 8(3), Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 2 August 2024.

ployment have been truly adverse because women spend more time caring for children, moreover if there is an ill or dependant relative.

Generally speaking, to date, they have lacked of enough incentives to encourage men assuming household responsibilities at the same level and involvement than women. Likely, the absence of specific rights acknowledged for them in legislations of many Member States has worsened this situation. The outcome can be expressed in terms of reinforcing gender stereotypes and perpetuating the differences between both genders in labour market.

The Recitals state that flexible work arrangements allow women the development of a profession and the access to paid work. However, that point of view gives rise to other side effects, such as the increase in gender pay gap in comparison with men.

In this context, some key objectives that the Directive must achieve are posed. Among them, that men enjoy the rights linked with family care in equality with women. Similarly, it is necessary a set of childcare and dependant people care services that must be affordable, reliable and quality oriented. At this regard the targets established by the Commission have been widely frustrated. On the other hand, there is a clear need of accurate statistics of comparative figures between genders to check the different impact of measures on men and women.

The Directive is self-limiting avoiding several important issues. Above all, it refers to legislations of Member States on some basic issues, such as the definition of civil and family status and –even more important- the concepts of ‘father’, ‘mother’ and ‘progenitor’. The question immediately arises: just as the case-law of the ECJ has developed its own definitions, autonomous from the domestic law, the same task might be developed relating family relationships when it comes to application of the (EU) 2019/1158 Directive. If not, its effectiveness may be highly limited.

It is very important the reference made by the Recitals to small enterprises in order not to increase the administrative, law and tax barriers for them. Needless to say that, as it happens with other EU legislation, the ECJ will have to take into account the specific perspective of these small size entities in the application and interpretation of rights to reconcile work and family life.

The new Directive’s choice not to enter into the nomenclature that each Member State has adopted for each measures designed to incorporate the rights provided in it is also interesting. To assess the degree of accomplishment of its objectives and purposes it will be reviewed the content of all those national measures. Surely, this is a very reasonable idea, but it will give rise to controversy and problems about the adequate incorporation of EU Law into national systems.

Specific consideration deserves the very important Recital 46: ‘*Allowing one parent to transfer to the other parent more than two months out of the four months of parental leave provided for in this Directive does not constitute a provision that is more favourable to the worker than the minimum provisions laid down in this Directive*’. Apart from the specific subject to which it refers, to which it will be commented on *infra*, it reveals a very interesting orientation which constitutes main criterion of the Directive: the fights against gender stereotypes and the need to clearly distinguish positive action measures in favour of women from other rules which constitute protectionist biases of female condition that impose true burdens for their development in the labour marker.

Leaving behind the description of the purposes of the piece of UE legislation, it should be noted that the number of judgments that have dealt with the two successive versions of the Framework Agreement on parental leave has not been too high. Therefore, their identification and quotation is relatively simple. However that circumstance does not impair the invaluable interest of the case-law about this subject, since it has established guidelines, mainly in the more recent rulings, that reinforce the strength of a legislation that, at a first sight, seems scarcely demanding or involved in reconciling work and family life and in male co-responsibility. Surely the new Directive will produce new preliminary rulings and a case law which will harmonize deeper this subject will be built.

Obviously the Directive (UE) 2019/1158, whose deadline for incorporation expired on 2 August 2022, still has not given rise to case law. But surely it will be come to the attention of the ECJ in the following years through a large number of preliminary rulings.

II. SCOPE OF APPLICATION

The two Framework Agreements on parental leave have been applicable, without any doubt, to public servants irrespective of their relationship with Public Administration, irrespective of the employment or statutory relationship they may have⁹. Beyond this idea, the ECJ has avoided to decide if share-

⁹ Judgment of 16 September 2010, *Chatzi*, C-149/10, EU:C:2020:534. Also, Judgment of 7 of September of 2017, *H. and Land Berlin*, C-174/16, EU:C:2017:637.

holders of a work cooperatives are include or not in its scope¹⁰, nor has been discussed the concept of worker in this subject matter. In any event, it must be remembered that, as a trend, that common concept is being established as a EU definition, not necessarily equivalent to the understanding that each Member State has developed in this regard. Moreover, the EU concept is, as trend, wide and inclusive, and applicable to all the fields of social policies irrespective to which Regulation or Directive is been applied. Now, Art. 2 of the Directive establishes its scope of application including workers, men and women, ‘who have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, taking into account the case-law of the Court of Justice’.

As far as its temporal scope is concerned, the Directive is applicable to all workers who apply for any all the rights guaranteed in it, irrespective or the day of birth of the child for whom the application is requested¹¹.

III. THE PATERNITY LEAVE

This leave must be deemed as one of the most important steps forward produced by Directive (UE) 2019/1158. It is granted for ten days to fathers or, if and to the extend recognized by national law, to equivalent second parents, on the occasion of the birth of the worker's child. It should be noted the subtle difference between ‘on the occasion of the birth’ and ‘on the grounds of the birth’, the later related to the definition of parental leave. Thus, there must be a close proximity of the paternity leave with the birth, meanwhile the relationship of the parental leave with that birth is only causal¹².

Member States may determine whether to allow paternity leave to be taken partly before or only after the birth of the child and whether to allow such leave to be taken in flexible ways, like part time. The right shall not be made subject to a period of work qualification or to a length of service qualification and can't be dependant on the worker's marital or family status, as defined by national law.

As refers to economic rights linked to paternity leave, Art. 8(2) obliges Member States to grant a payment or allowance that shall guarantee an income at least equivalent to that which the worker concerned would receive in the

¹⁰ Judgment of 16 June 2016, *Rodríguez Sánchez*, C-351/14, EU:C:2016:447.

¹¹ Judgment of 16 September 2010, *Chatzi* (C-149/10, EU:C:2020:534).

¹² Therefore, it is not covered by the Directive an extension of the maternity leave to single-parent families, as has been ruled in Judgment of 16 May 2024, *CCC*, C-673/22, EU:C:2024:407.

event of a break in the worker's activities on grounds connected with the worker's state of health, subject to any ceiling laid down in national law. Member States may make the right to a payment or an allowance subject to periods of previous employment, which shall not exceed six months immediately prior to the expected date of the birth of the child. The contents of this economic right follows almost the same rule that the one provided under Directive 92/85/CE, of the Council, of 19 of October of 1992, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers for the maternity right (Art. 11(3)).

IV. THE BASIC CONTENT OF PARENTAL LEAVE

This leave consists of an individual right to leave¹³ of four months granted to all workers, men and women, on the occasion of the birth or adoption of a child, for caring purposes. The leave has to be taken before the child reaches a specified age, up to eight years, to be specified by each Member State or by collective agreement. At least, two of the four months have a non-transferable character with the aim of promoting equality of treatment between men and women.

As the leave can't be transferred for one parent to the other, both are entitled for a period of at least four months. Thus, Member States are not allowed to provide that one parent can enjoy the full right of the other and the circumstances of one partner cannot limit the right of the other¹⁴.

The current Directive, in comparison with the former legislation on parental leave, is much more demanding on remuneration or public allowance during parental leave. The 2009 Framework Agreement envisaged under its clause 5 a broad reference related to incomes during the leave. Currently, Art. 8 establishes that, at least during the two-month period of non-transferable leave, the parents will receive a remuneration or allowance in an amount enough to facilitate the take-up of parental leave by both parents.

Surely, that amount, as described in Art. 8(3) of the Directive, will be subject to broad discussions. The purpose is guaranteeing a protection enough not to discourage the use of parental leave, including male workers. The article is not void in content and will oblige to development of case-law that establishes the substantive streams.

¹³ The ECJ case law has insisted on individual entitlement to this right ECJ. As a matter of example, Judgment of 16 of July of 2015, *Maïstrellis*, C-222/14, EU:C:2015:241.

¹⁴ Judgment of 16 of July of 2015, *Maïstrellis*, C-222/14, EU:C:2015:241.

On the other hand, the four months period is the same provided under the 2009 Agreement. Apparently, it is too short and not appropriate to produce enough harmonization between Member States, whose national legislations are quite diverse in this respect. In any event it must be highlighted that the ECJ has acknowledged that the parental leave is a social right of the EU of remarkable importance.

The aforementioned individual nature of the leave must help to overcome some points of view which, under the pretext of arguing a wider or better protection for women in their jobs or worker conditions, reinforced the role of the mother as main responsible on household, in detriment of male co-responsibility. These positions, which had been defended during a long time (even in the ECJ case-law that interpreted the Directive 76/207/EEC¹⁵), were opposed in *Roca Álvarez* case¹⁶, which assessed the alignment of a breastfeeding leave in its regulation before the 2012 reform –a feminized leave, at least partially– with the Equality Directive. However, it was not until the case *Maïstrellis*¹⁷ when a feminized leave was assessed from the perspective of the parental leave Agreement of 1996. The Court understood that Member States may not impose conditions that, in practice, deprive one parent from the right to enjoy parental leave due to the professional circumstances of the other one.

As regards to the period of notice to be given, according to art. 5(3), “Member States shall establish a reasonable period of notice that is to be given by workers to employers where they exercise their right to parental leave. In doing so, Member States shall take into account the needs of both the employers and the workers”. The purpose is not the harmonization of basic requirements but the establishment of homogenous burdens on Member States. The wide diversity of standards among them explains that the Directive only tries to advance through broad concepts.

On the other hand, Art. 5(4) allows making right to parental leave ‘subject to a period of work qualification or to a length of service qualification, which shall not exceed one year’. In case of successive fixed-term contracts with the same employer, the sum of those contracts shall be taken into account for the purpose of calculating the qualifying period¹⁸.

¹⁵ Mainly in Judgment of 12 of July of 1984, *Hofmann*, C-184/83, EU:C:1984:231. Unfortunately, the *Hofmann* jurisprudence has survived because it has been expressly declared persuasive in Judgment of 18 of November of 2020, *Syndicat CFTC du personnel de la Caisse primaire d’assurance maladie de la Moselle*, C-463/19, EU:C:2020:932.

¹⁶ Judgment of 30 of September 2010, C-104/09, EU:C:2010:561.

¹⁷ Judgment of 16 of July of 2015, *Maïstrellis*, C-222/14, EU:C:2015:241.

¹⁸ It must be underlined that, in the case of paternity leave, the economic right linked to it can be conditioned to a previous period of entitlement, but not the right itself.

Art. 5(5) deals with the possibilities of the employer to delay exercise of the right by the worker: ‘Member States may establish the circumstances in which an employer, following consultation in accordance with national law, collective agreements or practice, is allowed to postpone the granting of parental leave for a reasonable period of time on the grounds that the taking of parental leave at the time requested would seriously disrupt the good functioning of the employer. Employers shall provide reasons for such a postponement of parental leave in writing’. Therefore, a plain refusal is not feasible, irrespective of the serious reasons that the company may object. Moreover, the postponement must be justified in writing. Also, employers are obliged, prior to any postponement to offer, to the extent possible, flexible ways to take the parental leave.

One of the aspects of the parental leave over which not enough light was shed in the previous two agreements was the flexible modalities through which the right may be exercised. In that respect, the UE remained one step behind the experiences of national legislations. Now, art. 5(6) expressly reflects such possibilities, but referring them to Member States, that “shall take the necessary measures to ensure that workers have the right to request that they take parental leave in flexible ways”. Also, they “may specify the modalities of application thereof. The employer shall consider and respond to such requests, taking into account the needs of both the employer and the worker. The employer shall provide reasons for any refusal to accede to such a request in writing within a reasonable period after the request”. It would be fair a future degree of harmonization in this regard.

This issue hardly has posed problems under the ECJ, apart from the controversy (which be referred later) over the calculation of severance pay in case of termination of contract. Anyway, it has been declared that the exercise of parental leave in a flexible way cannot be disadvantaged in comparison with a full-time alternative. Otherwise, the Directive’s objective of flexibility would be undermined¹⁹.

There is a strong relationship between Directive (UE) 2019/1158 and Directive 97/81/CE of the Council of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC. Both lack of any cross-reference with the other but their purposes coincide in promoting gender equality and combining work and family life. Likewise, part-time parental leave is protected by the 1997 Agreement. Therefore, those Directives often are applied in a complementary way, reinforcing together the protection they guarantee.

¹⁹ In this regard, Judgment of 27 February 2014, *Lyreco Belgium* (C-588/12, EU:C:2014:99).

V. THE CARERS' LEAVE

The progressive ageing of population, sharply accentuated in Europe, raises the need for public policies and legislation oriented towards the caregiving of elder people and other people who suffer diseases, accidents or other circumstances that need the attention from others. That necessity, largely felt from years ago, reaches the Directive (UE) 2019/1158, that establishes a carers' leave. It is a first experience, waiting for future Directives shall impose more demanding obligations.

Art. 6(1) establishes that 'Member States shall take the necessary measures to ensure that each worker has the right to carers' leave of five working days per year. Member States may determine additional details regarding the scope and conditions of carers' leave in accordance with national law or practice. The use of that right may be subject to appropriate substantiation, in accordance with national law or practice'. The leave is provided for each year, not for each person who needs care. So, any worker will be entitled for five days per year, irrespective if he/she enjoys it for attending one, two or more relatives. Actually, this feature had been explained by the ECJ considering the parental leave, which is the same irrespective if there is one child to care or twin siblings²⁰. Anyway, this is not a single leave, but a number of days per year that can be dedicated to care. Art. 6(2) empowers Member States to allocate carers' leave on the basis of a reference period other than a year, per person in need of care or support, or per case.

VI. TIME OFF FROM WORK ON GROUNDS OF FORCE MAJEURE

Art. 7 echoes the right already established under the two previous Framework Agreements: "Member States shall take the necessary measures to ensure that each worker has the right to time off from work on grounds of force majeure for urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable. Member States may limit the right of each worker to time off from work on grounds of force majeure to a certain amount of time each year or by case, or both".

This sort of time off has not been assessed by the ECJ. The Directive doesn't provide if it is or not a paid right or on its distribution among members of a household. On the other hand, the expression 'force majeure' doesn't fit

²⁰ Judgment of 16 of September of 2010, *Chatzi*, C-149/10 (EU:C:2010:534).

with the classical understanding it may have from a Private Law point of view. It is an autonomous EU concept, apparently related to accidents, diseases or deaths that require the immediate attendance of the worker. Obviously, Member States can improve the Directive but it is undeniable that Art. 7 covers these specific situations. However, the expression ‘indispensable’ gives this right a restrictive bias.

VII. FLEXIBLE WORKING ARRANGEMENTS

Under the application of Directive 2010/18/UE, the ECJ had disassociated the adjustment of working hours from the parental leave if the adaptation was not asked for on the employee’s return after the parental leave²¹. This dissociation should perhaps be amended, but nowadays the problem has been relegated, since it has been recognized a different right of adaptation of work time or other working conditions.

The establishment of flexible working time systems regulated in Art. 9 of the Directive is one of its core contributions which expresses a modern approach to the rights linked to reconciliation of work and family life, oriented towards the maintenance of the activity and not towards leaves. It is focused on workers with children under eight years of age and to carers for dependent persons. However, this article admits that the flexibility arrangements are subject to a reasonable length of time, without specifying what this limit may be: ‘Member States shall take the necessary measures to ensure that workers with children up to a specified age, which shall be at least eight years, and carers, have the right to request flexible working arrangements for caring purposes. The duration of such flexible working arrangements may be subject to a reasonable limitation’.

In reality, the Directive does not establish subjective rights but procedural ones. The company must consider and assess the applications made within a reasonable period of time, taking into account its own needs and those of the employee. Moreover, it must justify both refusals and postponements. It is recognized a right to return to the previous conditions at the end of the agreed period as well as an anticipated return if the circumstances of the worker change, although anticipation can be denied by the company assessing both – workers’ and employers’ – needs. On the other hand, Member States are allowed to subordinate these rights to a period of services or to a seniority that

²¹ Judgment of 16 of June of 2016, *Rodríguez Sánchez* (C-351/14, EU:C:2016:447).

can't be longer than six months, taking into account, in case, the successive contracts, following the Framework Agreement on fixed term contracts (Directive 99/79/EC, of the Council, of 28 of June of 1999).

VIII. PROTECTION OF ACQUIRED RIGHTS OR RIGHTS IN PROCESS OF ACQUISITION

Art. 10 refers to this subject. Pursuant to its first paragraph, 'Rights that have been acquired or that are in the process of being acquired by workers on the date on which leave provided for in Articles 4, 5 and 6 or time off from work provided for in Article 7 starts shall be maintained until the end of such leave or time off from work. At the end of such leave or time off from work, those rights, including any changes arising from national law, collective agreements or practice, shall apply'.

Case-law of the ECJ applying Clause 5 of the Parental Leave Framework Agreement 1995 has underlined its binding character, strengthening its scope of application. First, it is not opened to exceptions but guarantees all the rights of the worker, whether economic or otherwise, without any condition²². Indeed, it constitutes a basic principle that a worker must remain at the same position when returning from the parental leave –or, taking in the consideration the Directive (EU) 2019/1158, from the paternity or careers' leave-. Moreover, it is reinforced with the acknowledgement of an autonomous and EU profile of the concepts of 'acquired rights' and 'rights in process of acquisition'²³. As the ECJ emphasises, clause 5 expresses a principle of the EU of particular importance. Thus it can't be subject to a restrictive understanding and it includes all the rights and advantages related to working conditions.

As a matter of example, considering the annual leave, a worker who enjoys the rights recognized in art. 10 doesn't lose his/her acquired rights. Therefore, during a part-time parental leave the annual leave accrued previously must be granted. If it has been acquired in the framework of a full-time service,

²² Judgment of 22 of December of 2009, *Meerts*, C-116/08 (EU:C:2009:645), and Judgment of 7 of September of 2017, *H. and Land Berlin* (C-174/16, EU:C:2017:637).

²³ As it is expressed in Judgment of 22 of December of 2009, *Meerts* (C-116/08, EU:C:2009:645), 'it follows from the need for uniform application of Community law and the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Community, having regard to the context of the provision and the objective pursued by the legislation in question'.

it is against the Directive limiting its duration because the working time has been later on reduced for the purpose of caring children²⁴.

However, the ECJ has pointed out that the exercise of a full-time parental leave can't be considered as working time for the purpose of accruing the right to annual leave²⁵. The Judgment remarks that, unlike an illness, parental leave hasn't an unpredictable character but depends on the decision of the worker to look after the child. On the other hand, the worker is not subjected to physical or psychological limitations produced by an illness, so that both circumstances are very different. Similarly, parental leave must be distinguished from maternity, whose purposes are sharply different. Therefore, although both illness and maternity are deemed working time for the purposes of annual leave, it is not the same with the rights related to the care of children or dependant persons. Even taking for granted that following ECJ case-law a leave guaranteed by EU Law can't undermine the enjoyment of other leave recognized by the same EU Law, that *acquis* is not applicable respecting parental leave and annual leave. Anyway, it is doubtful which will be the decision of the ECJ in the confluence of paternity and annual leave.

The same principle of conservation of acquired rights and rights in process of acquisition impairs that employment termination's severances could be reduced in case of part-time parental leave. In this respect, Spanish Law went ahead EU Law, first through case-law and later through LO 3/2007 although without making reference to the parental leave Framework Agreement. As art. 10(1) establishes, 'Rights that have been acquired or that are in the process of being acquired by workers on the date on which leave provided for in Articles 4, 5 and 6 or time off from work provided for in Article 7 starts shall be maintained until the end of such leave or time off from work. At the end of such leave or time off from work, those rights, including any changes arising from national law, collective agreements or practice, shall apply'. Thus the ECJ -applying the homologous clause 2(6) of the parental leave Framework Agreement- has held that a termination severance cannot be reduced based on the fact that termination was decided during a part-time parental leave. As the Court points out, 'That body of rights and benefits would be compromised if, where the statutory period of notice was not observed in the event of dismissal during part-time parental leave, a worker employed on a full-time basis lost the right to have the compensation for dismissal due to him determined on the

²⁴ Judgment of 22 of April of 2010, *Zentralbetriebsrat der Landeskrankenhäuser Tirols* (C-486/0, EU:C:2010:215).

²⁵ Judgment of 4 of October of 2019, *Dicu* (C-12/17, EU:C:2018:799).

basis of the salary relating to his employment contract’²⁶. Moreover, the right of a compensation in case of termination of a contract must be deemed as a condition of employment, because it is paid due to the services that the affected person has developed and would continue developing if the unfair dismissal would not have been decided²⁷.

The ECJ insists on this principle of protection of acquired rights up to its more demanding consequences. Among them, it has held that it is not permissible to extinguish an acquired right or a right in process of acquisition on the ground that national legislation provides that such right is legally exhausted on the expiry of a non-extendable deadline, which continues to run during a worker’s absence on parental leave²⁸. This idea, as will be seen, is remarkably important in systems that provide for particularly long extended leaves, as it imposes the freezing of acquired rights and rights in process of acquisition during long periods of time. As it was argued in the case that the Court ruled, the access to an upper professional group can be dependent on conditions only if those conditions are not exposed to be lost during the enjoyment of a right recognized by the Directive²⁹.

The ECJ also argues that exposing at risk the good functioning of the services or the same survival of the company by the long lasting leave can’t be sufficient justification for denial of a right³⁰. Surely, that demanding case-law, born under the parental leave, must be now applicable to the other rights envisaged under Art. 10(1) of the Directive.

Moreover, as Art. 10(2) *in fine* establishes, workers who exhaust their paternity, parental or carers’ leave are entitled to take advantage of any improvement in working conditions that would have accrued in case of not enjoying the leave. There is not case-law in this regard but a similar rule included in the maternity Directive has given rise to a judgment of the ECJ. Indeed, in the

²⁶ Judgment of 22 of December 2009, *Meerts* (C-116/08, EU:C:2009:645). The same point of view in Judgment of 27 February 2014, *Lyreco Belgium* (C-588/12, EU:C:2014:99). Also, judgment of 8 May 2019, *Praxair* (C-486/18, EU:C:2019:379) is devoted to the calculation of an outplacement allowance resulting out from a collective dismissal: ‘Clause 2.6 of the framework agreement on parental leave ... must be interpreted as precluding, where a worker employed full-time and for an indefinite duration is dismissed at the time he is on part-time parental leave, the compensation payment for dismissal and the redeployment leave allowance to be paid to that worker being determined at least in part on the basis of the reduced salary which he receives when the dismissal takes place’.

²⁷ *Ibid.*

²⁸ Judgment of 7 September 2017 (*H. and Land Berlin*, C-174/16, EU:C:2017:637). The case was related to the development of a period of practices for the access to a superior level position.

²⁹ Therefore it was deemed against the Framework Agreement a legislation that had not provided any extension of a training period neither when the affected person was in a situation of parental leave. Thus, the ECJ recognized her right to develop the relevant training after returning from the leave.

³⁰ Judgment of 7 September 2017, *H. and Land Berlin* (C-174/16, EU:C:2017:637).

judgment *Alabaster*³¹, considering the principle of equal payment currently envisaged under Art. 157 TFEU, the ECJ ruled that ‘Article 119 of the EC Treaty (Articles 117 to 120 of the Treaty have been replaced by Articles 136 to 143 EC) must be interpreted as requiring that, in so far as the pay received by the worker during her maternity leave is determined at least in part on the basis of the pay she earned before her maternity leave began, any pay rise awarded between the beginning of the period covered by the reference pay and the end of the maternity leave must be included in the elements of pay taken into account in calculating the amount of such pay. This requirement is not limited to cases where the pay rise is back-dated to the period covered by the reference pay’.

IX. PROTECTION AGAINST DISMISSAL OR AGAINST OTHER UNFAVOURABLE TREATMENTS

Art. 12 of the Directive shows a direct relationship with Art. 33(3) of the CFRUE: ‘To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child’. Undoubtedly, more than twenty years later, the verbatim of that article would be different, but it echoes the protection against decisions of termination of contracts notified on the occasion or on the grounds of the birth or adoption of a child. It would be necessary to add, also, on the grounds of the care of elder people.

Being inspired by Art. 10 of Directive 92/85/EEC of 19 of October of 1992, Art. 12 provides a protection against dismissal for the reason of having asked for or being enjoying a paternity, parental or carers’ leave, or time off in the framework of a flexible working time schedule. Unlike the former, the protection established in the 2019 Directive is based on the grounds, not on a fixed-term protection. However, the broader similarities produce that the incorporation of both Directives may converge in more or less uniform rules. Therefore, case law on Art. 10 of 92/85/EEC may be inspiring. For instance, as refers to dismissals for reasons not related to the individual workers concerned, it might be taken into account the case *Porras Guisado*³². Its rationale has wide

³¹ Judgment of 30 March 2004, *Alabaster* (C-147/02, EU:C:2004:192).

³² Judgment of 22 of February of 2018, *Porras Guisado*, C-103/16, EU:C:2018:99. Following its ruling, ‘...Article 10(2) of Directive 92/85 must be interpreted as not precluding national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy without giving

interest because it transcends the analysis on the reasons of the dismissal and wonders if the selection of workers impacted by the decision of redundancy gives rise to a disparate treatment or adverse effect towards persons that interrupt the services due to paternity, or care of children or elder people. Undoubtedly, that's a demanding perspective in which not enough attention has been posed.

The 2019 Directive entails a very important step forward in comparison with the previous 2009 Agreement. Both have left uncovered from express protection against dismissal the time off from work on grounds of force majeure, but the Directive protects rights granted by Arts. 4, 5, 6 and 9 (although the later only when it implies a leave of the worker).

Reference has already been made to the issue of severance pay in the case of part-time leave. Having analysed it from the perspective of the maintenance of acquired rights or rights in process of acquisition, some additional comments must be made on the basis of Art. 12. The ECJ has ruled that the protection would be useless if the compensation would be calculated based on the wage earned during the parental leave. Indeed, if so would be, there would not be a sufficient obstacle to dissuade the company from terminating the contract of employment while workers enjoy the reconciliation right³³. This would increase the precariousness of the employment of workers who choose to take advantage of it, resulting in an emptying of the content of the protection against dismissal. Moreover, the reduced calculation of the compensation would in practice result in a deterrent factor for workers, who would decide not to benefit from the rights recognized in the Directive³⁴.

Without prejudice to the above, an employer can dismiss a worker who has taken the leave provided that termination has not been due to its application or enjoyment³⁵. It is not *per se* against the Agreement to carry out an evaluation of a person's performance in such circumstances in the framework of a redundancy that affects, among others, his/her position. However, UE rules cannot be avoided in such proceedings, or in cases of dismissals for eco-

any grounds other than those justifying the collective dismissal, provided that the objective criteria chosen to identify the workers to be made redundant are cited. Article 10(1) of Directive 92/85 must be interpreted as precluding national legislation which does not prohibit, in principle, the dismissal of a worker who is pregnant, has recently given birth or is breastfeeding as a preventative measure, but which provides, by way of reparation, only for that dismissal to be declared void when it is unlawful”...

³³ Judgment of 22 December 2009, *Meerts* (C-116/08, EU:C:2009:645) and judgment of 27 February 2014, *Lyreco Belgium* (C-588/12, EU:C:2014:99).

³⁴ *Ibid.*

³⁵ Judgment of 20 June 2012, *Riežniece* (C-7/12, EU:C:2013:410).

nomic reasons³⁶. On the other hand, the performance evaluation followed in those circumstances can put the worker who had used the leaves and absences from work provided in Arts. 4, 5, 6 and 9 of the Directive in a disadvantageous position in relation with workers who have not been covered by them. That will be so because assessing the last period of services produces disparity taking into account that, in the case of the worker who has interrupted his/her employment relationship, it will be necessary to consider a previous period of time. Usually, such a difference will not be inappropriate, if does not harm a person who takes advantage of the leave³⁷. In reality, Art. 12(2) reinforces the Court's ruling, when it recognizes the right of the workers who suspect that their dismissals have been carried out in breach of Arts. 4, 5, 6 and 9 of the Directive to obtain a justification of the termination by the company, sometimes in writing: 'Workers who consider that they have been dismissed on the grounds that they have applied for, or have taken, leave provided for in Articles 4, 5 and 6, or have exercised the right to request flexible working arrangements as referred to in Article 9, may request the employer to provide duly substantiated reasons for their dismissal. With respect to the dismissal of a worker who has applied for, or has taken, leave provided for in Article 4, 5 or 6, the employer shall provide reasons for the dismissal in writing'.

In the framework of the protection against dismissal, Art. 12 sets a rule on the burden of proof that is quite classical and clearly inspired in Directive 2006/54/EC, of 5 of July of 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Its paragraph 3 provides that 'Member States shall

³⁶ Judgment of 20 June 2012, *Riežniece* (C-7/12, EU:C:2013:410). Also, judgment of 7 September 2017, *H. and Land Berlin* (C-174/16, EU:C:2017:637).

³⁷ Judgment of 20 June 2012, *Riežniece* (C-7/12, EU:C:2013:410): 'where a much higher number of women than men take parental leave, which it is for the national court to verify, and the Framework Agreement on Parental Leave contained in the Annex to Directive 96/34, must be interpreted as precluding:

- a situation where, as part of an assessment of workers in the context of abolishment of officials' posts due to national economic difficulties, a worker who has taken parental leave is assessed in his or her absence on the basis of assessment principles and criteria which place him or her in a less favourable position as compared to workers who did not take parental leave; in order to ascertain whether or not that is the case, the national court must *inter alia* ensure that the assessment encompasses all workers liable to be concerned by the abolishment of the post, that it is based on criteria which are absolutely identical to those applying to workers in active service and that the implementation of those criteria does not involve the physical presence of workers on parental leave; and

- a situation where a female worker who has been transferred to another post at the end of her parental leave following that assessment is dismissed due to the abolishment of that new post, where it was not impossible for the employer to allow her to return to her former post or where the work assigned to her was not equivalent or similar and consistent with her employment contract or employment relationship, *inter alia* because, at the time of the transfer, the employer was informed that the new post was due to be abolished, which it is for the national court to verify'.

take the measures necessary to ensure that where workers who consider that they have been dismissed on the grounds that they have applied for, or have taken, leave provided for in Articles 4, 5 and 6 establish, before a court or other competent authority, facts capable of giving rise to a presumption that they have been dismissed on such grounds, it shall be for the employer to prove that the dismissal was based on other grounds'. Actually, it is little more than a transcription of Art. 19.3 of that Directive.

X. RETURN FROM PATERNITY, PARENTAL AND CARERS' LEAVE

Art. 10(2) recognizes the right of the worker who finishes the paternity, parental, or carers' leave to reinstatement in his/her job or to an equivalent position in not less favourable conditions. Likewise, the worker has the right to take advantage of any improvement in working conditions to which he/she would have acceded had they not taken the leave. It must be underlined that, in comparison with its homologous clause 5(1) of the Parental Leave Agreement of 2009, the content of the right has been eroded, since, according to that clause, reinstatement might be in the same position or, should it be impossible, in an equivalent post in accordance with his/her contract of employment or labour relationship.

The ECJ has interpreted clause 5(1) with a high degree of exigence following the literal expression of the Agreement. In this sense, it has been expressed that it must be verified that the employer is unable to reinstate the concerned employee in the same position held prior to the leave. Then, in of the event of impossibility, it must be assessed and weighted that the alternative job is equivalent or similar. To proceed to that evaluation, the company has to justify why it is impossible the return to the same position³⁸. If the position offered is lower than the one developed before the leave, it will entail a breach of the duty of reinstatement³⁹. Likewise, it is not acceptable to establish as a condition for reinstatement that the worker passes a selection process because such requirement would leave his/her right void. Indeed, on the one hand would delay his/her reinstatement and, on the other, that reinstatement would be conditioned and, therefore, insecure⁴⁰.

³⁸ Judgment of 7 of September of 2017, *H. and Land Berlin*, C-174/16 (EU:C:2017:637).

³⁹ *Ibid.*

⁴⁰ *Ibid.*

The ECJ will have to moderate its case-law taking into account the content of Art. 10(2) of the Directive (EU) 2019/1158 as regards the identity of the offered position, as it will suffice if that position is equivalent. However, it must be maintained the reasoning of the Court in the case *Land Berlin* in all other aspects. Moreover, a material breach of the duty to reinstate can be established, taking into account the circumstances. For instance, if it is verified that the offered position will be suppressed in the next future⁴¹. On the other hand, as it has expressed the ECJ, the reinstatement right doesn't require that in fact the worker had developed the position that has to be reserved during the leave. It is enough that it would be granted to him/her⁴².

On the other hand, the reinstatement is compulsory even if the enjoyed leave surpasses broadly the basic length of time provided in the Framework Agreement, as otherwise it would be dissuasive for the exercise of the right⁴³. That's a very interesting conclusion because it affects mainly the systems that recognize long-lasting maternity, paternity, parental and carers' leaves, likely with poor –if any– economic coverage beyond the minimum requirements of the Directive. The message is plainly diaphanous: whatever the length of the leave, the right to reinstatement in the same position remains unscathed. Other conclusion, following the criteria of the ECJ, would hinder the exercise of the right.

XI. RECONCILIATION OF FAMILY AND WORK AND SEX DISCRIMINATION

The link between reconciliation of work and family and equality and sex discrimination is absolutely clear, as it has been anyway suggested. In fact, the first cases known by the Court of Justice on work and children care were posed from the point of view of the Directive 76/207 EEC, of the Council, of 9 of February of 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Some of them have been already referred, as it has also been addressed the issue of non-transferability of the parental leave to ease gender equality. However, it is necessary to make reference to other cases in which specific problems have been discussed.

⁴¹ Judgment of 20 of June of 2012, *Riežniece* (C-7/12, EU:C:2013:410).

⁴² It is not relevant, for instance, that the worker had not developed the work assigned to the position due to an illness related to her pregnancy.

⁴³ In this regard, judgment of 7 September 2017, *H. and Land Berlin* (C-174/16, EU:C:2017:637).

It should be noted the connection between attention to persons with disabilities and parental leave. Not surprisingly, Art. 5(8) of the Directive –as clause 3(3) of the Framework Agreement 2009- submits to Member States the task to evaluate the necessity of adjusting the conditions of access and the detailed modalities of application of parental leave to necessities of parents with children with disabilities or long-lasting illnesses. Surely, that rule was established taking into consideration the case *Coleman*⁴⁴, about associative discrimination, which shows the special needs of care that requires a child in those conditions. By the way, also sex discrimination is concerned in this regard.

On the relationships between parental and maternity leave, ECJ case-law has expressed that both are qualitatively different leaves with their own purposes. Indeed, although with any degree of ambiguity, the Court has ruled that the maternity leave, also in the transferable to the other parent period, does not lose the condition of maternity right covered under Directive 92/85/EEC. Therefore, it is not a parental leave⁴⁵. This reasoning was repeated more resoundingly with the aim of excluding that a worker who returned from her maternity right and asked for a part-time parental leave could be protected under clause 6(1) of the Framework Agreement 2009 -*mutatis mutandis* Art. 9 of the Directive- on adaptation of timetable⁴⁶.

Now, with the establishment of the paternity leave, it is needed to distinguish it from parental leave, to ascertain if Member States comply with the requirements of the Directive. However, this task may become more difficult taking into account the ‘*passerelle clause*’ that establish a sort of interchange between paternity, parental, carers’ and maternity leaves. In this regard, art. 20(6) expresses that ‘For the purposes of complying with Articles 4, 5, 6 and 8 of this Directive and with Directive 92/85/EEC, Member States may take into account any period of, and payment or allowance with respect to, family-related time off work, in particular maternity leave, paternity leave, parental leave and carers’ leave, available at national level which is above the minimum standards provided for in this Directive or in Directive 92/85/EEC, provided that the minimum requirements for such leave are met and that the general level of protection provided to workers in the areas covered by those Directives is not reduced’.

⁴⁴ Judgment of 17 of July of 2008, *Coleman* (C-303/96, EU:C:2008:61).

⁴⁵ Judgment of 19 September 2013, *Montull* (C-5/12, EU:C:2013:571). Also, the judgment of 4 October 2019, *Dicu* (C-12/17, EU:C:2018:799), insists in the different purposes of both leaves.

⁴⁶ Judgment of 16 June 2016, *Rodríguez Sánchez* (C-351/14, EU:C:2016:447).

On the other hand, the relationships between parental and maternity leaves has been assessed from other perspective, related to the requirements to access to the later or, if so, to a public or private allowance derived from birth. Specifically, it has been posed the question if payment of maternity leave can be subject to the condition of a period of services between parental leave and the exercise of the new right. If so, it would be possible to deny the payment of the maternity, if parental leave was not compensated in any way. The answer by the ECJ is indeed interesting since its point of view is expressed in very wide terms. It departs from the consolidated case-law pursuant to which a permit guaranteed by EU Law cannot hinder the exercise of other leave granted by the same Law⁴⁷. In the case of the maternity leave, the right to maintain, at least, the same payment that would be obtained in case of interruption of the activity for reasons related to the health would lack of content if it would be necessary to return to work after parental leave and before taking the maternity leave⁴⁸. It is worth risking that the same reasoning might be applicable to the transit between parental and paternity leave.

Already in the strict consideration of the link between parental leave and equality on the grounds of gender, Recitals of 26 and 27 of the Directive 2006/54/EC recognize such relationship, appealing to an individual and not transferable paternity leave and to other one of the same features in case of adoption, which might be recognized to men and women. As it has been indicated, Art. 16 of that Directive provides –although does not impose– the establishment of such leaves from Member States⁴⁹. Meanwhile, the ECJ insists that men and women are located in a comparable situation for the purposes of care and education of children. Neither care nor education constitute measures of protection of health and security of pregnant women, who have recently given birth or are breastfeeding. Therefore, differences of treatment can constitute direct discrimination on the grounds of gender⁵⁰.

In that context, difficulties are focused mainly in drawing the exact dividing line between specific measures in favour of women –allowed in art., 157(4) TFEU– and gender discriminations, direct or indirect. A case in which these

⁴⁷ Judgment of 13 February 2014, *Terveys-ja* (C-512/11 and C-513/11, EU:C:2014:73).

⁴⁸ Judgment of 13 February 2014, *Terveys-ja*, (C-512/11 and C-513/11, EU:C:2014:73).

⁴⁹ Art. 16: 'Paternity and adoption leave. This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence'.

⁵⁰ Judgment of 16 of July of 2015, *Maistrellis* (C-222/14, EU:C:2015:241).

limits are discussed in their subtle balances is *Leone*⁵¹, which refers to an improvement and an anticipation in the retirement pension that compensated the interruptions in work due to maternity and caring children. Taking into account the balances of French legislation on this subject and the circumstances at hand, the Court concluded that an indirect discrimination had been produced because men had more difficulties to accede to the improvements in retirement derived from interruptions in their careers due to those reasons⁵². Actually, those improvement and anticipation were not really designed to compensate disadvantages, helping in professional career to workers which interrupt it for reasons related to birth and education of children. Indeed, their purposes were not targeted at all to build gender equality in their respective careers between men and women.

XII. RECONCILIATION RIGHTS AND DIVERSITY OF FAMILIAR STRUCTURES

It is evident that the Directive (UE) 2019/1158 is oriented to a family with two parents and in relationships among them and their children not born in multiple births. However, already from the 2009 Agreement it was increased the attention to particular situations. Now, the Directive develops deeper on this point, but mainly from a programmatic perspective not granting subjective rights. Particular focus is given to disabled parents or parents with disabled children.

There is, as it has been mentioned, a singular appeal –art. 5.8- to adjustment of parental leave in case of children with disabilities or long-term diseases-

⁵¹ Judgment of 17 of July of 2014, *Leone* (C-173/13, EU:C:2014:2090).

⁵² In reality, the case *Leone* (judgment of 17 of July of 2014, *Leone*, C-173/13, EU:C:2014:2090) may be understood as a logical sequence after the judgment of 29 of November of 2001, *Griesmar*, “C-366/99, EU:C:2001:648”. In the case *Leone*, the ECJ expresses that leaves apart from maternity were voluntary, unlike maternity. Furthermore, those leaves were not paid and didn’t accrued pension rights. The Court concedes that to compensate disadvantages suffered in professional careers due to the caring of children constitutes a legitimate aim of social policy. However, it wonders if the controverted measures had as actual purpose that compensation of disadvantages. Relating to a bonus of the pension equivalent to one year per each child cared, maybe it was in accordance with such a purpose, although some technical details suggested that it was not so. Indeed the bonus also covered women that gave birth before entering in the public service, so that they haven’t interrupted their professional careers. Besides, the system gave advantage to a percentage much longer of women than men. As regards to the access to early retirement, it was hard to understand that such measure compensated disadvantages in professional careers. Especially when it had not been correctly justified the systematic and coherent character of the applicable scheme. Actually, neither a bonus in the pension constituted a compensatory measure that could be sustained in art. 157.4 TFEU because it was applied at the time of the retirement and did not afforded remedies that compensate disadvantages suffered along the professional careers.

es or to the particularities of adoptive parents. It is only a call to Member States to assess those necessities. On the other hand, Art. 18(2)(a) refers to a report in which the interrelation between the leaves recognized in the Directive and other leaves –for instance, a leave in case of adoption- will be weighted. That is to say, although this latter is not regulated in Directive (EU) 2019/1158, it is recognized as a right granted in some Member States.

Also, Art. 5(8) appeals to parents with a disability. Again, it is only a submission to Member States directly related with Art. 23 of the UN Convention on the rights of persons with disabilities.

The articles of the Directive are absolutely silent on single-parent families, but its Recital 37 refers to them, so that Member States have to evaluate adaptation of parental leave to their specific needs. At this regard, the ECJ has ruled that a request for a preliminary ruling on granting the social security allowance provided for the second parent to a single mother who enjoys her *iure proprio* allowance is inadmissible taking into account that the Directive (EU) 2019/1158 is not on Social Security rights⁵³. As it can be seen, all considerations about specific families or families with particular necessities are made around the parental leave. So, it can be posed the question if it would not be reasonable taking those families into account in relationship with other rights of the Directive, particularly the binomial maternity-paternity and flexible work arrangements, but not forgetting the other institutions provided in it.

There are no more references, but the ECJ, almost in parallel with the publication of the Directive 2010/18/EU, passed a judgment that tackled the specific case of the caring of twin siblings, which affords interesting reflections on the care of more than a child, whether simultaneous or successive⁵⁴. The case-law that expresses de Court is particularly important because it includes a list of recommendations and guidelines to Member States on the implementation of which a broad reflection is needed.

The doubt raised by the referring Court concerned, above all, to the number of leaves which had to be granted to parents in case of twin birth: if one for each child born or one for both. The ECJ recognizes that the reference to the birth or adoption of ‘one child’ is doubtful. It states that the use of the singular ‘one’ may have generic value and not numeric, therefore not implying the right to one leave per each child. Undoubtedly, the increase in the burdens due to the care of twins has quantitative character, but the effort is not necessarily longer than caring for a single child. Thus, doubling the length of the right does not

⁵³ Judgment of 16 of May of 2024, CCC, C-673/22, EU:C: 2024:407.

⁵⁴ Judgment of 16 of September of 2010, *Chatzi*, C-149/10, EU:C:2010:534.

constitute an adequate measure, but it is necessary to assess the whole social system in which the rules established for solving the difficulties that parents of twin siblings face are framed. That evaluation is also necessary from the perspective of the principle of equality of treatment because it is compulsory that different circumstances do not receive the same treatment, except if there are reasons enough justifying this same treatment.

The reasoning of the Court continues with a reference to cases of children who are very close in age to each other, which have in common with the case of twins the simultaneity of upbringing. The Commission uses this comparison to defend the recognition of an autonomous leave for the care of each child. But the concept ‘small difference of age’ is of difficult quantification in its essence. Moreover, the care of twins, while requiring more effort, is favoured by certain synergies, so that this care is not necessarily similar to that provided for children with close ages.

Therefore, parents of twins are in a particular situation that has to be taken into account by the national legislation in its incorporation the EU Directive. Among the rules that a Member State which has established a parental leave longer than the minimum provided in the Directive can adopt –continues the reasoning of the Court–, an adequate measure would consist in adjusting it for the case of birth of successive children. So they could be conjugated an extension considerably longer and a wider flexibility in its enjoyment and in working organization. So, the increasing of tasks in education of children could be faced. However, it is possible to design qualitative different measures, as material assistance based in entities of care of children, or economic allowances and specific subsidies that allow a wider margin of choose of the model of parental care.

All which leads to the Court to hold that clause 5(2) of the Framework Agreement –currently, Art. 5 of the Directive– can’t be understood as requiring the birth of twins to confer entitlement to a number of periods of parental leave equal to the number of children born. However, understood in the light of the principle of equal treatment, this clause obliges the national law-maker to establish a parental leave regime which ensures that the parents of twins receive treatment that takes due account of their particular needs, according to the situation in the Member State concerned. It is incumbent upon national courts to determine whether the national rules meet that requirement and, if necessary, to interpret those national rules, so far as possible, in conformity with European Union law.

CHAPTER 25

WORKING HOURS, REST, EFFECTIVE WORK

MARÍA LUISA SEGOVIANO ASTABURUAGA

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I. DIRECTIVE 2003/88/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 4 NOVEMBER 2003 CONCERNING CERTAIN ASPECTS OF THE ORGANISATION OF WORKING TIME

1. Object

The Directive regulates working time and rest periods with the aim of protecting the safety and health of employees, since working time has a direct impact on the safety levels and health of employees, given that long working

hours are an occupational risk factor. The working day sets the time that the employee must dedicate to perform his activity, establishing the boundary between working time and rest period, so that the employee can devote it to his family, personal and social life.

2. Scope of application

The Directive lays down maximum working hours and minimum rest periods, including daily rest periods, weekly rest periods and annual leave, as well as breaks and maximum weekly working time. It also regulates certain aspects of night work, shift work and patterns of work, and lays down certain derogations. It contains certain provisions concerning mobile employees and off-shore work, as well as employees on board seagoing fishing vessels.

It applies to all sectors of activity, private and public, within the meaning of Article 2 of Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

The CJEU judgment of 20 November 2018, *Sindicatul familia Constanta* (C-147/17, EU:C:2018:926) decides whether professional foster carers, employed by an administrative authority, who take into their homes children whose parents have been temporarily or definitively deprived of the right to care and provide for their education and maintenance, fall within the scope of Directive 2003/88.

The court has answered this question in the negative, with the following reasoning:

“76 Consequently, the specific features inherent in the activity of professional foster carers at issue in the main proceedings must be regarded as conclusively precluding the application to them of Directive 2003/88/EC...”

It follows from the above that the Romanian authorities, in accordance with the second subparagraph of Article 2(2) of Directive 89/391, have ensured that, as regards the organisation of their working time, the safety and health of professional foster carers is ensured as far as possible.

The judgment of 15 July 2021, *Ministrstvo za obrambo*, C-742/19, EU:C:2021:597 resolves the question referred for a preliminary ruling as to whether, as a non-commissioned officer in the Slovenian army, an uninterrupted ‘imaginary service’ of seven days a month, performed by a non-commis-

sioned officer in the Slovenian army, during which he had to be permanently present and contactable in the barracks to which he was assigned, falls within the scope of the Directive. This “imaginary service” comprised both periods during which B. K. was required to carry out actual guard duty and periods during which he was simply obliged to remain at the disposal of his superiors. In the event of the unannounced arrival of the military police, an inspection team or an intervention team, he had to record this on the registration form and carry out the tasks assigned to him by his superiors.

The judgment has held that such situation does not fall within the scope of the Directive.

CJEU judgment of 4 May 2023, *Glavna direktsia „Pozharna bezopasnost i zashtita na naselenieto (Travail de nuit)* (joined cases C-529/21, 536/21, 732/21 and 738/21, EU:C:2023:374) analyzed whether Directive 2003/88 applies to an official working as a firefighter, ruling that it applies to all sectors of activity, whether public or private, in order to promote improvements in the safety and health of employees at work and to regulate certain aspects of the organisation of their working time. It points out that it follows that the scope of the Directive must be interpreted broadly, so that the exceptions to that scope provided for in the first subparagraph of Article 2(2) of the Directive must be interpreted restrictively. Those exceptions were adopted solely in order to ensure the proper functioning of services essential for the protection of public safety, health and order in the event of exceptionally serious and important circumstances (judgment of the Court (Second Chamber) of 4 October 2018, *Feniks* (C-337/10, EU:C:2018:805), paragraph 21 and the case-law cited).

II. WORKING TIME AND REST PERIOD

1. Concept

Article 2 of the Directive gives a definition of both concepts in the following terms:

- Working time: any period during which the employee remains at work, at the employer’s disposal and in the exercise of his activity or duties, in accordance with national laws and/or practices.
- Rest period: any period that is not working time.

2. Concept of Community law

The CJEU has specified that these are concepts of Community law, so that the Member States cannot unilaterally define the scope of these concepts, as this would jeopardise the useful effect of the Directive, as the interpretation in conformity is necessary to guarantee the full effectiveness of the Directive and the uniform application of these concepts in all the Member States, without it being possible to establish exceptions, as they are not provided for in Articles 17 and 18 of the Directive.

CJEU judgment of 9 September 2003, *Jaeger* (C-151/02, EU:C:2003:437) refers to a preliminary ruling, in which the parties to the main proceedings disagree as to whether the time spent in the on-call service (*Bereitschaftsdienst*) organised by the city of Kiel in the hospital it administers should be considered working time or a rest period.

The dispute pending before the referring court relates exclusively to the employment law aspects of on-call duty and not to the conditions of compensation for on-call duty.

Mr Jaeger takes the view that the on-call duty he performs as an attending or emergency doctor in the emergency department is to be regarded in its entirety as working time within the meaning of the ARBZG because of the direct application of Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time.

The CJEU states that: “In any event the concepts of working time and rest period within the meaning of Directive 93/104 may not be interpreted in accordance with the requirements of the various legislations of the Member States but constitute concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of that directive, as the Court did at paragraphs 48 to 50 of the judgment in *Simmap*. Only such an autonomous interpretation is capable of securing for that directive full efficacy and uniform application of those concepts in all the Member States.”

CJEU judgment of 1 December 2006, *Dellas* (C-14/04, EU:C:2005:728) rules on the question referred for a preliminary ruling concerning Mr Dellas, an educator specialising in centres for young people or adults with disabilities in residential care, who was dismissed by his employer because of disagreements with the latter concerning, in particular, the concept of actual work, as well as the remuneration corresponding to the hours of night work, carried out while on duty, by the educators of the centres and of the medical-social services for the care of disabled and handicapped persons.

The CJEU states: “(42) As regards more specifically the concept of ‘working time’ within the meaning of Directive 93/104, the case-law has already held that that directive defines that concept as any period during which the employee remains at work, at the employer’s disposal and in the course of his activity or duties, in accordance with national legislation and/or practice, and that that concept is intended as opposed to that of a rest period, the two concepts being mutually exclusive (see *SIMAP*, paragraph 47, and *Jaeger*, paragraph 48).

(43) In that context, it must be pointed out, first, that Directive 93/104 does not provide for an intermediate category between periods of work and rest periods and, second, that the specific elements of the concept of ‘working time’ for the purposes of that directive do not include the intensity of the work performed by the employee or his output.

(44) The Court has also held in that regard that the concepts of ‘working time’ and ‘rest period’ within the meaning of Directive 93/104 must not be interpreted in the light of the provisions of the various laws of the Member States, but constitute Community law concepts which must be defined according to objective characteristics, by reference to the scheme and purpose of that directive, which is to lay down minimum requirements for improving the living and working conditions of employees. Only such an autonomous interpretation can ensure the full effectiveness of the directive and the uniform application of those concepts in all the Member States (see *Jaeger*, paragraph 58).

(45) The Court of Justice has concluded that the Member States may not unilaterally determine the scope of these concepts, or of the other provisions of Directive 93/104, by subjecting to any conditions or restrictions the right of employees, recognised by that directive, to have their periods of work and, correspondingly, their rest periods duly taken into account.

The CJEU judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82), a volunteer firefighter in the municipality of Nivelles, who claims one euro in damages for failure to pay him, during his years of service, the remuneration for his services as a volunteer firefighter, in particular his on-call services at home.

The judgment states that the fact that Mr Marzak does not have the status under national law of a professional firefighter but that of a volunteer firefighter does not preclude him from being classified as a ‘employee’ within the meaning of Directive 2003/88, given that he became a member of the fire protection service of the municipality of Nivelles, in which he carried out certain real and effective activities under the direction of another person, in return for which he received remuneration.

It points out that Member States may not derogate in respect of volunteer firefighters from the obligations arising from the Directive, in particular the definition of working time contained in Article 2, nor may they adopt a more restrictive definition of working time than that contained in the Directive.

3. Assumptions considered working time

The question has been raised as to whether medical on-call duty should be regarded as working time when there may be long periods of inactivity during such time.

The CJEU has held that medical on-call duty is considered to be effective working time because during such duty - even if there are periods of inactivity during which they can rest or sleep - doctors are required to be physically present in the hospital, which deprives them of the freedom to dispose of their time, keeping them away from their family and social environment. On the other hand, in the case of on-call duty - where physical presence at the workplace is not required, but only that the doctor be present and available if his services are needed - the total time spent on call is not considered as working time, but only the period during which the actual provision of services is required. (judgment of 3 October 2000, *SIMAP*, C-303/98, EU:C:2000:528).

Similarly, as we have seen in the previous section, in the judgment of 9 September 2003, *Landeshauptstadt Kiel* (C-151/02, EU:C:2003:437) and judgment of 1 December 2006, *Dellas* (C-14/04, EU:C:2005:728).

The different consideration that the CJEU gives to on-call duty and on-call duty is reflected in the CJEU judgment of 11 January 2007, *Vorel* (C-437/05, EU:C:2007:23) in which it declared that it is not contrary to Directive 2003/88 for on-call duty to be paid differently.

The question has been referred for a preliminary ruling as to whether the fact that a forestry officer is provided with accommodation on the parcel of land he is to guard means that all the time during which he is provided with accommodation must be classified as working time. The CJEU, by order of 4 March 11, *Grigore* (C-258/10, EU:C:2011:122), has resolved this question, ruling:

“Article 6 of Directive 2003/88 must be interpreted as precluding, in principle, a situation in which, although the contract of employment of a forestry officer provides for a maximum working day of eight hours a day and a maximum working week of 40 hours, that officer must in reality, by virtue of statutory obligations, undertake the supervision of the forest parcel for which he is respon-

sible either on a permanent basis or in such a way as to exceed the maximum working week provided for in that article. It is for the national court to carry out the necessary checks to determine whether that is the case in the case before it and, if necessary, to verify whether the conditions laid down in Article 17(1) of Directive 2003/88 or in Article 22(1) of that directive concerning the possibility of derogation from Article 6 are satisfied in relation to the dispute in the main proceedings.

The question has been referred for a preliminary ruling as to whether the time spent by technical assistance and maintenance employees travelling from their homes to the first centre where the client-company, which has requested their services, is located, as well as the time spent travelling from the client-company's centre, where they have carried out the last intervention of the day, to their homes, should be classified as working time.

The CJEU judgment of 10 September 15, *Tyco* (C-266/14, EU:C:2015:578) has ruled that this period is to be considered as working time.

The question has been referred for a preliminary ruling as to whether on-call time spent at home by an employee who is required to respond to his employer's summons within eight minutes is to be regarded as working time.

The CJEU in the aforementioned judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82) has understood that it must be considered working time within the meaning of Article 2 of the Directive, despite the fact that the place where the employee must be is not his place of work but his home.

It recalls that the Court has already had occasion to rule on the question of the qualification of on-call time as "working time" or "rest period", stating:

"(59) On the other hand, it is clear from the case-law of the Court of Justice that the decisive factor for the classification of 'working time' within the meaning of Directive 2003/88 is the fact that the employee is obliged to be physically present at the place determined by the employer and to remain at the employer's disposal in order to be able to provide his services immediately in case of need. Those obligations, which prevent the employees concerned from choosing their place of stay during on-call periods, must be regarded as falling within the performance of their duties (see, to that effect, Case C-151/02 *Jaeger*, paragraph 63, and the order in Case C-258/10 *Grigore*, unpublished, paragraph 53 and the case-law cited).

(60) Finally, it should be noted that the same is not true in the situation where the employee is on call under the on-call duty system, which means that he is permanently accessible but does not have to be present at the workplace. Although he is at his employer's disposal insofar as he must be contactable, in this situation the employee can manage his time with fewer constraints and devote himself to his personal interests. In such circumstances, only time devoted to the actual provision of services should be regarded as 'working time' within the

meaning of Directive 2003/88 (see, to that effect, Case C-151/02 Jaeger, paragraph 65 and the case-law cited).

He concludes that, in the present case, Mr Matzak was not only required to be contactable during his on-call time but also to respond to his employer's summons within eight minutes and, moreover, was required to be physically present at the place determined by the employer, which was Mr Matzak's home and not his place of work, as was the case in the cases which gave rise to the case-law cited in paragraphs 57 to 59 of the present judgment.

The question has been raised for a preliminary ruling as to whether the period during which parental leave is taken is to be regarded as working time for the purposes of holiday entitlement.

The judgment of 4 October 2018, *Dicu* (C-12/17, EU:C:2018:799) has answered that this period is not considered as working time:

“(31) However, the case-law cited in the two preceding paragraphs cannot be applied *mutatis mutandis* to the situation of a employee, such as Ms Dicu, who was on parental leave during the relevant period. 32 It must first of all be pointed out that the occurrence of incapacity for work due to illness is, in principle, unforeseeable ... and beyond the employee's control By contrast, the taking of parental leave is not unforeseeable and results, in most cases, from the employee's wish to care for his child (see, to that effect, Case C-116/06 Kiiski, EU:C:2007:536, paragraph 35).

(33) On the other hand, in so far as the employee on parental leave is not subject to physical or mental limitations caused by illness, he is in a different situation from that resulting from incapacity for work due to ill health.

In any event, the situation of an employee on parental leave differs from that of a employee exercising her right to maternity leave. Maternity leave is intended, on the one hand, to protect the biological condition of the woman during and after her pregnancy and, on the other hand, to protect the special relationship between the woman and her child during the period following pregnancy and childbirth by preventing the accumulation of burdens resulting from the simultaneous pursuit of an occupational activity from disturbing that relationship (see, to that effect, judgment of 18 March 2004 Merino Gómez C-342/01, EU:C:2004:160, paragraph 32, and Case C-116/06 Kiiski, paragraph 46).

The question was raised for a preliminary ruling as to whether the six-hour daily “on-call period” during which the employee, a specialist technician, could leave the transmission centre, but had to be reachable in case of a call-out and, if necessary, had to report to his place of work within one hour, should

be regarded as working time. Only urgent activities had to be carried out immediately, while other activities could be carried out the following day.

The judgment of 9 March 2021, *D. J. v Radiotelevizija Slovenija* (C-344/19, EU:C:2021:182), has answered with nuances that it should be considered as working time.

The question has been referred for a preliminary ruling as to whether working time is considered to be that which requires a firefighter on ‘BvE’ duty, RJ to be contactable at all times and to have with him his operational uniform and a service vehicle provided by his employer. He must respond to incoming calls informing him of incidents for which he is required to make decisions. In certain situations, he must be able to travel to the place of intervention or to his place of work. and, in the event of a call, he must be able to reach the city limits, in uniform and with the aforementioned vehicle, making use of the exceptions to the generally applicable traffic rules and the pre-emptive rights to which he is entitled, within twenty minutes.

The judgment of 9 March 2021, *RJ v Stadt Offenbach am Main* (C-580/19, EU:C:2021:183) has answered with nuances that it should be considered as working time:

“... only constitutes, in its entirety, ‘working time’ within the meaning of that provision if it is clear from an overall assessment of all the circumstances of the case, in particular the consequences of that period and, where appropriate, the average frequency of intervention during that period, that the constraints imposed on that employee during that period are of such a nature as to affect objectively and substantially his ability to manage freely, during that same period, the time during which his professional services are not required and to devote it to his own interests”.

The question has been referred for a preliminary ruling as to whether the break during which the employee, a company firefighter, has to remain at the employer’s disposal in the event of immediate departure for an intervention, is to be considered as working time if he has to do so within a period of two minutes, a situation which arises only occasionally and unforeseeably.

The CJEU judgment of 9 September 2021 (C-107/19, EU:C:2021:722) has understood that it is working time.

The question has been raised for a preliminary ruling as to whether the period during which a employee takes compulsory vocational training courses after the end of normal working hours, at the training provider’s premises, away from his place of work and without performing work duties, is to be regarded as working time.

The judgment of 28 October 2021 (C-909/19, EU:C:2021:893) has answered this question in the affirmative.

The question referred for a preliminary ruling is whether the period during which a standby firefighter, employed part-time by the municipality under a system of on-call duty on a non-attendance basis, makes himself available to the fire brigade of the fire station for which he was trained, must be regarded as working time, being obliged, when he receives an emergency call to take part in an intervention, to arrive at the fire station within five minutes of the call and, when he receives an emergency call to take part in an intervention, to arrive at the fire station within five minutes of the call, He is obliged to participate in 75 % of the interventions of that brigade, and when he receives an emergency call to participate in an intervention, he is obliged to arrive at the fire station within five minutes of the call and, in any event, to respect a maximum presentation time of ten minutes.

This period of on-call duty on a non-face-to-face basis covers, in principle, 24 hours a day, 7 days a week. It is interrupted only by holiday periods.

The judgment of 11 November 2021 (C-214/20, EU:C:2021:893), has understood, with nuances, that it is not working time:

“...does not constitute “working time”, within the meaning of that provision, if an overall assessment of all the circumstances of the specific case, in particular the extent and conditions of that right to exercise another professional activity and the absence of an obligation to participate in all the interventions carried out from that park, shows that the limitations imposed on that employee during that period are not of such a nature as to affect objectively and very significantly his right to freely manage, during that period, the time during which his professional services as a firefighter are not required”.

4. Registration of working time

The question has been raised whether household employers are exempt from the obligation to establish a system that allows the working hours worked by their employees to be registered.

The Judgment of 19 December 2024 (C-531/23, EU:C:2024:1050) has declared that household employers are not exempt from the obligation to keep a record of working hours:

“49 In the light of the case-law referred to in paragraphs 38 to 40 above, it must be held that the judicial interpretation of a provision of national law or

an administrative practice based on such a provision, under which employers are exempt from establishing a system enabling the duration of the daily working time of each domestic worker to be measured, and which therefore deprive domestic workers of the possibility of determining objectively and reliably the number of hours worked and their distribution over time, clearly does not comply with the provisions of Directive 2003/88, and more specifically with the rights flowing from Article 3, 5 and 6 of that directive, read in the light of Article 31(2) of the Charter.

50 However, it is apparent from the case-law referred to in paragraph 34 above that the general obligation to record working time does not preclude national legislation from laying down specific features either because of the sector of activity concerned or because of the specific characteristics of certain employers, in particular their size, provided that such legislation provides employees with effective means of ensuring compliance with the rules relating, in particular, to the maximum weekly working time.

51 Thus, a system requiring employers to measure the daily working time of each domestic worker may, on account of the particular features of the domestic work sector, provide for derogations in respect of overtime and part-time work, provided that those derogations do not render the legislation in question devoid of substance, which it is, in the present case, for the referring court, which alone has jurisdiction to interpret and apply national law, to determine.

52 As regards the alleged indirect discrimination on grounds of sex, it should be recalled that it is clear from Article 2(1)(b) of Directive 2006/54 that such discrimination occurs where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

53 The existence of such a particular disadvantage may be established, for example, if it were proved that that provision, criterion or practice is to the disadvantage of a significantly greater proportion of individuals of one sex as compared with individuals of the other sex. It is for the national court to assess to what extent the statistical evidence adduced before it is valid and whether it takes into account, on the one hand, all those workers subject to the national legislation at issue and, on the other, the respective proportion of workers that are and are not affected by the alleged difference in treatment (see, to that effect, judgment of 24 February 2022, TGSS (Domestic worker unemployment), C-389/20, EU:C:2022:120, paragraphs 41 and 43 and the case-law cited).

54 The national court must not only take into account all those workers subject to the national legislation in which the difference in treatment has its origin, but also compare the respective proportion of workers that are and are not affected by the alleged difference in treatment among the women in the workforce who come within the scope of that legislation with the same proportion of men in the workforce coming within its scope (see, to that effect, judgment of 24 February 2022, TGSS (Domestic worker unemployment), C-389/20, EU:C:2022:120, paragraph 42 and the case-law cited).

55 In the present case, the referring court appears to rely on the judgment of 24 February 2022, TGSS (Domestic worker unemployment) (C-389/20, EU:C:2022:120), and the statistics set out therein in order to assume that the applicant in the main proceedings belongs to a group of workers that is clearly female-dominated.

56 It follows that the judicial interpretation of a provision of national law and/or an administrative practice based on such a provision, under which employers are exempt from their obligation to establish a system enabling the duration of the daily working time of each domestic worker to be measured, would put female workers at a particular disadvantage compared with male workers.”

Hence, the judgment concludes

“Articles 3, 5 and 6 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union,

must be interpreted as precluding national legislation, and its interpretation by the national courts or an administrative practice based on such legislation, under which domestic employers are exempt from the obligation to establish a system enabling the duration of time worked by domestic workers to be measured, thereby depriving those workers of the possibility of determining objectively and reliably the number of hours worked and their distribution over time.”

III. MINIMUM REST PERIODS

The Directive establishes a minimum daily, weekly and annual rest period, as well as the right to a break during work lasting more than six hours. However, it does not contain any provision as to what constitutes a rest period

beyond the mere definition, contained in Article 2, that it is any period which is not working time.

The issue of the so-called “right to digital disconnection”, which can be defined as the right of employees not to receive any communication from the company at the end of the working day, in particular not to receive calls, messages or emails, is gaining momentum in most EU countries. The Directive does not contain any provision in this respect.

1. Daily rest

Article 3 of the Directive, in Chapter I, under the heading “minimum rest periods”, “daily rest”, provides that Member States shall take the necessary measures to ensure that all employees have a minimum daily rest period of 11 consecutive hours in the course of each 24-hour period.

Article 4 provides that Member States shall take the necessary measures to ensure that employees whose daily working time exceeds six hours are entitled to a rest break, the details of which, including the duration and conditions for granting it, shall be determined by collective agreements or agreements between the two sides of industry or, failing that, by national legislation.

The rule does not stipulate the maximum length of the daily working day, and it will therefore be up to the regulations of each Member State to determine this.

However, two points should be made, the first being that, by setting a minimum daily rest period of 11 hours, the maximum working day that can be worked in order to respect this rest period is 13 hours.

Secondly, if it is stipulated that the average working week may not exceed 48 hours, including overtime, in accordance with Article 6, this provision must be taken into account when setting the maximum daily working hours.

The judgment of 17 March 2021, *Academia de Studii Economice din Bucureops ti* (C-585/10, EU:C:2021:210), decides whether, in the case where an employee concludes several employment contracts, the term “working time”, as defined in Article 2(1) of Directive 2003/88, means “any period during which the employee is at work, at the employer’s disposal and carrying out his activity or duties”, refers to a single (full-time) contract or to all the (employment) contracts concluded by that employee.

The Court has ruled that, where a employee has concluded several employment contracts with the same employer, the minimum daily rest period

laid down in Article 3 applies to those contracts taken as a whole and not to each of them separately.

2. Weekly rest and maximum working hours

2.1 WEEKLY REST

It is regulated in Article 5, which states that it is not appropriate to overlap daily rest with weekly rest, since, if this overlapping were accepted, it would mean that, in certain cases, weekly rest would be reduced, as the hours corresponding to daily rest would be included in it. In total, the right to 35 hours of rest (24 hours of weekly rest + 11 hours of daily rest) is acknowledged.

The judgment of 9 November 17, *Maio Marqués Da Rosa* (C-306/16, EU:C:2017:844) resolves the question whether the right to an uninterrupted minimum rest period of 24 hours per seven-day period, referred to in Article 5 of Directive 2003/88, requires that the employee be granted such rest after six days of work.

The question arises because Mr Maio Marqués Da Rosa provided his services for Varzim Sol, the work being organised in accordance with rotating work and rest periods during which the employees successively occupied the same posts at a predetermined rhythm, there being occasions, in 2008 and 2009, when that employee was working for seven consecutive days, having brought an action claiming damages, on the understanding that he should have been paid for the seventh days as overtime. The referring court asks, in essence, whether Article 5 of the Directive and Article 31 of the Charter must be interpreted as requiring that the minimum uninterrupted rest period of 24 hours to which an employee is entitled be granted, at the latest, for a period of six consecutive working days.

The judgment states that it follows from the wording of Article 5 of the Directive that the Member States must adopt the necessary measures to ensure that all employees enjoy “for each seven-day period” a minimum period of uninterrupted rest of 24 hours, plus the 11 hours of daily rest provided for in Article 3 of Directive 2003/88, but it does not specify when this minimum period of rest must be taken and therefore contains a certain flexibility in the choice of that time.

The judgment of 2 February 2023, *MÁV-START* (C-477/21, EU:C:2023:140) ruled that the daily rest period provided for in Article 3 of

that Directive does not form part of the weekly rest period referred to in Article 5 of that Directive, but is additional to it. Where national legislation provides for a weekly rest period exceeding 35 consecutive hours, the employee must be granted, in addition to that period, the daily rest guaranteed by Article 3 of that directive.

2.2 WEEKLY WORKING TIME

Article 6, true to the objective proclaimed in Article 1 of the Directive - to lay down minimum safety and health requirements for the organisation of working time - provides that Member States shall take the necessary measures to ensure that, in accordance with the need to protect the safety and health of employees, weekly working time is limited, leaving the Member States free to determine how this limitation is to be implemented.

It sets a maximum limit on weekly working time, which is an average of 48 hours, including overtime per seven-day period.

2.3 REFERENCE PERIOD

Article 16 significantly extends the reference period to be taken into consideration for fixing the minimum weekly rest period and the maximum weekly working time.

It provides that the minimum uninterrupted rest period of 24 hours per 7-day period may be set on the basis of a reference period of 14 days.

With regard to the maximum working week set at 48 hours, including overtime, Member States are allowed to calculate it on the basis of a reference period of four months.

The judgment of 11 April 2019, *Syndicat des cadres de la Sécurité intérieure* (C-254/18, EU:C:2019:318) resolves the question referred for a preliminary ruling as to whether Decree No 2002-1279, as amended by Decree No 2017-109, which lays down specific rules on working time and rest periods applicable to French national police officers, precludes Articles 6, 16 and 19 of the Directive 2017/109, which lays down specific rules on working time and rest periods applicable to French national police personnel, is contrary to the directive, Article 1 of which provides that the weekly working time, calculated over each seven-day period, including overtime, may not exceed 48 hours on average over a six-month period of the calendar year.

2.4 EXCEPTIONS

Article 17(1) provides that Member States may derogate from Articles 3 to 6 - daily rest, breaks, weekly rest, maximum weekly working time, 8 - duration of night work - and 16 - reference periods - when, because of the particular characteristics of the activity carried out, the working time is not measured and/or predetermined, or when it can be determined by the employees themselves.

They may in particular provide for exemptions in the case of:

- Senior executives or other persons with autonomous decision-making power.
- Employees in family regime.
- Employees in liturgical activities in churches and religious communities.

2.5 INDIVIDUAL NON-APPLICATION OF THE MAXIMUM WEEKLY WORKING TIME: OPT-OUT CLAUSE

The opt-out clause is the possibility under Article 22 for Member States to derogate from Article 6 - maximum weekly working time - provided that they take the necessary measures to ensure that the maximum weekly working time is not exceeded:

- No employer shall require an employee to work more than 48 hours in any seven-day period, calculated as an average of the reference period referred to in Article 16(b) - 4 months - unless he has obtained the employee's consent to perform such work.
- No employee shall suffer any prejudice by reason of his unwillingness to give his consent to perform such work.
- The employer shall keep up-to-date records of all employees carrying out such work.
- The above records shall be made available to the competent authorities, which may, for reasons connected with the safety and/or health of employees, prohibit or restrict the possibility of exceeding the maximum weekly working time.
- The employer provides the competent authorities, at their request, with information on the consent given by employees to perform

work exceeding 48 hours in any seven-day period, calculated over a reference period of four months.

IV. PACE OF WORK

In the preamble, paragraph 11, it is pointed out that certain characteristics of the work may have adverse effects on the safety and health of employees,

In line with this consideration, Article 13, under the heading “pace of work”, provides that Member States shall take the necessary measures to ensure that employers who plan to organise work according to a certain pattern take into account the general principle of adapting work to the individual, in particular to reduce monotonous work and work at a certain pace, depending on the type of activity, and health and safety requirements, especially with regard to breaks during working time.

V. NIGHT WORK, SHIFT WORK, MOBILE EMPLOYEES, OFF-SHORE WORK AND EMPLOYEES ON BOARD SEAGOING VESSELS

Night work and shift work are regulated in Articles 8 to 12 of the Directive.

The concept of mobile employees and off-shore work is included in Article 20 of the Directive.

The regulation of the cases of employees working on board sea fishing vessels is found in Article 21 of the Directive.

The judgment of 7 July 2022, *Coca-Cola European Partners Deutschland GmbH* (C-257/21, EU:C:2022:529) decides whether it is contrary to Directive 2003/88 for a collective agreement to pay more for occasional night work (25% surcharge) than for regular night work (20% surcharge), the CJEU having ruled that the question is outside EU law.

Judgment of 20 June 2024, *EA v Artemis security SAS* (C-367/23, EU:C:2024:529) ruled that it is not contrary to Directive 2003/8 for national legislation to provide that, in the event of a breach by an employer of the national provisions implementing this provision of EU law, which provide that night employees are entitled to a free health assessment prior to their recruitment and at regular intervals thereafter, the night employee’s right to com-

pensation for that breach is subject to the requirement that the night employee proves the harm caused to him or her.

VI. MORE FAVOURABLE PROVISIONS

Article 15 states: “This Directive shall be without prejudice to the Member States’ right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of employees”.

In other words, the Directive lays down minimum rest periods and maximum working periods, as well as maximum reference periods, so that Member States can set longer rest periods, shorter working periods and shorter reference periods.

These provisions are complemented by Article 23, which provides that the implementation of the Directive shall not constitute a valid justification for a reduction in the general level of protection of employees.

CHAPTER 26

MINIMUM WAGES¹

PROF. DR. DANIEL PÉREZ DEL PRADO

INDEX: I. Reasons for a directive on minimum wages. II. The controversial legal base. III. Objectives and measures. 1. Promotion of collective bargaining on wage-setting. 2. Measures for guaranteeing adequate minimum wages. 3. Measures for the effectiveness of minimum wage protection. IV. Conclusions: the added value of Directive on minimum wage

I. REASONS FOR A DIRECTIVE ON MINIMUM WAGES

The promotion of Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union (hereinafter, Directive 2022/2041) has been justified on two main reasons. On the one hand, there are a number of legal arguments that enshrines the intervention into the labour market in order to guarantee appropriate working conditions (“decent” in terms of the ILO). On the other hand, it

¹ This work is part of the research project “Technological change and transformation of labour sources: Law and collective agreement in the face of digital disruption” (RTI2018-094547-B-C21) and “Algorithmic management and equal opportunities in the company (AlgoEquality)” (TED2021-130325A-I00).

is also possible to find economic reasons that focuses on the increase of inequality and poverty and the deterioration of social wellness.

Regarding the first ones, it is necessary to highlight that the Union aims, *inter alia*, to promote the well-being of its peoples and to work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment, while promoting social justice and equality between women and men². In similar terms, Article 151 TFEU provides that the Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter (ESC), have as their objectives, *inter alia*, the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection and dialogue between management and labour³.

Among these rights, Article 31 of the Charter of Fundamental Rights of the European Union (CFREU) must be highlighted, as provides for the right of every worker to working conditions which respect his or her health, safety and dignity⁴. Coherently, the ESC establishes that all workers have the right to just conditions of work, to a fair remuneration sufficient for a decent standard of living for themselves and their families, as well as of statutory minimum wage-setting mechanisms, to ensure the effective exercise of this right⁵.

Nevertheless, these are not the statutory regulations involved, as collective bargaining has a key role in the development of minimum wage regulation. Accordingly, Article 27 of the CFREU, that is, the right of workers to information and consultation is also connected to this issue; along with Article 28, that provides for the right of workers and employers to negotiate and conclude collective agreements at the appropriate levels. The ESC establishes the right of all workers and employers

² Article 3 of the Treaty on European Union (TEU). Similarly, article 9 of the Treaty on the Functioning of the European Union (TFEU) sets that the Union is to take into account, *inter alia*, requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, and the fight against social exclusion.

³ Directive 2022/2041 also mentions other international standards, such as the of ILO Convention 131, on setting minimum wages, that sets the obligation to establish a minimum remuneration whose amount is set taking into account, not only economic parameters of general interest, but also « the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups» (article 3).

⁴ And taking into consideration the right to equality between women and men in all areas, including employment, work and pay (Article 23 of the CFREU).

⁵ Articles 2 and 4 of the ESC.

to organise in local, national and international organisations for the protection of their economic and social interests and the right to bargain collectively⁶.

Finally, Chapter II of the European Pillar of Social Rights (EPSR) establishes a set of principles to serve as a guide towards ensuring fair working conditions. Principle No 6 reaffirms workers' right to fair wages that provide for a decent standard of living. It also provides that adequate minimum wages are to be ensured, in a way that provides for the satisfaction of the needs of the worker and his or her family in light of national economic and social conditions. Furthermore, it recalls that in-work poverty is to be prevented and that all wages are to be set in a transparent and predictable way, according to national practices and respecting the autonomy of the social partners⁷.

Consequently, there is a quite relevant legal *acquis* focused on guaranteeing adequate wages at EU level, although concrete regulation was necessary. Nevertheless, as it was mentioned before, these are not the only reasons provided to justify the regulation in this area. Among economic arguments, the Directive itself mentions the effects of the COVID-19 pandemic, although the deterioration of living and working conditions started before and goes beyond it⁸. It also observes some structural trends, such as the reshape of labour markets, increasingly characterised by high shares of precarious and non-standard forms of work, often including part-time, seasonal, platform and temporary agency workers. These trends have led, in many cases, to a greater job polarisation resulting in an increasing share of low-paid and low-skilled occupations and sectors in most Member States, as well as to higher wage inequality in some of them. Also, the strengthen of the in-working poverty phenomenon.

Under the light of the consequences of the last economic crisis and, particularly, the Great Recession, the EU has adopted a perspective based on the idea that «better living and working conditions, including through adequate minimum wages, benefit workers and businesses in the Union as well as society and the economy in general and are a prerequisite for achieving fair, inclusive and sustainable growth»⁹ and assumed that «minimum wage protection through collective agreements is beneficial to workers and em-

⁶ Article 6 of the ESC.

⁷ Principle No 8 of the Pillar provides that the social partners are to be consulted on the design and implementation of economic, employment and social policies according to national practices and that they are to be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action.

⁸ CASAS BAAMONDE, M. E., *El Derecho del Trabajo en la emergencia de la pandemia de la COVID-19. ¿y después?*, Real Academia de Ciencias Morales y Políticas, Madrid, 2021.

⁹ Recital 7.

ployers as well as businesses»¹⁰. This Commission's option is crucial for the development of this kind of regulation or policies if it is taken into consideration that there is no consensus among economist concerning the effects of minimum wages on the labour market and the economy as whole. In general, these positions could be grouped around two large blocks of arguments¹¹:

On the one hand, critics of the minimum wage raise two major objections. The first of them refers to the fact that the minimum wage would artificially raise the price of the labour factor above the free market price, which would result in a poor allocation of resources. The final consequence is that the allocation of labour and capital would be inefficient, since one would be relatively more expensive than the other as a consequence of legislative intervention. The second is related to the effect of the minimum wage on the population at which it is directed and, in particular, lower-paid workers. Specifically, it is alleged that far from affecting them positively, it would produce the opposite effect, since it would reduce the employment of these groups.

On the other hand, the defenders of the minimum wage reject the previous arguments on the basis that, first, it has not been demonstrated that the minimum wage represents the only obstacle to economic efficiency and that its suppression would achieve the objective of a balanced labour market. In fact, if we start from an imperfect market situation, the elimination of just one of the distortions does not necessarily have to bring us closer to the optimum but may even take us further away from it¹². In other words, in imperfect labour markets, intervention does not have to produce a negative effect, but on the contrary, it can result in a more efficient allocation of resources. Second, in relation to the well-being of the groups subject to protection, even in the case in which a negative effect on employment is demonstrated, a net loss of well-being cannot be deduced from this, since this depends on both the salary level and the frequency with which you have work.

Considering this lack of consensus concerning the economic impact of wage-setting, the social consequences of the last economic crisis and the desire of relaunching social regulation, the EU institutions have promoted and important and novel directive considering its content, but not without controversy.

¹⁰ Recital 23.

¹¹ MARSHALL, F. R.; BRIGGS, V. M.; KING, A. G., *Economía laboral: salarios, empleo, sindicalismo y política laboral*, Ministerio de Trabajo y Seguridad Social. Centro de Publicaciones, Madrid, 1987.

¹² LIPSEY, R. G.; LANCASTER, K., *The General Theory of Second Best*, Elgar Reference Collection. International Library of Critical Writings in Economics, vol. 220. Cheltenham, U.K. and Northampton, Mass.: Elgar, 2008, pp. 55-82.

II. THE CONTROVERSIAL LEGAL BASE

Inspired by these reasons, Directive 2022/2041 was built following the procedure set at Article 154 TFEU, as any other working condition (Article 153(1)(b) TFEU). After consulting management and labour in this two-stage process with regard to possible action to address the challenges related to adequate minimum wage protection in the Union, there was no agreement among the social partners to enter into negotiations with regard to those matters. Consequently, the Commission decided to take action at Union level by using the remaining legal way, that is, the article 153 TFEU. After tough political negotiations in the Council owed to the opposition of Denmark and Sweden out of a concern for the autonomy of their social model, the Directive was passed by the European Parliament and published in the Official Diary in October 2022.

However, shortly after its adoption, Denmark brought an action of annulment¹³ based on three main reasons. First, the infringement of the of the conferral of powers and the breach of Article 153(5) TFEU, that sets that the provisions of this Article shall not apply, among others, to pay. Denmark argues that the Directive interferes directly with the determination of the level of pay in the Member States and concerns the right of association, which is excluded from the competence of the EU legislature pursuant to Article 153(5) TFEU. Second, Denmark also submits that the contested directive could not validly be adopted on the basis of article 153(1)(b) TFEU because it pursues both the objective set out in Article 153(1)(b) TFEU and the objective set out in Article 153(1)(f) TFEU. The latter objective is not ancillary to the first and presupposes the use of a decision-making procedure different from that followed when the contested directive was. The two decision-making procedures are incompatible since the adoption of acts under article 153(1)(f) TFEU, in contrast to those adopted under Article 153(1)(b) TFEU, requires unanimity (article 153(2) TFEU). Finally, the Danish Government submits that, in adopting Article 4(1)(d) and Article 4(2) of the contested directive, the defendants infringed the principle of the conferral of powers and acted in breach of Article 153(5) TFEU. Those provisions interfere directly with the determination of the level of pay in the Member States and concern the right of associa-

¹³ Action brought on 18 January 2023 — Kingdom of Denmark v European Parliament and Council of the European Union (Case C-19/23).

tion, which is excluded from the competence of the EU legislature pursuant to Article 153(5) TFEU.

The advocate general Emiliou supported this position in his Opinion of 14 January 2025. According to his point of view, neither Article 153(2)(b) TFEU, read in conjunction with Article 153(1)(b) TFEU, nor Article 175 TFEU could have been used by the EU legislature to adopt the Directive 2022/2041. On the one hand, because the Directive directly interferes with the ‘pay’ exclusion in Article 153(5) TFEU. On the second hand, because using Article 175 TFEU as legal base would circumvent the ‘pay’ exclusion in Article 153(5) TFEU as well ¹⁴. It follows that the EU legislature was not competent to adopt that instrument and, thus, acted in breach of the principle of conferral laid down in Article 5(2) TEU.

Although the judgement is pending, there are, nevertheless, good reasons to think that the Directive will survive ¹⁵. Concerning the first and the last reason, it must be reminded that in spite of the wording of the Article 153(5) TFEU, it has been interpreted as the legal base for several prior legal measures, such as Directive 2008/104/EC on temporary agency work, Directive 1999/70/EC on fixed-term work, or Directive 97/81/EC on part-time work. The main argument is that the Court has interpreted Article 153(5) TFEU restrictively: «the exception relating to ‘pay’ set out in Article 137(5) EC is explained by the fact that fixing the level of pay falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States. In those circumstances, as European Union law stood, it was decided to exclude determination of the level of wages from harmonisation under Article 136 EC et seq. (see *Del Cerro Alonso*, paragraphs 40 and 46, and *Impact*, paragraph 123). That exception must therefore be interpreted as covering measures – such as the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed wage – which amount to direct interference by European Union law in the determination of pay within the Union. It cannot, however, be extended to any question involving any sort of link with pay; otherwise, some of the areas

¹⁴ Opinion of 14 January 2025, *Kingdom of Denmark v European Parliament and Council of the European Union* (C-19/23, ECLI:EU:C:2025:11, paragraphs 71-77 and 130-134). This opinion has been analyzed by BARRIO FERNÁNDEZ, A., «La Opinión del Abogado General Emiliou sobre la Directiva de Salarios Mínimos: Una Visión Crítica», *Brief de la AEDTSS*, 2025, 7 February 2025, at <https://www.aedtss.com/la-opinion-del-abogado-general-emiliou-sobre-la-directiva-de-salarios-minimos-una-vision-critica/>.

¹⁵ GARBEN, S., «Choosing a Tightrope Instead of Rope Bridge - The Choice of Legal Basis for the AMW Directive», en Ratti, L., Brameshuber, E., Pietrogiovanni, V. (eds.) *The EU directive on adequate minimum wages: context, commentary and trajectories*, 1, Hart Publishing, Gordonsville, 2024, pp. 25-38.

referred to in Article 137(1) EC would be deprived of much of their substance (see, by analogy, *Impact*, paragraph 125)¹⁶.

This is in line with the Court's general interpretation of the principle of conferral and EU competences which can be summarized as, on the one hand, derogations from main rules always need to be interpreted restrictively (*Case Del Cerro Alonso*¹⁷) and, on the other hand, Union Competences are usually strengthened and very rarely the Court annuls a measure for having been adopted *ultra vires*¹⁸.

The Directive tries to justify this point when it declares «this Directive neither aims to harmonise the level of minimum wages across the Union nor does it aim to establish a uniform mechanism for setting minimum wages. It does not interfere with the freedom of Member States to set statutory minimum wages or to promote access to minimum wage protection provided for in collective agreements, in accordance with national law and practice and the specificities of each Member State and in full respect for national competences and the social partners' right to conclude agreements. This Directive does not impose and should not be construed as imposing an obligation on the Member States where wage formation is ensured exclusively via collective agreements to introduce a statutory minimum wage or to declare collective agreements universally applicable. Moreover, this Directive does not establish the level of pay, which falls within the right of the social partners to conclude agreements at national level and within the relevant competence of Member States»¹⁹.

Concerning the second reason, the ECJ's case law has set that the choice of legal basis must be focused on the “predominant purpose or component”²⁰ of the measure, that determine which indent and, as a consequence, which procedure is to be applied²¹. It is clear that Directive 2022/2041 has as “essential objective”, not the regulation of representation and collective defence of the interest of workers and employers, but the improvement of working conditions, particularly if it considers that wage is one of the most significant ones.

¹⁶ Judgment of 10 June 2010, *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and others* (Joined Cases C-395/08 and C-396/08, EU:C:2010:329, paragraphs 36-37).

¹⁷ Judgement of 13 September 2003, *Yolanda Del Cerro Alonso* (C-307/05, EU:C:2007:509).

¹⁸ Among these rare examples, it is possible to find the Judgment of 5 October 2000, *Germany v Parliament and Council* (C-376/98, EU:C:2000:544) or the Judgment of Judgment of 12 November 1996, *United Kingdom v Council* (C-84/94, EU:C:1996:431).

¹⁹ Paragraph 19.

²⁰ Judgment of 8 December 2020, *Hungary v Parliament and Council* (C-620/18, EU:C:2020:1001, paragraphs 38).

²¹ Again, Judgment of Judgment of 12 November 1996, *United Kingdom v Council* (C-84/94, ECLI:EU:C:1996:431, paragraphs 25-30).

«Collective bargaining is only an instrument to achieve the main objective, namely higher minimum wages»²².

Hence, as it is explained in the preamble, the Directive takes precautions concerning the principles of subsidiarity and proportionality: «action taken at Union level to improve the adequacy and coverage of minimum wages can contribute to further improving living and working conditions in the Union and mitigating concerns about possible adverse economic effects resulting from isolated measures of Member States. Since the objectives of this Directive cannot be sufficiently achieved by the Member States, but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives. This Directive lays down procedural obligations as minimum requirements, thus leaving untouched Member States' prerogative to introduce and maintain more favourable provisions. Rights acquired under the existing national legal framework should continue to apply, unless more favourable provisions are introduced by this Directive. The implementation of this Directive cannot be used to reduce existing rights for workers, nor can it constitute valid grounds for reducing the general level of protection afforded to workers in the field covered by this Directive, including, in particular, with regard to the lowering or abolition of minimum wages»²³.

These are translated into the normative part, when Article 1(2) & (3) sets that «this Directive shall be without prejudice to the full respect for the autonomy of the social partners, as well as their right to negotiate and conclude collective agreements» and «the competence of Member States in setting the level of minimum wages, as well as to the choice of the Member States to set statutory minimum wages, to promote access to minimum wage protection provided for in collective agreements, or both». Additionally, paragraph (4) declares that «the application of this Directive shall be in full compliance with the right to collective bargaining. Nothing in this Directive shall be construed as imposing an obligation on any Member State: (a) where wage formation is ensured exclusively via collective agreements, to introduce a statutory minimum wage; or (b) to declare any collective agreement universally applicable.»

²² Kovács, E., «Subject Matter (Article 1)», en Ratti, L., Brameshuber, E., Pietrogiovanni, V. (eds.) *The EU directive on adequate minimum wages: context, commentary and trajectories*, 1, Hart Publishing, Gordonsville, 2024, p. 152.

²³ Paragraphs 37 and 38.

III. OBJECTIVES AND MEASURES

Aside the legal base controversy, the Directive pursues three main objectives: the adequacy of statutory minimum wages; the promotion of collective bargaining on wage-setting; and the effective access of workers to their rights to minimum wage protection where provided for under national legislation and/or collective agreements. Our analysis will be focused on each of these three areas.

But, before that, it is important to highlight that the subjective scope of the Directive is limited to workers «who have an employment contract or employment relationship as defined by law, collective agreements or practice in force in each Member State, with consideration to the case-law of the Court of Justice». As a consequence, it follows the trend initiated by Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, and followed by Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, and Directive on improving working conditions in platform work, besides our protagonist. This ambiguous formulation and, particularly, the reference to the ECJ's case law has been interpreted as a way to expand the subjective scope, as national concepts are narrower than the one elaborated by the Court of Justice²⁴. Actually, the preamble expressly declares that, fulfilling the criteria set by Luxembourg, the subjective scope comprehends «workers in both the private and the public sectors, as well as domestic workers, on-demand workers, intermittent workers, voucher-based workers, platform workers, trainees, apprentices and other non-standard workers, as well as bogus self-employed and undeclared workers could fall within the scope of this Directive».

Additionally, the Directive introduces a set of definitions that had not been included in others before. These concepts are: 'minimum wage' (the minimum remuneration set by law or collective agreements that an employer, including in the public sector, is required to pay to workers for the work performed during a given period); 'statutory minimum wage' (minimum wage set by law or other binding legal provisions, with the exclusion of minimum wages set by collective agreements that have been declared universally applicable without any discretion of the declaring authority as to the content of the applicable provisions); 'collective bargaining' (all negotiations which take place according to national

²⁴ MENEGATTI, E., «Scope (Article 2)», in Ratti, L., Brameshuber, E., Pietrogiovanni, V. (eds.) *The EU directive on adequate minimum wages: context, commentary and trajectories*, 1, Hart Publishing, Gordonsville, 2024, pp. 156-158.

law and practice in each Member State between an employer, a group of employers or one or more employers' organisations on the one hand, and one or more trade unions on the other, for determining working conditions and terms of employment); 'collective agreement' (written agreement regarding provisions on working conditions and terms of employment concluded by the social partners that have the capacity to bargain on behalf of workers and employers respectively according to national law and practice, including collective agreements that have been declared universally applicable); and 'collective bargaining coverage' (the share of workers at national level to whom a collective agreement applies, calculated as the ratio of the number of workers covered by collective agreements to the number of workers whose working conditions may be regulated by collective agreements in accordance with national law and practice).

Whereas there is no doubt that these definitions are relevant «for the purposes of this Directive», if they will have an impact on other parts of the EU's social *acquis* remains to be seen. Actually, there is little EU Law in the field of wages, including collectively bargained wages. Although Articles 28 and 31 CFREU are connected to this issue, there is no explicit mention of wage-setting or minimum wage requirements. Regarding secondary law, what exists mostly covers the right to equal pay (Directive 2006/54/EC on equal treatment between men and women, Directive 2000/78/EC establishing a general framework on equal treatment, and Directive 96/71/EC concerning the posting of workers). Only few directives, such as Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union and Directive 2014/67/EU on administrative cooperation through the Internal Market Information System regulate wage beyond this issue, but collaterally. Hence, the codification of the meaning of the five terms will help to delineate and promote the common core of (minimum) wage-setting systems in the EU Member States and prevent regressive developments in the field of EU labour law²⁵.

1. Promotion of collective bargaining on wage-setting

The promotion of collective bargaining in the Directive is justified in the fact that «sectoral and cross-industry level collective bargaining is an essential factor for achieving adequate minimum wage protection and therefore needs to

²⁵ HOUWERZIJL, M., «Definitions (Article 3)», en Ratti, L., Brameshuber, E., Vincenzo Pietrogiovanni (eds.) *The EU directive on adequate minimum wages: context, commentary and trajectories*, 1, Hart Publishing, Gordonsville, 2024, pp. 169-179.

be promoted and strengthened.»²⁶ The idea that underlies this statement and, as a consequence, the whole Directive, is that countries with a high collective bargaining coverage tend to have a small share of low-wage workers regardless whether they have a statutory minimum wage system²⁷ (all EU countries except for Denmark, Sweden, Finland, Austria and Italy). Although high coverage seems to be associated with a higher effective wage floor in countries without statutory minimum wages, it is also useful for countries which use this wage floor mechanism, as contributes to reduce inequality and working poor.

Nevertheless, other analysis highlights that the relationship between coverage rate and low-paid workers is far from be clear, as there are countries with similar coverages but very different levels of low salaries and, on the contrary, countries with similar shares of low-paid workers and quite different coverage rates²⁸. In this regard, it must be kept in mind that there are substantial differences among wage-floor systems that make the comparison particularly difficult. For example, those which have *erga omnes* extension mechanisms (i.e., France or Spain) show high coverage rates despite their level of unionization is low, what is the key aspect for keep these high rates in other countries, such as the Nordics.

At the end of the day, the point in common of both approaches could be found in the idea that high coverage rates would benefit, without a doubt, countries with non-statutory minimum wages (contractual system -again, Denmark, Sweden, Finland, Austria and Italy) and countries with statutory minimum wages (statutory system²⁹) but without generalized extension mechanism or with important differences between the guaranteed wage floor and the levels of the labour market. In these cases, high coverage collective bargaining would contribute to reduce low-salaries.

Anyway, the idea of having, at least, two main group of countries concerning wage setting mechanisms underlies the measures included in the Article 4 and drove the debate around this standard. Actually, its wording, described as narrowed³⁰, was aimed to equate strengthening of collective bargaining on wage

²⁶ Recital 16.

²⁷ HAAPANALA, H.; MARX, I.; PAROLIN, Z., *Decent Wage Floors in Europe: Does the Minimum Wage Directive Get It Right?*, IZA - Institute for Labour Economics, 2022, p. 29.

²⁸ LO FARO, A., «Promotion of Collective Bargaining on Wage-Setting (Article 4)», en Ratti, L., Brameshuber, E., Pietrogiovanni, V. (eds.) *The EU directive on adequate minimum wages: context, commentary and trajectories*, 1, Hart Publishing, Gordonsville, 2024, p. 192.

²⁹ Within this group, differences are also very important as it is practically shown in the table included in MÜLLER, T.; SCHULTEN, T., «The Collective Bargaining in Disguise - How the European Minimum Wage Directive Aims to Strengthen Collective Bargaining», en Ratti, L., Brameshuber, E., Pietrogiovanni, V. (eds.) *The EU directive on adequate minimum wages: context, commentary and trajectories*, 1, Hart Publishing, Gordonsville, 2024, p. 75.

³⁰ LO FARO, A., «Promotion of Collective Bargaining on Wage-Setting (Article 4)», cit., p. 184.

setting with an increase of collective rate, what is the furthest point admitted by Member States (including some social partners) with a contractual system; whereas it is excluded any reference to the notion of wage adequacy, whose relevance remained restricted to countries with a statutory system.

Hence, Article 4 distinguishes two main types of criteria for promoting collective bargaining on wage-setting. On the one hand, general measures, applicable to all Member States. This includes: (a) promote the building and strengthening of the capacity of the social partners to engage in collective bargaining on wage-setting, in particular at sector or cross-industry level; (b) encourage constructive, meaningful and informed negotiations on wages between the social partners, on an equal footing, where both parties have access to appropriate information in order to carry out their functions in respect of collective bargaining on wage-setting; (c) take measures, as appropriate, to protect the exercise of the right to collective bargaining on wage-setting and to protect workers and trade union representatives from acts that discriminate against them in respect of their employment on the grounds that they participate or wish to participate in collective bargaining on wage-setting; and (d) for the purpose of promoting collective bargaining on wage-setting, take measures, as appropriate, to protect trade unions and employers' organisations participating or wishing to participate in collective bargaining against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

As it can be seen, all of them are procedural measures aimed to guarantee a balanced and non-interfered collective bargaining between the parties and involved. Nevertheless, most of them are not real novelties in most European industrial relation systems. This highlights the importance of other complementary measures focused on guarantying its effective implementation, such as the one included in Article 9, which sets that, in accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, Member States shall take appropriate measures to ensure that, in the awarding and performance of public procurement or concession contracts, economic operators and their subcontractors comply with the applicable obligations regarding wages, the right to organise and collective bargaining on wage-setting, in the field of social and labour law established by Union law, national law, collective agreements or international social and labour law provisions, including ILO Freedom of Association and the Protection of the Right to Organise Convention No 87 (1948) and ILO Right to Organise and Collective Bargaining Convention No 98 (1949).

On the other hand, measures for Member States with low collective bargaining coverage. This is defined as a rate is less than a threshold of 80 %. The Member State shall establish such an action plan after consulting or by agree-

ment with the social partners, or, following a joint request by the social partners, as agreed between them. The action plan shall set out a clear timeline and concrete measures to progressively increase the rate of collective bargaining coverage, in full respect for the autonomy of the social partners. The Member State shall review its action plan regularly, and shall update it if needed. Where a Member State updates its action plan, it shall do so after consulting the social partners or by agreement with them, or, following a joint request by the social partners, as agreed between the social partners. In any event, such an action plan shall be reviewed at least every five years. The action plan and any update thereof shall be made public and notified to the Commission.

This threshold has been defined as an indicator triggering the obligation to establish an action plan³¹, but not a target itself. The reason is the respect of the autonomy of the social partners, as their right to collective bargaining excludes any obligation to conclude collective agreements. As a consequence, each Member State with a collective bargaining coverage rate below 80 % should adopt an action plan to promote collective bargaining to «progressively increase the collective bargaining coverage rate»³². The same reason justifies that this obligation must be considered achieved when the Member State sets an action plan whose measures aimed to “progressively increase” the rate, regardless the practical result in its trend in the short run. From this approach, it would be an obligation of “means” but not of “results”. This does not imply that each country is exempted of assessing the plan and follow its effectiveness. As it was mentioned before, they are actually obliged to review and shall update its action plan. But it must remain clear that it is not possible to impose an obligation which depends (at least, partially) on others, the social partners.

Aside this question, there are a series of queries that should be solved³³. First, what the rate is to be used in order to check the level of coverage. During the preparatory phase, the Commission used the database elaborated by the Hugo Sinzheimer Institute at the University of Amsterdam and incorporated to the OECD’s statistics³⁴, but there are others which show different results, such the ones built by the ILO³⁵, Eurostat (built using the Structure of Earnings

³¹ MÜLLER, T., *Dawn of a new era? The impact of the European Directive on adequate minimum wages in 2024*, ETUI, Brussels (Belgium), 2024, p. 2.

³² Recital 25.

³³ LO FARO, A., «Promotion of Collective Bargaining on Wage-Setting (Article 4)», cit., p. 195.

³⁴ EUROPEAN COMMISSION, *Commission Staff Working Document accompanying the Consultation document «Second phase consultation of Social Partners under 154 TFEU on a possible action addressing the challenges related to fair minimum wages»*. SWD(2020) 105 final, European Commission, Brussels (Belgium), 2020, pp. 33-34.

³⁵ <https://ilostat.ilo.org/topics/industrial-relations/>

Survey -SES-) and the Eurofound³⁶ (based on the European Companies Survey -ECS-). Furthermore, within the Eurostat system, it is also possible to calculate this rate by using the Labour Force Survey³⁷. Second, how the 80 % threshold will be measured when confronted to with infra-national partitions based on different sectors or regions. Finally, and in spite of the interpretation given here, if this threshold can have any role in the evaluation of Member States' obligations to comply with the Directive.

2. Measures for guaranteeing adequate minimum wages.

The core of the measures included in the Directive points to the procedure to set statutory minimum wages. Paradoxically, this procedure is not applicable to all Member States, but only for those that have this type of mechanism. In this respect, it is worth reinterring that Directive 2022/2041 does not oblige the Member States to introduce or maintain statutory minimum wages, but a legal tool to fix and update it when it is assumed by the national legal system. In other words, the Directive does not aim to the institutional harmonization of a uniform statutory minimum wage mechanism.

Hence, Article 5 regulates the basic elements of the procedure for setting minimum wages. By nature, this standard chrysalises in Member States' obligations and it is practically no conceivable a case for its direct application. However, some authors have suggested, taking into consideration the ECJ's case law, that a hypothetical violation of this article could mean the inapplicability of the respective provisions of the national law³⁸. Despite this is legally possible, this hypothetical solution would consider its practical consequences, as there would not be any alternative to substitute the infringing national norm.

The Article 5 can be analysed by distinguishing five different areas or purposes:

First, its objectives or functions. Procedures for the setting and updating of statutory minimum wages shall contribute to achieve a decent standard of living, reducing in-work poverty, as well as promoting social cohesion and

³⁶ <https://www.eurofound.europa.eu/en/european-industrial-relations-dictionary/collective-bargaining-coverage>

³⁷ https://www.mites.gob.es/es/estadisticas/condiciones_trabajo_relac_laborales/CCT/welcome.htm

³⁸ SAGAN, A.; SCHMIDT, A., «The Procedure for Setting Adequate Statutory Minimum Wages (Article 5)», en Ratti, L., Brameshuber, E., Vincenzo Pietrogiovanni (eds.) *The EU directive on adequate minimum wages: context, commentary and trajectories*, 1, Hart Publishing, Gordonsville, 2024, p. 270.

upward social convergence, and reducing the gender pay gap. Particularly, the Article connects this aim with the criteria used to determine the level of the statutory minimum wage.

According to the interpretation of the ESC, the standard of living is referred not only to the workers but also their families³⁹. The European Social Pillar also follows this line. Actually, its Principle No 6 declares that minimum wages are adequate when provide for «the satisfaction of the needs of the worker and his or her family in light of national economic and social conditions, while safeguarding access to employment and incentives to seek work»⁴⁰. This means that both personal and family needs must be analysed in the particular national and social context, including employment issues. In all cases, personal and family needs include not only material necessities such as food, clothing and housing, but also immaterial needs, like the participation in cultural, educational and social activities could also be taken into consideration⁴¹.

Regarding the reduction of work poverty, it seems that wage setting systems must be focused on diminishing it at national level⁴². Among the criteria associated to this aim it highlights «the comparison of the net minimum wage with the poverty threshold and the purchasing power of minimum wages»⁴³. It must be remembered that the European Union has set the at-risk-of-poverty threshold by using different levels of the median and mean disposable income⁴⁴, although the most common used would be the one set at 60% of the median equivalised disposable income. These thresholds are naturally connected to the criteria used to set the minimum statutory wage though Member States are free to decide which one it shall be used, as we are going to see below.

Promoting social cohesion and upward social convergence has been connected to the idea of sustaining domestic demand and purchasing power⁴⁵. In other words, according to the Directive, a stimulant wage policy can be good for the functioning of the whole economy as an incentive of the aggregate demand provided that inflation is under control and does not affect job searching. Additionally, the Directive assumes that «supporting a sustainable and inclu-

³⁹ Recital 4.

⁴⁰ Recital 5.

⁴¹ Recital 28.

⁴² Recital 8.

⁴³ Recital 28.

⁴⁴ These levels are set between the 40% and the 70% of the national median equivalised income and the 40% and the 60% of the national mean equivalised income. [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_statistics_on_income_and_living_conditions_\(EU-SILC\)_methodology_-_monetary_poverty#Description](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_statistics_on_income_and_living_conditions_(EU-SILC)_methodology_-_monetary_poverty#Description)

⁴⁵ Recital 8.

sive economic recovery, which should lead to an increase in quality employment»⁴⁶. As this aim can be pursued in different geographical levels, some analyses have highlighted that the Directive would be setting it at European level⁴⁷. Although this can be easily assumed, in practical terms, it is difficult to separate how wage setting policies could contribute to improve social cohesion and convergence in different geographical substrates instead of an extensive and integral impact on all of them or, if preferred, on the social cohesion as whole.

The last objective is reducing the gender pay gap. Here, the hypothesis is crystal clear: «given the over-representation of women in low-paid jobs, improving the adequacy of minimum wages contributes to gender equality, closing the gender pay and pension gap, as well as elevating women and their families out of poverty, and contributes to sustainable economic growth in the Union⁴⁸». Although closing gender pay gap seems to appear as an ancillary goal, as it would be the natural result of the improvement of pay conditions, its express mention shows its particular importance within this wage setting policy.

Second, the criteria to be considered in order to set the national statutory minimum wages. As it was mentioned above, according to Article 5(1), these criteria must be related to the objectives of the wage setting procedure as they were described previously. Member States are free to decide those criteria and their relative weight in accordance with their national practices in relevant national law, in decisions of their competent bodies or in tripartite agreements. Anyway, the criteria shall be defined in a clear way. Member States may decide on the relative weight of those criteria, including the elements referred to in paragraph 2, taking into account their national socioeconomic conditions.

Although this freedom, Member States shall include, «at least», the following ones:

First, the « a) the purchasing power of statutory minimum wages, taking into account the cost of living». This is crucial for both the aims of preventing in-work poverty and social cohesion, as it assesses the real advance of the minimum wages depending on the inflation. There cannot be advantages in these areas whether salaries do not grow in real terms.

⁴⁶ Recital 9

⁴⁷ SAGAN, A.; SCHMIDT, A., «The Procedure for Setting Adequate Statutory Minimum Wages (Article 5)», cit., p. 208.

⁴⁸ Recital 10

Second, «the general level of wages and their distribution» and «the growth rate of wages». Aside that wage distribution is also connected to social cohesion and equality (including the gender approach), both criteria are basic in order to determine a certain level in a particular period of time. In order to set a new minimum limit, it is necessary to know where we are and where we come from. Some authors has criticized the used of both of them as, in the Heisenberg's uncertainty principle, «it does not make sense to establish as parameters at the same time the levels (static dimension) and their growth (dynamic dimension): if we look at the general level of salaries at all times, it will not matter where it comes from (at what speed it increases or decreases); on the contrary, if what is measured is the growth rate, this will only serve to set a minimum wage in relation to another that already existed in a previous period». This is true if it is considered a precise moment, for example, the one to take the decision of the increasement and its amount. Nevertheless, from a dynamic perspective, considering not a punctual time, but a period, both criteria can be useful if, for instance, it is necessary to distribute the agreed growth over several years taking into account the economic situation.

The last criterium is the «long-term national productivity levels and developments», which is the only one that goes further the limits of pay policy and connects to the general functioning of the economy. The idea that underlies it is to remunerate as much as possible according to the national economic growth, as it is a maxim of Economics that, in a perfect market, labour is remunerated with its marginal productivity. Nevertheless, in a quite innovative approach, Directive 2022/2041 includes the terms “in the long-run” and its “developments”. This suggests that it would be possible to remunerate over the limit of the national productivity if this is compensated in the long run or by any development, such as the advances produced by technological innovations.

From a general perspective, it must be highlighted that, completely in line with the objectives mentioned above, there are no more criteria related to general economic variables and, particularly, inflation. This implies a clear change compared to previous historical stages of the EU policy, and makes emerge some doubts about the relationship between Directive 2022/2041 and the European Economic Governance, particularly, the Stability and Growth Pact. Anyway, within the limits of the Directive, as their purposes are guaranteeing a decent level of live, preventing in-work poverty and contributing social cohesion, price variation must be taken into consideration as an indispensable issue in a strategy for real improvements in the purchasing power instead of an impassable limit for any kind of wage increment.

Third, the minimum thresholds. Here, the Directive is also very flexible, as the two mentioned on it must be interpreted as examples, as Member States *may* use indicative reference values commonly used at international level *such as* 60 % of the gross median wage and 50 % of the gross average wage, and/or indicative reference values used at national level.

The Directive justifies their inclusion because they are «commonly used at international level»⁴⁹. In preparatory documents, the Commission pointed to both median and average wages and both net and gross median and average wages, highlighting the pros and cons of each option⁵⁰. The idea that underlies the use of these variables is setting a limit, like the poverty threshold which seems to inspire them⁵¹. Actually, the percentages applied to these indicators are not mentioned, but are just in the middle of the ones frequently used in its statistics (*vid. supra*)

Among these international references, the preparatory documents also mentioned the thresholds set by the European Committee of Social Rights, within the Council of Europe, in order to comply with the obligations imposed on them by the European Social Charter, that is, the 60% of the average net salary, and in no case can it be below 50%⁵². It must be noted that net salary is lower than gross wage. Actually, in 2018, minimum wages were lowest as a ratio of the net average wage (below 45%) in Czechia, Estonia, Germany, Greece and Hungary⁵³. Additionally, the average salary is usually higher than the median salary, as the highest wages means a low number of recipients but influences the amount of the whole sample. If the differences between gross and net salaries are big enough, it would be possible to fulfilled the requirements of the interpretation of the Charter, whatever the criteria used (if it is chosen one of the two included in the Directive).

Whatever the refence used, Directive 2022/2041 admits the possibility of setting not only one, but more than one minimum statutory wages. Article 6(1) allows different rates of statutory minimum wage for specific groups of

⁴⁹ Recital 28.

⁵⁰ EUROPEAN COMMISSION, *Commission Staff Working Document accompanying the Consultation document «Second phase consultation of Social Partners under 154 TFEU on a possible action addressing the challenges related to fair minimum wages»*. SWD(2020) 105 final, cit. Annex 2.

⁵¹ For example, the OECD uses the concept of “low wage”, placing it at two-thirds of the median wage, while the “poverty wage”, which coincides with the international reference for the poverty line, would be 50% of the median wage. half. OECD (ED.), *Tackling the jobs crisis*, OECD, Paris, 2009.

⁵² EUROPEAN COMMITTEE OF SOCIAL RIGHTS, *Conclusions XIV-2 - Statement of interpretation - Article 4-1*, European Committee of Social Rights, Strasbourg, 1998.

⁵³ EUROPEAN COMMISSION, *Commission Staff Working Document accompanying the Consultation document «Second phase consultation of Social Partners under 154 TFEU on a possible action addressing the challenges related to fair minimum wages»*. SWD(2020) 105 final, cit., p. 22.

workers or for deductions that reduce the remuneration paid to a level below that of the relevant statutory minimum wage. These variations or deductions must «respect the principles of non-discrimination and proportionality, the latter including the pursuit of a legitimate aim». According to its wording, this standard comprehends two different technics, both limited by the principle of proportionality. On the one hand, “deductions” and, on the other hand, “variations”.

Deductions has not been dogged by controversy⁵⁴ as they are usually referred not to the statutory minimum wage, but the total gross salary. In other words, deductions are not usually applicable to statutory minimum wage. On the contrary, this is a limit for deductions. Nevertheless, Article 6 suggests that in some circumstances further “deductions” that lower the statutory minimum wage can be justified, even though these exemptions are very limited as they must pursue a legitimate aim. According to the preamble, examples of such deductions might be the recovery of overstated amounts paid or deductions ordered by a judicial or administrative authority⁵⁵.

So, the interest is on what the Directive call “variations”, which shall be connected to specific “group of workers”. The use of the word “variation” suggests the idea of setting “different rates”, typically lower than the general one, but not the total exception of the minimum wage guarantee for these groups, what would imply the practical elimination of this institution, besides being disproportionated. Actually, as an exception to the general rule, that it the existence of a single statutory minimum wage for all workers, variation must respect the principles of non-discrimination and proportionality, the latter including the pursuit of a legitimate aim. Typically, the promotion of employment among groups in difficulties, such as young people, long-term unemployed people or people with disabilities⁵⁶ has been considered a legitimate aim. Actually, Article 6(1)(c) of Directive 2000/78/EC considers as a legitimate aim setting different remuneration conditions for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection.

Fourth, the update of the statutory minimum wage. As it was mentioned before, this is an area in which the EU has made a 180° turn. Whereas a dec-

⁵⁴ GRZEBYK, P., «Variations and Deductions (Article 6)», en Ratti, L., Brameshuber, E., Vincenzo Pietrogiovanni (eds.) *The EU directive on adequate minimum wages: context, commentary and trajectories*, 1, Hart Publishing, Gordonsville, 2024, p. 222.

⁵⁵ Recital 29.

⁵⁶ A complete list from all Member States can be found in GRZEBYK, P., «Variations and Deductions (Article 6)», cit., p. 220.

ade ago, the official position of EU's institutions was the complete opposition to this kind of mechanisms as they were seen as a source of inflation, its inclusion in the Directive clearly shows, at least, that the fight against poverty and social cohesion may be put at the same level of importance as the inflation. Although it is necessary to see how is going to be the concrete practical relationship between these wage guarantee mechanisms and the European Economic Governance, particularly, the Stability and Growth Pact, just considering them in such a way places the debate in a completely different scenario.

Despite this huge change of direction, Directive 2022/2041 shows here the same flexibility and precautions as in other areas. Hence, Article 5(3) sets that «Member States may additionally use an automatic mechanism for indexation adjustments of statutory minimum wages, based on any appropriate criteria and in accordance with national laws and practices, provided that the application of that mechanism does not lead to a decrease of the statutory minimum wage». It must be noted that the wording of this standard expressly mentions that these tools may be based on «any appropriate criteria», what opens the possibility of introducing the last trends on this issue, such the use of the productivity or the results of the company. Nevertheless, there is no doubt that the tradition in wage indexation is the use of inflation or, more precisely, the national price indexes as official reference of this variable. If this is connected to the aim pursued by the Directive that we have analysed above, it is crystal-clear that guaranteeing the maintenance of the purchasing power continues being the key target of this kind of mechanism, despite it may be compensated or relativized by other criteria. This interpretation is additionally supported but the non-regression clause included at the end: «the application of that mechanism does not lead to a decrease of the statutory minimum wage» (Article 16). Concerning this guarantee, nevertheless, it must be highlighted that is referred to the “statutory minimum wage”, that is, statutory indexation mechanisms, so reductions could still be admitted in collective bargaining indexation mechanism provided that the minimum level set by them is above the threshold set by the statutory minimum wage.

Along with automated indexation, Directive 2022/2041 sets another additional tool also focused on assuring the adequate updating of minimum wages, preventing practices of real reduction of the minimum statutory wages but simply not altering them and permitting that inflation makes the rest. Hence, Article 5(5) creates two different obligations depending if the automatic indexation mechanism is set or not. In the first case, updates take place, at least, at least every four years, whereas in the latter, it will be happened, at least, every two

years. It must be noted that the Directive is ensuring regular and timely updates, so more frequent renewals are admissible (and desirable). For example, Article 27 of the Spain's Workers Statute sets the update of the statutory minimum wage annually and admits a six-month revision when inflation forecast is not met. From a practical perspective, indexation mechanisms usually set the year as the most common reference for updating. From this perspective, the Directive is very flexible when admits four times more the most common situation when automated renewal is set and the double when it is not automated.

Finally, the creation of consultive bodies. This is probable the most important novelty, as institutional participation in this issue is not generalized in the EU. According to Article 5(6), «each Member State shall designate or establish one or more consultative bodies to advise the competent authorities on issues related to statutory minimum wages, and shall enable the operational functioning of those bodies». The explicit reference to one or more bodies is probably based on the idea of, at least, two tasks when dealing with statutory minimum wages: on the one hand, setting or configuring them, what includes the selection and application of criteria and indicative reference values for the determination of the level of the statutory minimum wage, the establishment of variations and deductions in statutory minimum wage, and the settlement of an automatic indexation formula; and, on the other hand, the updates of statutory minimum wages, when automatic indexation has not been adopted or its modification or adaptation where such formula exists, and the decisions both on the collection of data and the carrying out of studies and analyses to provide information to authorities and other relevant parties involved in statutory minimum wage-setting (although this information can be used also in the first field mentioned first).

In all these activities (that is, those included in Articles 5 & 6), social partners participation shall be voluntary possible «in a timely and effective manner» (Article 7) which means that their inclusion in the consultive bodies in charge of carrying out these tasks must be guaranteed.

3. Measures for the effectiveness of minimum wage protection

Finally, the Directive includes a number of mechanisms aimed to guarantee its effectiveness. Article 8 explicitly mentions it, but it is possible to find them further its limits. According to the preamble, «an effective enforcement system, including reliable monitoring, controls and field inspections, is necessary to ensure the functioning of and compliance with national statutory mini-

imum wage frameworks»⁵⁷, so it is possible to set connection with Articles 10 to 15. Hence, the tools related to the effectiveness of the wage-setting mechanisms can be classified as follows:

First, controls and field inspections conducted by labour inspectorates or the bodies responsible for the enforcement of statutory minimum wages. Although, the focus is set on labour inspection, other administrative bodies with competences in this area are also considered, such as labour courts⁵⁸, dispute resolution entities or social security administrations. Actually, there is not obstacle to include non-administrative or private subjects that develops activities on wage enforcement and, particularly, the social partners. In the case of the inspection staff, ILO Convention 81 requires it to be composed of public officials whose status and conditions of service are such that they are assured of stability of employment and are independent of changes of government and of improper external influences (Article 6).

Besides controls and inspections (what includes visits, examinations, tests, enquires, interrogations or orders, but also and particularly, training and guidance -Article 8 (b)-), their actions comprehend the possibility of imposing penalties and other legal remedies⁵⁹ provided for shall be effective, proportionate and dissuasive (Article 13). In Member States without statutory minimum wages, those rules may contain or be limited to a reference to compensation and/or contractual penalties provided for, where applicable, in rules on enforcement of collective agreements. To carry out these activities, inspectors and other bodies must be furnished with adequate tools and means to properly perform theirs task. In the current context, this inevitable implies the possibility of using digital technologies⁶⁰, what connects this tool with other of the Directive related to the collection and analysis of data on salaries and wage-setting. To this end, but also for others related to enforcement, the Directive reminds that the EU makes available the necessary funding under the Technical Support Instrument and the European Social Fund⁶¹.

Second, as it was mentioned above, the effectiveness of wage setting mechanisms is also assured by the fact of, in the awarding and performance of public procurement or concession contracts, requiring economic operators and

⁵⁷ Recital 30.

⁵⁸ Loi, P., «Penalties (Article 13)», en Ratti, L., Brameshuber, E., Pietrogiovanni, V. (eds.) *The EU directive on adequate minimum wages: context, commentary and trajectories*, 1, Hart Publishing, Gordonsville, 2024, pp. 305-307.

⁵⁹ *Ibid.*

⁶⁰ ILO, *Guidelines on general principles of labour inspection*, 2022, p. 16

⁶¹ Recital 40.

their subcontractors comply with the applicable obligations regarding wages, the right to organise and collective bargaining on wage-setting (Article 9).

This is not a real novelty, as this obligation was introduced by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, but it may have an important impact in making minimum wages, collective bargaining and freedom of association a priority among the many issues that procurement officials have to consider⁶².

Article 9 highlights that it referred to «the applicable obligations» «in accordance with Directives 2014/23/EU and 2014/25/EU». This suggests an intention to use procurement to reinforce existing obligations relating to wage-setting or collective bargaining instead of creating new duties. In order to achieve this aim, generally speaking, it identifies three action areas. First, the respect to obligations on remuneration set by EU and national law enables authorities to use procurement to supplement other enforcement methods, and protect themselves against spending their money on non-compliant firms. Second, concerning collective agreements, it permits to spread procurement both from an objective and subjective point of view, as more matters concerning salaries and more workers could be covered. Finally, the last-mentioned area is the right to organise and collective bargaining on wage-setting, what opens the possibility to use public procurement to reinforce collective bargaining and its proper implementations.

Third, transparency is also a powerful tool to empower the effectiveness of wage setting-regulation. Hence, following the trend of other recent European legislations, Directive 2022/2041 introduces different obligations concerning information, such as setting effective data collection tools, reporting the state and evolution of salaries and minimum wages mechanism -including action plans if required- to the Commission every two years (Article 10), publishing this information in a comprehensive and easily accessible way (Article 11), and making that it is brought to the attention of workers and employers, including SMEs (Article 14). Within this set of measures, it is also possible to include the evaluation on the implementation of the directive, planned by 15 November 2029, by the Article 15.

The aim of this group of articles is double. On the one hand, it sets a direct target which is developing an evaluation and control mechanism based on reporting. This is not completely new, as salaries and wage-setting have

⁶² DAVIES, A., «Public Procurement (Article 9)», en Ratti, L., Brameshuber, E., Pietrogiovanni, V. (eds.) *The EU directive on adequate minimum wages: context, commentary and trajectories*, 1, Hart Publishing, Gordonsville, 2024, p. 262.

been frequently included in the European Economic Governance and, particularly, in the European Semester, but it intensifies the already existing monitoring tools⁶³. On the other hand, there is a clear indirect objective, as information and data can be used to achieve other purposes of the Directive and particularly those related to enforcement and control and it was explained above.

Finally, when the regulation is infringed, adequate compensation mechanisms are also established. Accordingly, Article 12 guarantees that workers, including those whose employment relationship has ended, have access to effective, timely and impartial dispute resolution and a right to redress, in the case of infringements of rights relating to statutory minimum wages or relating to minimum wage protection. This is assured, without prejudice to specific forms of redress and dispute resolution provided for, where applicable, in collective agreements. Additionally, workers and their representatives must be also protected from any adverse treatment by the employer and from any adverse consequences resulting from a complaint lodged with the employer or resulting from any proceedings initiated with the aim of enforcing compliance relating to minimum wage protection.

In a Directive which is mainly procedural and, as a consequence, its implementation largely depends on the action of Member States, Article 12, but also Article 13, are the only ones in granting individual concrete rights to workers⁶⁴. In this sense, it follows the trend of the last directives of including and scheme “one right – one remedy”, that is, not only focusing on the recognition of social rights, but also setting guarantees. Particularly, it can be found two, both connect to the general right to an effective remedy and a fair trial (Article 47 CFREU): the right to redress (Article 12(1)) and the right to protection against unfavourable treatment (Article 12(2)). Although these to rights or guarantees are neither new, they introduce some specifics. The most important one is the fact of obtaining protection concerning the infringement of the right to a minimum wage, which, paradoxically, it is not expressly recognised in the Directive, which means the introduction of this right into the EU legal system⁶⁵.

⁶³ KRAUSE, R., «Monitoring and Data Collection and Information on Minimum Wage Protection (Articles 10 and 11)», en Ratti, L., Brameshuber, E., Pietrogiovanni, V. (eds.) *The EU directive on adequate minimum wages: context, commentary and trajectories*, 1, Hart Publishing, Gordonsville, 2024, p. 276.

⁶⁴ LAULOM, S., «Right to Redress and Protection against Adverse Treatment or Consequences (Article 12)», en Ratti, L., Brameshuber, E., Pietrogiovanni, V. (eds.) *The EU directive on adequate minimum wages: context, commentary and trajectories*, 1, Hart Publishing, Gordonsville, 2024, p. 290.

⁶⁵ *Ibid.*, p. 302.

IV. CONCLUSIONS: THE ADDED VALUE OF DIRECTIVE ON MINIMUM WAGE

Aside the fact that Directive 2022/2041 is a new example of the shift of Von der Leyen's Commission concerning social legislation compared to previous stages⁶⁶, it seems that there is consensus concerning its main input is setting a common procedure for wage-setting as most of obligations included are procedural in nature. Consequently, it is not possible to conclude on the existence of a fundamental right to a minimum wage, even if one argues that Article 31(1) CFREU, when interpreted in the light of the Directive, provides for a fundamental right to adequate minimum wages, at least from a horizontal direct effect approach⁶⁷. Hence, the individual worker cannot claim adequate minimum wages directly his employer as Article 31(1) CFREU, even in connection with the Directive, is insufficient itself⁶⁸.

Nevertheless, the ECJ called to interpret the Directive in the light of its main objectives, could potentially play a crucial role. Cases might be brought before the Court where the individuals claim to be negatively affected by the fact that their Member States did not correctly transposed or implement it because, for example, did not provide an action plan or because there is not a correct update of the minimum wage. The chances of such claims could depend on how well Member States could defend the broad margin of manoeuvre that Directive provides them⁶⁹.

⁶⁶ DOHERTY, M., «Make me good...just not yet? The (potential) impact of the Adequate Minimum Wage Directive», *Italian Labour Law e-Journal*, vol. 17, 1, 2024, pp. 211-226.

⁶⁷ BRAMESHUBER, E., «Constitutionalism and Social Rights- A Fundamental Right to Adequate Minimum Wages?», en Ratti, L., Brameshuber, E., Pietrogiovanni, V. (eds.) *The EU directive on adequate minimum wages: context, commentary and trajectories*, 1, Hart Publishing, Gordonsville, 2024, pp. 134-135.

⁶⁸ Judgement of 15 January 2014, *Association de médiation sociale* (C-176/12, ECLI:EU:C:2014:2).

⁶⁹ RATTI, L., «The Directive on Adequate Minimum Wages and the Revival of a European Social Union», en Ratti, L., Brameshuber, E., Pietrogiovanni, V. (eds.) *The EU directive on adequate minimum wages: context, commentary and trajectories*, 1, Hart Publishing, Gordonsville, 2024, p. 116.

CHAPTER 27

PAID ANNUAL LEAVE

JUAN MARTÍNEZ MOYA

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I. RECOGNITION WITHIN A COMPLEX REGULATORY SYSTEM

1. Regulatory framework

The legal framework governing paid annual leave has a broad and heterogeneous perimeter in its source of production, made up of legislation (including constitutional legislation) and national practices, European Union law and international law, fundamentally embodied in Convention 132 of the International Labour Organisation in relation to those countries that have ratified it.

Directive 93/104 of 23 November, subsequently codified by Directive 2003/88 of 4 November – a regulation that has become one of the basic pillars of Europe's social dimension – sets out the basic legal regime of the right to leave (art.7) by ordering the Member States to adopt the necessary measures to guarantee all workers: (a) the annual frequency of leave; (b) a minimum duration of four weeks; (c) that this rest is paid; (d) the guarantee of effective enjoyment by prohibiting paid annual leave from being replaced by financial compensation, except in the event of termination of the employment relationship. However, the provision of the Directive leaves it to the Member States to ensure that these measures are adopted in accordance with the conditions for obtaining and granting them laid down in the field of national laws and/or practices.

More controversial is the question of the direct effect of the right to paid annual leave. The ECJ has ruled that Article 7 fulfils the criteria for direct effect, as it is unconditional, unambiguous and precise, which is tantamount to stating that if a Member State has failed to transpose this provision into national law, or has made an incorrect transposition, an individual is entitled to assert his or her right to paid annual leave of at least four weeks before national courts against the State or public institutions, either in their capacity as employers or as public authorities (ECJ, 24 January 2012, Domínguez, C-282/10, EU:C:2012:33).

In this regard, the ECJ doctrine has once again specified that although a Directive cannot, by itself, create obligations for an individual (in the case of a private employer), however, as regards the right to paid annual leave, Article 31.2 of the CFREU can be invoked and applied directly. The basis for this direct applicability, according to the ECJ, lies in the fact that this provision is characterised by the fact that its existence has been established in a mandatory and unconditional manner and does not need to be specified by provisions of EU law or national law. These will only have to specify the exact duration of the paid annual leave and, where appropriate, certain conditions for the exercise of the right. On the basis of these premises, the ECJ concludes that that provision is sufficient in itself to confer on employees a right that can be invoked as such in a dispute with their employer

(ECJ 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften C-684/16, EU:C:2018:874; 6 November 2018, Kreuziger, C-619/16, EU:C:2018:872, 6 November 2018, Bauer and Willmeroth v Martina Broßonn, Joined Cases, C-569/16 and C-570/16, C:2018:871). As authoritative doctrine points out, both the joined cases Bauer and Willmertoh – refusal to pay two widows the payment of financial compensation for special paid leave of their spouses who did not get to take it – and the Max-Planck case – about financial compensation for paid annual leave not taken when the employment relationship was terminated – are examples of the existence of fundamental rights whose essential content can produce a horizontal effect, but whose non-"essential" elements lack such an effect. This is because the EU legislature or the national legislature must intervene in order to ensure that these elements are fully 'operational'. Thus, only measures that undermine the essence of these rights can be disapplied. In such cases, it may be argued that Article 31(2) of the Charter may be invoked where a national measure entails the loss of the right to annual leave, thereby undermining its essential content. Conversely, the same is not true of the non-essential elements of that right, such as the precise duration of annual leave and, where appropriate, the conditions under which that right may be exercised.

In the recent case-law of the ECJ, the normative value of the *Charter of Fundamental Rights* as a text in the legal order of the European Union that codifies fundamental rights and that "shall have the same legal value as the Treaties" (Article 6(1) TEU, first subparagraph), is gaining greater presence and affirmation, a normative rank that places it within the framework of primary law of the Union. This situation sometimes poses many problems in the criteria for judicial review of the law (*control of conventionality*, compatibility, conformity, proportionality, and also analysis of priorities if the fundamental right is not included in the national constitutional text) in the EU Member States, and in particular in the interpretation of the national judge. An example of this is found in a question on the overtime supplement in paid annual leave remuneration (ECJ 13 January 2022, DS and Koch Personaldienstleistungen GmbH C514/20 EU:C:2022:19), in the Charter it is applied as an inspiring or guiding source of the Directive, "interpretation of the Directive in the light of Article 31.2 of the Charter". Recently, the ECJ Judgment of 9 November 2023 XT, and others, Keolis Agen SARL, Syndicat national des transports urbains SNTU-CFDT (C-271/22 to C-275/22) C-271/22 to C-275/22 EU:C:2023:834) addressing the question of the possibility of setting time limits for claiming the right to take leave, once again ruled on the effect on the direct effect of the Working Time Directive in horizontal situations stating that a worker may invoke the right to paid annual leave, enshrined in the first of these provisions and specified by the second,

against his employer, the fact that the latter is a private company, holding a public service concession, being irrelevant in this regard.

2. Quantitatively and qualitatively relevant jurisprudence

The clarity of Article 7 of Directive 2003/88, of 4 November, and its configuration as a precept not subject to exceptions, however, has not ceased to generate doubts as to the adequacy of these minimum rules by national legislation and practice. This is a provision that gives rise to numerous preliminary rulings by national courts, which has opened up a space where many disputes are decided in the courts, giving rise to a quantitatively and qualitatively relevant jurisprudence.

The volume of litigation in this area has not gone unnoticed in the institutional sphere of the European Union, many of them led by the German Supreme (Labour) Court. Within the European Commission, attention has been paid to the important body of case law and the exhaustive review process in this area, resulting in an interpretative Communication on Dir. 2003/88/EC of the European Parliament and of the Council, on certain aspects of the organisation of working time, with the aim of providing legal clarity and certainty to Member States and other interested parties involved when applying the Working Time Directive as well as assisting national authorities, legal practitioners and businesses in interpreting it. To that end, it brings together in a single document the provisions of the Directive and the case-law of the Court interpreting them¹.

As regards paid annual leave, the Communication summarises the Court's extensive case-law, which covers a number of aspects ranging from the obligation to grant workers the right to transfer unused paid annual leave when they were unable to exercise that right, for example because of sick leave², to the need to clarify the Directive that additional periods of paid annual leave granted by Member States in excess of the four weeks required by the Directive may be subject to the conditions laid down by national law³.

The ECJ has stated on many occasions that the right of every worker to take paid annual leave, as a principle of EU social law, is expressly recognised in Article 31(2) of the Charter of Fundamental Rights of the European Union,

¹ In addition to the Interpretative Communication (hereinafter referred to as the "Communication"), the European Commission presents the implementation report provided for in Article 24 of the Directive which analyses the situation with regard to the transposition of the Directive.

² ECJ, 10 September 2009, Vicente Pereda, C-277/08, EU:C:2009:468.

³ Judgments of the ECJ of 24 January 2012, Domínguez C-282/10, paragraphs 47 to 49, EU:C:2012:33 and 3 May 2012, Neidel C-337/10, paragraphs 34 to 37, EU:C:2012:263.

which Article 6(1) TEU recognises as having the same legal value as the Treaties (ECJ 8 November 2012, *Heimann and Toltschin* C-229/11 and C-230/11, paragraph 22 and the case-law cited, EU:C: 2012:693).

The scope of this regulatory recognition and the interpretation carried out by the European Commission opens the way to a starting premise: we are dealing with a regulatory system understood in a broad and complex sense in its application.

As a consequence of all this, the articulation of the right to paid annual leave, which seemed to be based on solid and consolidated dogmatic and doctrinal constructions, has been seriously questioned in recent years, especially by the ECJ.⁴

II. GENERAL CONFIGURATION OF THE RIGHT TO PAID ANNUAL LEAVE IN THE DOCTRINE OF THE ECJ

1. As a principle of social law of the European Union

According to settled case-law, the right of every worker to take paid annual leave must be regarded as a principle of EU social law of particular importance⁵, from which no derogation may be made and the application of which by the competent national authorities can be effected only within the limits expressly laid down (see, *inter alia*, judgments of the ECJ of 26 June 2001, *Bectu* C-173/99, paragraph 43 C:2001:356, and 22 April 2010, *ZLT Tirols* C-486/08, paragraph 28, EU:C:2010:215).

The Directive does not allow for any derogation from Article 7(1) (Case *Bectu* – C-173/99, paragraphs 41 to 43; ECJ, 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, paragraph 24, EU:C:2009:18; 21 June 2012, *Anged*, C-78/11, paragraph 16, EU:C:2012:372; 6 April 2006, *Federatie Nederlandse*, C-124/05, paragraph 34, EU:C:2006:244).

⁴ A fact that confirms this diagnosis is the doctrine contained in the judgment of the ECJ of 29 November 2017, *King* C-214/16 EU:C:2017:914 on the unlimited carry-over of paid annual leave not taken, declaring that it is contrary to national legislation to the law of the European Union that, in the event of a dispute between a worker and his employer when determining whether he is entitled to paid annual leave, he or she obliges the worker to take his or her before knowing whether he is entitled to be paid, as well as any national practice or legislation that prevents a worker from postponing, and where appropriate accumulating, until the time of termination of his employment relationship, rights to paid annual leave not exercised corresponding to several consecutive periods of accrual, due to the employer's refusal to pay that leave.

⁵ In the Interpretative Communication on Directive 2003/88/EC, the European Commission acknowledges that the Court has examined the right to paid annual leave very carefully and has held, in particular, that it is a principle of particular importance in Community and EU social law, and cites a wide range of judgments, chronologically ordered, where that principle is recognised, from the judgment of the ECJ of 26 June 2001, *Bectu* C-173/99, paragraph 43 C:2001:356, to the judgment of 20 July 2016, *Hans Maschek* C-341/15, paragraph 25, EU:C:2016:57.

2. A right of plural content

In accordance with the case-law of the Court of Justice, the expression 'paid annual leave' in Article 7(1) of Directive 2003/88 means that, during annual leave within the meaning of that directive, the remuneration must be maintained and, in other words, that the worker must receive the ordinary remuneration for that rest period (ECJ 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, paragraph 58, EU:C:2009).

The rulings of the ECJ (inter alia, ECJ 10 September 2009, *Vicente Pereda*, C-277/08, EU:C:2009:468 and *Schultz-Hoff*, 20 January 2009, *Schultz-Hoff and others*, C-350/06 and C-520/06, EU:C:2009) conceptually consolidate the right to leave on the following premises: (a) The right to paid annual leave is a principle of Community social law on the basis of the following premises: (a) The right to paid annual leave is a principle of Community social law on the basis of the of special importance. (b) The right to paid annual leave does not expire at the end of the reference period laid down by national law where the worker has been on sick leave for all or part of the reference period and has not actually had the opportunity to exercise that right. (c) The Directive only allows the right to actual enjoyment of leave to be replaced by an allowance in lieu of the termination of the employment relationship. (d) The purpose of the right to paid annual leave is to allow workers to rest and to have leisure and recreation, while the right to sick leave is intended solely to enable them to recover. (e) If the period of annual leave has been previously fixed, in the event that the worker is in a situation of TD during it, he is entitled to the setting of a new period of annual leave. (f) Article 7 of the Directive precludes national provisions or conventional rules which provide that a worker who is on sick leave during the previously allocated leave period is not entitled, after medical discharge, to take his or her annual leave in a different period and, where appropriate, even outside the reference period.

3. The relevance of the teleological element

The purpose of the right to paid annual leave is to allow the worker to rest from the performance of the tasks incumbent on him or her under his or her employment contract (ECJ 22 November 2011, *KHS* C-214/10, paragraph 31 C:2011:761), and to have a period of leisure and recreation (ECJ 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, paragraph 25, EU:C:2009).

This is a rest period that is different from others, such as sick leave, which is granted to workers in order to enable them to recover from illness (see, to

that effect, ECJ, 21 June 2012, *Anged*, C-78/11, paragraph 19 and the case-law cited, EU:C:2012:372). Their purposes are divergent in these two types of rest periods, which means that the ECJ concludes that a worker who is on sick leave during a previously fixed period of annual leave is entitled, at his request and in order to be able to effectively enjoy his annual leave, to take it on a date other than that of the sick leave (ECJ 10 September 2009, *Vicente Pereda*, C-277/08, paragraph 22, EU:C:2009:468; 21 June 2012, *Anged*, C-78/11, paragraph 20, EU:C:2012:372).

It is for the national court, which alone has jurisdiction to interpret national legislation, to determine whether the purpose of the period of rest for convalescence differs from that of the paid annual leave defined in Article 7 of Directive 2003/88, in accordance with the interpretation given by the Court of Justice, which must provide the national court with an answer which will be of use to it and enable it to determine the dispute before it, may, to that end, provide the latter with information drawn from all the evidence provided by that court (ECJ, 30 June 2016, *Sobczyszyn*, C-178/15, EU:C:2016:502).

This right is associated with the guarantee of the safety and health of workers and no exception is admissible against it (ECJ 16 March 2006, *C.D. Robinson-Steele and Others* C-131/04 and 257/04, EU:C:2006:177; 6 April 2006, *Federatie Nederlandse* C-124/05). The ECJ goes further by pointing out that although the positive effect of paid annual leave on the safety and health of the worker is fully deployed when it is taken in the year envisaged, i.e. during the current year, such rest time does not lose its relevance in this regard if it is taken at a later period (*Federatie Nederlandse* cases C-124/05, paragraph 30, EU:C:2006:244, and *Schultz-Hoff and Others*, C-350/06 and C-520/06, paragraph 30).

4. A right within the scope of the Directive free from exceptions and non-restrictive interpretation

4.1 BREADTH OF THE SUBJECTIVE SCOPE OF APPLICATION

A general principle of the Working Time Directive is that it is applicable to all sectors of activity, private and public (art.1.3). No exceptions to this right can be established in a contract (ECJ, 16 March 2006, *C.D. Robinson-Steele and Others*, C-131/04 and 257/04, EU:C:2006:177).

Its scope of application also includes other activities specific to the public service – armed forces, police and civil protection services – provided that they are carried out under normal circumstances. The decisive factor is the nature of

the activities of workers in carrying out 'public service activities' aimed at ensuring public order and security (ECJ, 3 October 2000, *Simap*, C-303/98, EU:C:2000:528), rather than the mere existence of a public sector employer or public intervention in the financing or organisation of the relevant service. Although the Court has not yet ruled on this point, it would seem unjustified, in the case of exceptional events such as natural or technological disasters, attacks, serious accidents or other events of the same nature, the gravity and magnitude of which require the adoption of measures indispensable for the protection of life, health and collective security, temporarily exempt only public sector workers and continue to require strict compliance with the provisions of the Directive for private sector workers, e.g. workers in private hospitals⁶.

Article 7 of Directive 2003/88 is excluded from both conditional and unconditional derogations provided for other aspects regulated in the aforementioned Directive.

4.2 EXCEPTIONS

The scope of Directive 89/391 must be interpreted broadly, so that the exceptions to its scope provided for in the first subparagraph of Article 2.2 thereof must be interpreted restrictively (see, to that effect, *inter alia*, ECJ 3 October 2000 *Simap*, C-303/98 EU:C:2000:528, paragraphs 34 and 35, and 12-1-06, *Commission v Spain* C-132/04, paragraph 22). In this regard, it should be pointed out:

1. That these exceptions were adopted only in order to ensure the proper functioning of the services essential for the protection of safety, health and public order in the event of circumstances of exceptional gravity and importance (ECJ, 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584; ECJ, order of 7 April 2011, *May* C-519/09, paragraph 19, EU:C:2011:221). According to settled case-law, the concept of 'worker', within the meaning of Article 45 TFEU, has an autonomous scope and should not be interpreted restrictively.

A 'worker' is to be considered to be any person engaged in real and effective activities, excluding activities carried out on such a small scale that they are of a merely marginal and ancillary nature. According to that case-law, the characteristic of an employment relationship lies in the fact that a person performs, for a certain period of time, for and under the direction of another,

⁶ Interpretative communication on Directive 2003/88/EC.

certain services in return for which he receives remuneration (see, *inter alia*, ECJ C-66/85, paragraphs 16 and 17 EU, 3 July 1986: C:1986:284; 23 March 2004, Collins, C-138/02, paragraph 26, EU:C:2004:172; 7 September 2004, Trojani, C-456/02, paragraph 15, EU:C:2004:488). This doctrine on the concept of worker applies to the following cases: (i) a civil servant who performs firefighter activities under normal conditions (ECJ, 3 May 2012, Neidel, C-337/10, EU:C:2012:263), (ii) it also includes an employee of a public law entity to which the rules on the paid annual leave of civil servants are applicable, ECJ order of 7 April 2011 *May v AOK* (E-519/09) EU:C:2011:221; (iii) and also includes Italian justices of the peace who, within the framework of their duties, perform real and effective (not marginal) services, receiving compensation of a remunerative nature, may be included in the concept of 'worker' for the purposes of working time and paid annual leave ECJ judgment of 16 July 2020 *Governo della Repubblica italiana* (Statute of Italian Justices of the Peace) C-658/18 EU: C:2020:572). The ECJ judgment of 7 April 2022, *Statute of Italian Justices of the Peace* (C-236/20), EU:C:2022:263, complements this doctrine by stating that EU law precludes the justice of the peace from having paid annual leave or social benefits like professional judges, provided that it is subsumable under the concept of 'part-time worker' or 'fixed-term worker'. In this case, the existence of an initial competition specially designed for professional judges for access to the judiciary, which is not inherent in the appointment of justices of the peace, although it allows the possibility that they may not enjoy all the rights of professional judges, does not allow the exclusion of any right to leave and of any form of protection in the field of social benefits and pensions. And reinforcing this position, the ECJ of 27 June 2024, case C41/23 *Peigli*, ECLI:EU:C:2024:554, declares that European Union law precludes national legislation which, unlike what it provides for professional judges and prosecutors, excludes, for "honorary" judges and prosecutors, any right to payment of compensation during the period of leave during which judicial activities are suspended, since, first, Article 7(1) of Directive 2003/88 ensures that 'Member States shall take the necessary measures to ensure that all workers have a period of at least four weeks' paid annual leave', and, secondly, those honorary judges, being members of the Italian judicial system, are in a comparable situation to professional judges and prosecutors.

3. Consequently, it is not a right of restrictive interpretation (see, in particular, ECJ 22 April 2010, *ZLT Tirols* C-486/08, EU:C:2010:215 and 8 of November de 2012, *Heimann y Toltschin* C-229/11 and C-230/11, paragraph 23 and the case-law cited, EU:C: 2012:693). Its applicability cannot be distin-

guished between an indefinite term contract and a fixed-term contract (ECJ 26 June 2001, Bectu C-173/99, EU:C:2001:356).

5. A right of minimum duration of four weeks

Paid annual leave of four weeks appears as a minimum provision. During that period, 'the worker should normally be able to take effective rest in order to ensure effective protection of his safety and health' (ECJ, 26 June 2001, Bectu, C-173/99, EU:C:2001:356). The right to annual leave provides for four weeks, which means that workers must be released from their work obligations for four calendar weeks, regardless of whether they work full-time or part-time.

Leave above the minimum of Directive 2003/88 is not governed by that directive but by national law, although its minimum level of protection may not be indirectly lowered. The TSN and AKT case (ECJ Grand Chamber of 29-1-19 (C-609/17 and C-610/17, EU:C:2019:981) illustrates this situation. It addresses the case of a worker who suspends paid annual leave to undergo surgery, the paid annual leave is suspended due to illness, but finally the company refuses to postpone the enjoyment of the days of paid annual leave that the collective agreement adds to the legal ones. The aforementioned judgment states that EU law allows the granting (national rules, collective agreements) of days of paid annual leave exceeding the minimum period of four weeks, being possible to exclude the postponement of the enjoyment of these additional days of leave in the event of illness. These are, as authoritative doctrine has described them, cases immersed in 'twilight zones' in which it is difficult to determine where the darkness ends and where the light begins in relation to the application of the Charter, as opposed to 'situations of agency' in which a positive obligation is imposed on the Member States, such as those others, so-called 'derogatory situations' where a national measure constitutes a derogation from Union law.

However, beyond this minimum duration, conflictive situations have arisen in relation to increases in periods of duration that could compromise discrimination on grounds of nationality or free movement in the cases of companies in the tourism sector. And here a contrasting judgment can be made to find out whether the national regulations are in line with EU law. In the case of an Austrian company, in the tourism sector, for which several people work, generally with previous professional activity in other EU countries, a collective dispute arises regarding alleged discrimination based on nationality and violation of the right to free movement in relation to the increase in the period of duration of paid annual leave due to experience. The ECJ decides in this case that EU law does

not preclude the fact that in order to determine the right to an increase in leave (by one week) for having 25 years of professional experience, only a maximum of five years of that provided in companies other than the current one is taken into account, and this because it considers that it is not proven that the reference rule is more detrimental to those who do not have Austrian nationality (absence of discrimination on grounds of nationality), nor is the treatment worse for those who have changed companies by going to another State (absence of an obstacle to free movement) (ECJ judgment of 13 March 2019, *Gemeinsamer Betriebsrat, EurothermenResort Bad Schallerbach* (C-437/17), EU:C:2019:193).

III. EXERCISE OF THE RIGHT TO PAID ANNUAL LEAVE

1. Accrual of the right

1.1 GENERAL RULE

Within the scope of the Directive we find two basic rules that articulate the regime of accrual of paid annual leave:

1. Paid annual leave is accrued for the effective provision of services; and
2. Paid annual leave shall be granted 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice'.

With regard to the latter rule, the ECJ has specified that:

— The accrual of this right includes workers who are absent from work as a result of sick leave – of short or long duration – regardless of whether they have actually worked during the period of accrual of annual leave.

— States cannot unilaterally restrict the right to paid annual leave conferred on all workers by applying preconditions that would, in practice, prevent certain workers from enjoying it. Examples of national practices or regulations contrary to the Directive are:

- to impose on workers the condition of a period of thirteen weeks of uninterrupted employment with the same employer before accumulating paid annual leave;
- impose conditions which make it impossible for certain workers to exercise the right to paid annual leave (ECJ, 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, paragraph 58, EU:C:2009);

- prevent a worker from postponing, and, where appropriate, accumulating, until the termination of his employment relationship, rights to unexercised paid annual leave corresponding to several consecutive leave periods, due to the employer's refusal to pay that leave (ECJ, 29 November 2017, King C-214/16, EU:C:2017:914).

Notwithstanding the general rule set out above which prohibits Member States from unilaterally restricting the right to paid annual leave conferred on all workers, this does not prevent them from having a certain margin to regulate the manner in which the right to paid annual leave is exercised. This may include, for example, the planning of paid annual leave periods, the worker's possible obligation to notify the employer in advance of the paid annual leave period he or she intends to take, the imposition of a minimum period before being able to take leave, the criteria for the proportional calculation of the right to annual leave when the duration of the employment relationship is less than one year, etc.⁷.

National law may lay down conditions for exercising the right to paid annual leave, including conditions for its transfer at the end of the leave⁸.

However, the temporal effects of a ECJ judgment establishing that the remuneration of guaranteed paid annual leave (those proportional to the time actually worked), cannot be derogated from through a collective agreement (even if it contradicts national jurisprudence), cannot be limited by invoking legal certainty or legitimate expectations in the authorities (ECJ 13 December 2018, Hein, C-385/17, EU:C:2018:1018).

1.2 CONFLICT SITUATIONS

However, it is this margin of discretion deferred to national laws and practices that gives rise to many conflictive situations. The main ones are listed below:

- In relation to *temporary contracts*, the right to paid annual leave arises, without prejudice to the duration of the contract, in proportion to the days worked. Hence, it violates EU law to link the right to paid annual leave to the existence of an effective minimum working time (ECJ 24 January 2012, Domínguez C-282/10 EU:C:2012:33, among others).

⁷ Arguments of the Commission in Case C-173/99 referred to in the Opinion of Advocate General Antonio Tizzano of 8 February 2001, Bectu C-173/99, paragraph 34, ECLI:EU:C:2001:81, and in the Opinion of Advocate General Verica Trstenjak of 16-6-11, Williams and Others C-155/10, ECLI:EU:C:2011:403.

⁸ Report of the Commission, cit.

— *In periods of contractual suspension agreed for business reasons*, they do not preclude national provisions or practices, such as a social plan negotiated between an undertaking and its works council, according to which the worker's entitlement to paid annual leave with reduced working time is calculated in accordance with the principle of *pro rata temporis* (ECJ 8 November 2012, Heimann and Toltschin, C-229/11 and C-230/11, EU:C:2012:693).

— *Slide rules*. In the event of an increase in a worker's working hours, Member States are not required to provide for leave already accrued, and possibly taken, to be recalculated a posteriori, depending on the new pace of work of that worker. However, a new calculation must be made for the period during which the working day has increased.

- As regards the accrual of entitlement to paid annual leave, a distinction must be made between periods in which the employee worked at a different rate of work, since the number of annual rest units accrued in relation to the number of working units worked must be calculated separately for each period. The right to paid annual leave is constituted and must be calculated in relation to the rate (or times) of work provided for in the employment contract. To this end, a distinction must be made:

As regards the unit of time on the basis of which the calculation is to be carried out, it should be noted that the unit chosen by Directive 2003/88 in relation to the maximum weekly working time is the 'hour'.

It should be borne in mind that the concept of rest used in that directive, in particular that of annual rest, must be expressed in days, hours or fractions thereof (Dir. 2003/88 recital 5). Consequently, the calculation of the minimum number of days of paid annual leave to which the worker is entitled must be made, for the purposes of Directive 2003/88, in relation to the working days, working hours or fractions thereof, worked and provided for in the employment contract.

- As regards the period of work to which the entitlement to annual paid leave refers and the possible consequences that a change in the pace of work, in relation to the number of working hours, may or must have, on the one hand, on the number of days entitled to leave already accrued and, on the other hand, with regard to the exercise of that right over time, it should be recalled that, according to settled case-law, the enjoyment of annual leave in a period subsequent to the period during which the right to leave has accrued has no relation to the working

hours worked by the worker during that subsequent period (ECJ 22 April 2010, ZLT Tirols C-486/08, paragraph 28, EU:C:2010:215).

That conclusion is not affected by the application of the principle of *pro rata temporis* laid down in Clause 4(2) of the Framework Agreement on part-time work. While it is true that the Court has already held that the application of that principle is appropriate for the granting of annual leave for a period of part-time work, in so far as, for that period, the reduction in the days of annual leave to which the worker is entitled in relation to the leave granted for a period of full-time work is justified on grounds of the fact remains that that principle cannot be applied *ex post* to days of annual paid leave already accrued in the course of a period of full-time work.

Therefore, although the provisions of Clause 4(2) of the Framework Agreement on part-time work and Article 7 of Directive 2003/88 do not require Member States to recalculate the days of annual paid leave already accrued when a worker increases working hours, nor do they preclude Member States from adopting more favourable provisions for workers and from recalculating.

The Court of Justice has also held that the modification and, in particular, the reduction of the working day from full-time to part-time cannot reduce the right to annual leave that the worker has accrued during the period of full-time work (ECJ 22 April 2010 ZLT Tirols C-486/08, paragraph 30, EU:C:2010:215).

The distinction to be made between the different work rhythms for the accrual of the right to paid annual leave does not, however, have any effect on the exercise of the rights accrued. As is apparent from the case-law, annual leave accrued in the course of a reference period may be taken in a later period and the rest time acquired does not lose its relevance with regard to the positive effect of paid annual leave on the safety and health of the worker if it is taken, not in the period during which they were accrued and in which that worker worked full-time, but in a later period during which he works part-time (see, *inter alia*, ECJ 6 April 2006, *Federatie Nederlandse* C-124/05, paragraph 30, EU:C:2006:244; and 22-11-11, *KHS* C-214/10, paragraph 32, EU:C:2006:244).

The same conclusion is *a fortiori*, where the leave is not taken during the period in which it was accrued and during which the employee worked part-time, but during a subsequent period during which he worked full-time.

- Thirdly, as regards the period to be covered by the recalculation of the days of paid annual leave to which the worker is entitled, where, as in the case in the main proceedings, the worker, having accrued days of paid annual leave over a period of part-time work, increases working hours and goes on to work full-time, it should be noted that it is necessary to calculate for each period separately the number of annual rest units accrued in relation to the number of units worked.
- All of the foregoing leads to the conclusion that EU law requires a recalculation of the days of paid annual leave to which the worker is entitled only in relation to the period of work during which the worker increases his working hours. Units of paid annual leave already taken during the period of part-time work in excess of the days of paid annual leave accrued during the same period should be deducted from the new days that are accrued during the period of work during which the worker has increased the working day.

The calculation of the days of paid annual leave to which the worker is entitled is independent of the calculation of the financial compensation for unused paid annual leave due to the worker, in that, in order to be able to determine the latter, the number of days of paid annual leave to which the worker is entitled must first be calculated.

— *Termination of the employment relationship.* Nothing in Directive 2003/88 expressly determines how the financial compensation to replace the minimum period or periods of paid annual leave is to be calculated in the event of termination of the employment relationship (ECJ 20 January 2009, Schultz-Hoff and Others C-350/06 and C-520/06, EU:C:2009:18).

Part-time work. The problems that arise relate to the method of calculating the periods of service to accrue entitlement to leave and whether the duration of these can be reduced according to the time actually worked applying the *pro rata temporis* principle or whether the same duration should be maintained as in relation to full-time contracts, and by the principle of equality between full-time and part-time workers, even if the number of hours per day is lower in the case of part-time work. In any event, the reduction of the *working day from full-time to part-time* cannot reduce the right to annual leave that the worker has accrued during the period of full-time work (ECJ order of 13 June 2013, Brandes, C-415/12, EU:C:2013:398).

It should be noted that the Framework Agreement on part-time work does not contain any indication as to the rules for calculating such compensation. However, the ECJ has echoed the issue in two relevant pronouncements:

- The judgment of the ECJ of 22 April 2010, ZLT Tirols C-486/08, EU:C:2010:215, applied the *pro rata temporis* principle to the granting of annual leave for a period of part-time work. This ruling: (a) takes into account clause 4 of the Framework Agreement on part-time work, concluded on 6 June 1997, according to which, where appropriate, the *pro rata temporis* principle is to be applied to the working conditions of part-time workers; (b) applies that principle to the grant of annual leave for a period of part-time work, since, for that period, the diminution of entitlement to annual leave in relation to that granted for a period of full-time work is justified on objective grounds; (c) states that that principle cannot be applied ex post to an entitlement to annual leave acquired for a period of full-time work. It cannot be inferred from the relevant provisions of Directive 2003/88 that national legislation may provide, among the conditions for the application of the right to annual leave, for the partial loss of a right to leave acquired during an earlier reference period.
- Subsequently, the case-law (ECJ 11 November 2015, Greenfield C-219/14 EU:2015:C:745) elaborates on this by stating that clause 4(2) of the Framework Agreement on part-time work, concluded on 6 June 1997, which is annexed to Directive 97/81/EC, on the Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC, as amended by Council Directive 98/23/EC of 7 April 1998 and Article 7 of Directive 2003/88/EC of 4 November 2003 on certain aspects of the organisation of working time, must be interpreted as meaning that: (a) in the event of an increase in a worker's working time, Member States are not required to provide for leave already accrued, and possibly taken, to be recalculated ex post facto, in the light of that worker's new pace of work. However, a new calculation must be made for the period during which the working day has increased; and (b) the calculation of the days of paid annual leave to which the worker is entitled must be made in accordance with the same principles whether it is a question of determining the compensatory allowance for paid annual leave accrued and not taken, in the event of termination of the employment relationship, or of determining the result of the days of paid annual leave to which the worker is entitled, in the event that the employment relationship is maintained, carrying out an interpretation of the *pro rata temporis* principle.

— *Accrual of paid annual leave and execution of unlawful dismissal until reinstatement.* Very interesting is the preliminary ruling (in joined matters), emanating from the Courts of Cassation of Bulgaria and Italy on whether or not paid annual leave is accrued from the date of the dismissal, declared unlawful, until the reinstatement of the workers. The ECJ is categorical: EU law is opposed to national jurisprudence that rejects the *accrual* of leave during the period from (unlawful) dismissal to reinstatement. This is because what is decisive is that the employer's unlawful conduct prevents the performance of work (ECJ judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria*, C-762/18 and 37/19, EU:C:2020:504).

2. Enjoyment

2.1 GUARANTEE OF EFFECTIVE ENJOYMENT

The Directive (Art.7) provides for the guarantee of the effective enjoyment of the right to leave by prohibiting paid annual leave from being replaced by financial compensation, except in the event of termination of the employment relationship. However, applying the so-called "practical effect" of paid annual leave, the ECJ has been qualifying this rule in specific circumstances.

2.2 THE RIGHT TO FINANCIAL COMPENSATION AS AN EXCEPTION

2.2.1 *Requirements*

To be entitled to financial compensation, two conditions are necessary:

1. That the employment relationship has come to an end, that is, that it has ended, so that, if the contract has not ended, it is not possible to pay financial compensation.
2. That the worker has not taken all the annual leave to which he or she was entitled on the date on which the relationship ended. The Directive does not impose any additional conditions, nor should any prior application be required (ECJ 12 June 2014, *Gülay Bollacke*, C-118/13, EU:C:2014:1755; 20 July 2016, *Hans Maschek*, C-341/15, EU:C:2016:57; 25 November 2021, *Job Medium*, C233/20, paragraphs 32 and 34, EU:C:2021:960).

2.2.2 *Casuistry*

If the contract has been terminated, the reason for which it has been terminated is irrelevant to the right to financial compensation (ECJ judgment of 25 November 2021, *Job Medium*, C233/20, paragraphs 32 and 34 EU:C:2021:960). So much so, that EU law does not preclude the dismissal of temporary teachers at the end of the academic year, even if this deprives them of paid annual leave, as long as they are compensated for this concept (ECJ judgment of 21 November 2018 *Viejobueno Ibáñez y de la Vara González*, C-245/17, EU:C:2018:936).

In this way, a worker is entitled to financial compensation in the event of termination of the employment relationship for the following reasons:

— *Termination for organisational or production reasons*: if what prevented the worker from enjoying annual leave were reasons of a productive nature or related to the organisation of the company (ECJ order 21 February 2013, *Concepción Maestre García*, C-194/12, EU:C:2013:102).

— *If the termination of the employment relationship occurs while on medical leave* (ECJ 20 January 2009, *Schultz-Hoff and Others* C-350/06 and C-520/06, EU:C:2009:18; 3 May 2012, *Neidel* C-337/10, EU:C:2012:263).

If the termination of the employment relationship is due *to retirement*, the worker who had not had the possibility of enjoying all his rights to paid annual leave before the end of his employment relationship shall be entitled to financial compensation in respect of paid annual leave not taken, the reason or cause of the termination of the employment relationship being irrelevant, including the circumstance that a worker terminates of his or her own free will by virtue of his or her application for retirement and has not had the opportunity to exhaust his or her rights before the termination of the employment relationship (ECJ, 20 July 2016, *Hans Maschek*, C-341/15, EU:C:2016:57). A worker is entitled, at the time of retirement, to an allowance in lieu of paid annual leave not taken because he or she has not performed his or her duties due to illness (see, to that effect, ECJ 3 May 2012, *Neidel* C-337/10, paragraph 32, EU:C:2012:263). The ECJ judgment 27-4-23 C-192/22 EU:C:2023:347, case *FI and Bayerische Motoren Werke AG*, deals with the situation of accrued paid annual leave that could not be taken due to a short-term illness before the termination of the employment relationship (due to retirement) when there is an exemption from going to work. In this case, the right does not expire before the termination of the employment relationship as it cannot deploy its purpose and can be replaced by the aspect of economic compensation when the termination arrives.

— *Termination of contract after reinstatement in execution due to unlawful dismissal*: if after reinstatement the termination of the employment contract occurs, the worker must be paid financial *compensation* for the paid annual leave not taken (ECJ of 25 June 2020 Varhoven kasatsionen sad na Republika Bulgaria, C-762/18 and 37/19, EU:C:2020:504).

— Even if the termination of the employment relationship has resulted in *the abandonment or resignation of the worker* - a worker who after four months of activity resigns without explicit cause and claims €322 but the national regulation rules it out - EU law requires that there be financial compensation for the paid annual leave not taken corresponding to the last year of employment (ECJ of 25 November 2021 Job Medium GmbH (C-233/20) EU: C:2021:960). Opposing national legislation which, for reasons relating to the control of public expenditure and the organisational needs of the public employer (City of Copertino, Italy), prohibits the payment to a worker of financial compensation for days of paid annual leave accrued, both during the last year of employment and during the previous years, which have not been taken on the date of termination of the employment relationship, when the worker voluntarily terminates that employment relationship and has not demonstrated that he did not take his paid annual leave during that relationship for reasons beyond his control (ECJ of 18 January 2024, BU and Comune di Copertino case, ECLI:EU:C:2024:51, C218/22).

— Or due to *the death* of the worker (ECJ 12 June 2014, Gülay Bol-lacke C-118/13, EU:C:2014:1755). The death of a worker does not extinguish his or her right to paid annual leave, and financial compensation may be claimed by the heirs, even in the event that the national law excludes this possibility, because said estate cannot be deprived with retroactive effect - and therefore the heirs of the former of the effective enjoyment of the aforementioned patrimonial aspect of the right to paid annual leave. In such a case, the heirs will be able to rely directly on EU law both against a public employer and against a private employer (the spouses of the applicants in the main proceedings worked respectively for a municipality and for a private employer) (ECJ, 6 November 2018, Bauer and Willmeroth v Martina Broßonn, Joined Cases C-569/16 and C-570/16, C:2018:8716- 11-18).

— *Temporary agency workers who have ended their employment relationship*. The ECJ has addressed the question of whether employees who have been loaned by temporary employment agencies for two years, who have terminated their employment relationship, claim, among other concepts, the compensatory amount for unused paid annual leave. The case-law states that the duration and remuneration of paid annual leave are essential conditions,

which must be enjoyed by the staff assigned through temporary employment agencies as if they belonged to the staff of the user ECJ judgment of 12 May 2022, Luso Temp, C-426/20, EU:C:2022:373.

A case in which there is no right to financial compensation is one in which a worker whose employment relationship ended and who, by virtue of an agreement entered into with his employer, at the same time as he continued to receive his salary was obliged not to report to his place of work for a certain period that preceded the time of his retirement. In this case, he is not entitled to financial compensation for the rights to paid annual leave not taken during that period, except in the event that he has not been able to exhaust those rights due to illness (ECJ, 20 July 2016, Hans Maschek, C-341/15, EU:C:2016:57).

2.2.3 *Amount of financial compensation*

The Directive does not determine how the financial compensation for the minimum period of paid annual leave is to be calculated. However, the ECJ requires:

1. That the Member States ensure that the conditions laid down by national law take into account the limits arising from the Directive itself, and that the financial compensation is calculated 'in such a way that the worker in question occupies a situation comparable to that in which he would have been if he had exercised that right during his employment relationship' (ECJ 20 January 2009, Schultz-Hoff and Others C-350/06 and C-520/06, EU:C:2009:18).

2. That the worker's ordinary remuneration, which is that which must be maintained during the annual leave, is decisive for the calculation of the financial compensation for annual leave not taken at the end of the employment relationship (ECJ 8-11-12, Heimann and Toltschin C-229/11 and C-230/11; 20 January 2009, Schultz-Hoff and others C-350/06 and C-520/06, EU:C:2009:18, EU:C:2009:18).

2.3 MATTERS WITHIN THE COMPETENCE OF THE MEMBER STATES.

It is for the Member States to: (a) decide on the granting of additional days of paid annual leave to workers who increase the minimum period of four weeks provided for in Article 7 of Directive 2003/88. In such a case, Member States may decide to grant a worker who, because of illness, has not been able to complete the

full period of paid annual leave before the end of his employment relationship, the right to an allowance in lieu corresponding to that additional period; (b) to lay down the conditions for such a grant (ECJ, 20 July 2016, Hans Maschek, C-341/15, EU:C:2016:57); (c) authorising or prohibiting the taking of annual leave during sick leave (ECJ 20 January 2009, Schultz-Hoff and Others C-350/06 and C-520/06, EU:C:2009:18); and (d) The ECJ is not competent to answer the question relating to defining the carry-over period applicable to the right to paid annual leave, in a context in which there are contradictory criteria in national case-law (Council of State and Court of Cassation) (ECJ Judgment 9 November 2023 XT, and others, Keolis Agen SARL, Syndicat national des transports urbains SNTU-CFDT (C-271/22 to C-275/22), C-271/22 to C-275/22, EU:C:2023:834).

2.4 CONCURRENCE AND INTERACTION OF THE ENJOYMENT OF PAID ANNUAL LEAVE WITH OTHER SITUATIONS PROTECTED AND OTHER TYPES OF LEAVE

2.4.1 *The relevance of the purpose of paid annual leave*

The interaction of the right to enjoy paid annual leave with other protected situations has a point of connection with the relevance of the defining finalistic element of the right to leave set out above. Although the positive effect of paid annual leave on the safety and health of the worker is fully deployed when it is taken in the year envisaged, i.e. during the current year, such rest time does not lose its relevance in this respect if it is taken in a later period (ECJ 6 April 2006, Federatie Nederlandse C-124/05, EU:C:2006:244, and ECJ 20 January 2009, Schultz-Hoff and Others C-350/06 and C-520/06, EU:C:2009:18).

This statement is in line with a classic interpretative premise of the ECJ in situations of overlapping or interacting rights, namely that 'a leave guaranteed by Community law may not undermine the right to take another leave guaranteed by the same law' (ECJ, 6 April 2006, Federatie Nederlandse, C-124/05, EU:C:2006:244).

And since the casuistry is very varied, the ECJ judgment of 30 June 2016, Sobczyszyn C-178/15 EU:C:2016:502, has specified in relation to *periods of rest for convalescence* that they are not comparable to annual leave. However, it clarifies: (i) that EU law requires that, if the period of leave in a centre overlaps with a period of convalescence, the person concerned has the right to a new and specific date marking; (ii) The purpose of paid annual leave as rest time is not irrelevant if

it is taken at a later period in the case of a period of convalescence; it is for the national court to interpret whether the deferred leave fulfils its purpose.

2.4.2 *Interaction of entitlement to leave, sick leave, maternity leave and other parental leave*

One of the most emblematic rulings has been the aforementioned ECJ (Grand Chamber) judgment of 20 January 2009, *Schultz-Hoff and others* C-350/06 and C-520/06, EU:C:2009:18, which ruled on the coincidence of paid annual leave period with that of sick leave, establishing the following doctrine: (1) Community law – hereinafter, European Union law – neither prevents nor requires that working paid annual leave be taken during the time in which the worker is on sick leave; (2) EU law precludes the fact that time of inactivity due to illness does not count, for the purposes of accrual of leave, even if its duration is extended for the entire year in which it can be taken; and (3) Community rules protect the right of the worker to receive, at the end of the employment relationship, the financial compensation for paid annual leave not taken due to having been on sick leave, and that this compensation is calculated in accordance with the ordinary remuneration that would have corresponded to the enjoyment in natura of the weekly rest.

With regard to the *carry-over of untaken leave*, the ECJ states that "while the positive effect of paid annual leave on the safety and health of the worker is fully deployed when it is taken in the year envisaged, i.e. during the current year, such rest time does not lose relevance in this regard if it is taken at a later period" (ECJ 30 June 2016, *Sobczyszyn*, C-178/15, EU:C:2016:502). In that judgment, it is ruled that the directive is infringed by national legislation (in this case, Polish) which denies a worker his right to paid annual leave in respect of a year in which he was entitled to a period of convalescence leave, provided that the purpose of the period of convalescence rest differs from that of the entitlement to annual leave. This is a different rest period in that it differs from that of the right to sick leave, which is granted to workers in order to enable them to recover from illness (see, to that effect, ECJ; 21 June 2012, *Anged* C-78/11, paragraph 19 and the case-law cited, EU:C:2012:372;). In view of the divergent purposes of those two types of rest periods, the Court has concluded that a worker who is on sick leave during a pre-fixed period of annual leave is entitled, at his request and in order to be able to take his annual leave effectively, to take it on a date other than that of the sick leave (ECJ 10 September 2009, *Vicente Pereda*, C-277/08, EU:C:2009:468; 21 June 2012,

Anged, C-78/11, EU:C:2012:372;). The debate on the interaction of paid annual leave with the suspension of the contract, especially for maternity and sick leave (temporary disability) began as a problematic issue in national courts, but has been addressed with clarity of criteria by the ECJ.

In matters of *paid annual leave and maternity*, some national courts – such as the case of Spain – had been considering that a worker whose maternity leave coincided with a pre-fixed paid annual leave period was not entitled to have a different period of leave individually set for her or to claim damages in the alternative. This case law criterion was abandoned with the ECJ judgment of 18 March 2004, Paz Merino Gómez C-342/01 EU:C:2004:160, when it affirmed the right of the worker to enjoy her annual leave in a period other than maternity leave, even if it has been superimposed on the pre-fixed paid annual leave shifts. In the event that both periods coincide, the worker may make use of the right to annual leave at a time other than that established in the company for annual leave. It is the aforementioned ECJ Judgment of 20 January 2009, Schultz-Hoff and others C-350/06 and C-520/06, EU:C:2009:1820 that states that Community law does not determine how the overlap of paid annual leave and sick leave must be resolved, but the worker on leave who is denied access to leave must be able to enjoy this right.

The ECJ has stated on the interaction between maternity leave and paid annual leave:

- That the purpose of maternity leave and that of paid annual leave is different: the former is intended to protect the biological condition of the woman during and after her pregnancy, and to protect the particular relations between the woman and her child during the period following childbirth.
- A female worker must be able to take her annual leave in a period other than that of her maternity leave, also in the event of a coincidence between the period of maternity leave and that generally fixed, by means of a collective agreement, for the annual leave of the entire workforce" (ECJ ECJ 18 March 2004, Paz Merino Gómez, C-342/01, EU:C:2004:160).
- That this is an absolute principle and that, unlike the situation of sick leave, the transfer of paid annual leave cannot be limited (ECJ 20 January 2009, Schultz-Hoff and Others C-350/06 and C-520/06, EU:C:2009:18).

- Considering that the Directive protecting pregnant workers, workers who have recently given birth or are breastfeeding⁹, the Court added that this applies not only to the minimum period of paid annual leave of four weeks, but also to any additional period of leave provided for in national law (ECJ 18 March 2004, Paz Merino Gómez, C-342/01, EU:C:2004:160).

The ECJ judgment of 10 September 2009, Vicente Pereda, C-277/08, EU:C:2009:468, continued to close the loop of issues by stating that EU law precludes national provisions or collective agreements that establish that a worker who is in a situation of temporary incapacity during the period of annual leave set out in the paid annual leave calendar of the company in which he is employed is not entitled, once discharged from the hospital, to take their annual leave in a period other than that initially set, if any, outside the reference period in question.

In the event that other forms of leave were to be introduced into Union law, the Commission's interpretative report (cit.) considers: (a) that the principle established by the Court that 'a leave guaranteed by Community law cannot impair the right to take another leave guaranteed by the same law' would apply; and (b) if periods of different types of leave protected by EU law coincide, this could involve carrying over the annual leave, or part of it, to the following year.

- A significant breach of the general rule: the time of parental *leave*, unlike maternity leave and situations of illness, is not considered a period of effective work for the purposes of generating entitlement to paid annual leave (ECJ 4 October 2018, Dicu, C-12/17, EU:C:2018:799). This criterion of the ECJ is, in principle, disconcerting as it represents a break from what appeared to be a constant doctrinal line in the cases of interaction of the right to paid annual leave with the concurrence of sick and maternity leave. The justification for this criterion seems to be found in the singularity of the factual elements that make up the case, including the optional nature of the parental leave taken and the fact that its enjoyment is unrelated to a health impediment. The facts of the case are: Ms. Dicu, a judge at the Botoșani District Court, took full paid annual leave and subsequently maternity leave. Later, she took parental leave, during which time her

⁹ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ L 348, 28.11.1992, p. 1).

employment relationship was suspended. Finally, she enjoyed 30 days of paid annual leave. Practically, depending on the dates, all these leaves were taken without interruption. Under Romanian law, which provides for a right to paid annual leave of 35 days, Ms. Dicu applied to the court to which she is assigned to grant her the remaining five days of paid annual leave for 2015, which she wished to take during the working days between the Christmas paid annual leave. The District Court of Botoşani rejected that request on the ground that, under Romanian law, the duration of paid annual leave is proportional to the time actually worked during the current year and that, from that point of view, the duration of the parental leave which he had taken during 2015 could not be regarded as a period of actual work for the purposes of determining entitlement to paid annual leave. It also indicated that the paid annual leave that Ms. Dicu had taken between 17 September and 17 October 2015, corresponding to the year 2015, included seven days of leave taken in advance on account of the year 2016. An appeal was lodged by Ms. Dicu, but the District Court of Cluj upheld it. The Botoşani District Court and the Ministry of Justice appealed against that judgment to the Cluj High Court, which decided to stay the proceedings and to refer a question to the Court of Justice for a preliminary ruling. The question was formulated in very specific terms: 'Does Article 7 of Directive 2003/88/EC preclude a national provision which does not consider as a period of actual work, for the purposes of calculating the duration of annual leave, the period of work during which the worker took parental leave for a child under two years of age?' The ECJ, after recalling the purpose of the right to paid annual leave, specifies that the right to paid annual leave must be determined, in principle, on the basis of the periods actually worked under the employment contract. In this judgment, the ECJ takes into account its case-law on the assimilation to periods worked of certain situations in which the worker is unable to fulfil his or her duties: duly justified illness (ECJ 24 January 2012, *Domínguez* C-282/10 EU:C:201233, 20 January 2009, *Schultz-Hoff and others* C-350/06 and C-520/06, EU:C:2009:18), or workers on maternity leave (ECJ, 18 March 2004, *Paz Merino Gómez*, C-342/01, EU:C:2004:16018-3-04). However – and here the bankruptcy occurs in its traditional position – it reasons that that case-law cannot be applied *mutatis mutandis* to the situation of a worker, such as Ms Dicu, who took parental leave during the reference period, since those situations were of an 'unforeseeable' nature. Considers

that, in accordance with ILO Convention No 132 of 24-6-70 on paid annual leave, the principles of which must be taken into account, in accordance with recital 6 of Directive 2003/88, absences due to illness between absences from work 'for reasons beyond the control of the person concerned', they must be 'counted as part of the period of service', whereas the taking of parental leave is not unforeseeable and derives, in most cases, from the worker's desire to care for his or her child. And it adds that, to the extent that the worker on parental leave is not subject to physical or mental limitations caused by an illness, he is in a situation different from that resulting from an incapacity for work due to the state of health. It also states that the situation of a worker on parental leave, which is optional, differs from that of a worker exercising her right to maternity leave, since the purpose of the maternity leave is to protect the biological condition of the woman during and after her pregnancy. The ECJ concludes by pointing out that the period of parental leave taken by Ms Dicu during the reference period cannot be assimilated to a period of actual work for the purposes of determining her entitlement to paid annual leave in accordance with Article 7 of Directive 2003/88/EC.

- Another exception refers to the overlapping of a worker's enjoyment of paid annual leave with the obligation to quarantine and his right to postpone them. In these cases, the ECJ judgment of 14 December 2023 in *Sparkasse Südpfalz* C-206/22 ECLI:EU:C:2023:984) makes it clear that EU law does not require an employee who has had to quarantine due to the SARS-Cov-2 virus during his or her paid annual leave to be able to postpone it, since quarantine is not comparable to an illness because such a worker is in a different situation from that of a worker who is sick leave.

2.4.3 *Special paid leave and paid annual leave interaction*

The ECJ has had the opportunity to respond to the situation of overlapping paid annual leave and the concurrence of special paid leave typified in the law such as those that are caused by hospitalisation, marriage, death of family members, etc. Specifically, it was a national social court who raised the question for a preliminary ruling on whether any of the circumstances giving rise to special paid leave occur during paid annual leave or weekly rest. It is possible to set a specific date for its enjoyment. The ECJ gave a clear answer to the question by

stating that EU law on weekly rest and paid annual leave does not prevent leave superimposed on paid annual leave or weekly rest from being taken without enjoyment. And this for two reasons: (i) because of the defining requirements of this type of paid leave that require that one of the typified events (hospitalization, marriage, etc.) occur and that the needs or obligations that justify it occur during a period of work; (ii) because of the purpose they fulfil, which is none other than to allow absence from work to meet certain needs or obligations, so that they are inextricably linked to working time (ECJ (Grand Chamber) of 4 June 2020, *FETICO and Others*, C-588/18, EU:C:2020:420).

2.5 LOSS OF THE RIGHT TO ENJOYMENT

2.5.1 *General rule*

A national legislation may establish conditions for the exercise of the right to paid annual leave and provide in its internal rules for the loss of such right at the end of a reference period, provided that the worker who loses his or her right to paid annual leave has actually had the opportunity to exercise that right (ECJ 10 September 2009, *Vicente Pereda*, C-277/08, paragraph 19 and the case-law cited, EU:C:2009:468).

2.5.2 *Problems regarding the period of exercise of the right to leave and the cumulative nature of periods of enjoyment*

— *Deferral of entitlements to paid annual leave for long-term illness: Until when and how many consecutive periods can be claimed?* The ECJ Judgment of 9 November 2023 *XT, and others, Keolis Agen SARL, Syndicat national des transports urbains SNTU-CFDT*, C-271/22 to C-275/22 EU:C:2023:834, addresses the question of the possibility of setting *time limits* for claiming the right to take leave, or failing that, financial compensation, when periods of carry-over due to prolonged medical leave occur. In the case of French law, there is no national provision establishing an express time limit for such a carry-over, the situation at issue in the dispute concerned requests for leave submitted by workers less than fifteen months after the end of the reference period giving rise to such leave and were limited to two consecutive leave periods. The ECJ responds that in these cases it is possible to set time limits to claim the right to enjoy paid annual leave, or failing that, financial

compensation, provided that they are connected with the purpose of paid annual leave. And it adds: (i) in the event that, in the absence of a national provision that establishes an express time limit on the deferral of rights to paid annual leave acquired and not exercised as a result of long-term sick leave, applications for paid annual leave submitted by a worker less than fifteen months after the end of the accrual period that gives entitlement to such leave and limited to two consecutive accrual periods; (ii) in any event, such a carry-over does not undermine the purpose of the right to paid annual leave, since that leave retains its status as rest time for the worker concerned, and, secondly, that such a carry-over does not appear to expose the employer to the risk of too high an accumulation of periods of absence by the worker. This judgment leads us to make two observations: (i) Firstly, it reveals the importance that the ECJ attaches to the right to paid annual leave as a fundamental right referring to fair and equitable working conditions within the framework of the legal order of the European Union. The technical planning sheet incorporated into the official jurisprudence page of the ECJ confirms this ¹⁰. (ii) Secondly, the ECJ, with wise balance and consideration, connects in cases of postponement of paid annual leave due to the concurrence of processes of prolonged medical leave, the period of exercise and the extension of cumulative periods to the relevance of the purpose of the leave. In the specific case under consideration, it considers that requests for paid annual leave are admissible if they are made less than fifteen months after the end of the accrual period and are limited to two consecutive periods. Now, the questions are served, what if they occur after that period? Are these requests no longer heeded? Is the ECJ implicitly defining what a reasonable postponement is? And in the same way, what happens if more than two consecutive months are requested? An essential protagonist in the scenario to answer these questions will be constituted by the weighing judgment on the purpose to which paid annual leave must respond.

— *Claim for financial compensation for accumulated periods of unused paid annual leave.* The ECJ judgment of 29 November 2017, King C-214/16 EU:C:2017:914, advances in relevant aspects on the conditions for exercising the right to take leave and the possibility of claiming cumulatively, via financial compensation, periods not taken. In short, the ECJ allows workers to defer and accumulate the rights to paid annual leave not taken when an employer does not allow them to exercise their right to them. EU law precludes the worker from having to take leave before he knows whether he is entitled to special paid leave.

¹⁰ <https://curia.europa.eu/juris/fiche>

It is interesting to look at the history of the case. The lawsuit is brought by Mr. King claiming that he had worked for Sash WW under a 'self-employed commission-only contract', from 1 June 1999 until the time of his retirement, namely 6 October 2012. Under that contract, Mr. King received only commissions. When he enjoyed annual leave, it was not paid. On termination of his employment relationship, Mr King claimed from his employer payment of an allowance in lieu of his annual leave, whether taken and unpaid and for his leave not taken, for the entire period during which he had worked, namely from 1 June 1999 to 6 October 2012. Sash WW rejected Mr. King's application on the grounds that he had the status of a self-employed person. At first instance, the Employment Tribunal (United Kingdom) ruled that Mr King had to be classified as a 'worker' within the meaning of Directive 2003/88 and that he was entitled to the three categories of compensation for paid annual leave claimed as provided for in English law. On appeal, the question referred for a preliminary ruling by the Court of Appeal of England and Wales, Civil Chamber, United Kingdom, as it had doubts about the interpretation of EU law relevant to the settlement of the dispute. The Court of Appeal finds that United Kingdom law does not allow for the carry-over of annual leave after the reference period of that right and does not necessarily ensure an effective remedy for alleging an infringement of Article 7 of Directive 2003/88.

The ECJ concludes by declaring two things: (1) that national legislation is contrary to the European Union law which, in the event of a dispute between a worker and his employer when determining whether he is entitled to paid annual leave, obliges the worker to take his or her paid annual leave before knowing whether he is entitled to be paid; (2) that a national practice or regulation that prevents a worker from deferring, and where appropriate accumulating, until the termination of his employment relationship, rights to paid annual leave not exercised corresponding to several consecutive periods of departure, due to the employer's refusal to pay those paid annual leave, is also contrary to EU law.

The impact of this pronouncement on national legal systems will not be long in coming. The impact of this doctrine of the ECJ will allow "false self-employed", or workers with very flexible, occasional and intermittent contract conditions, to disrupt at least – if not repeal, although it seems complex that this is the case – the moment of setting the *dies a quo* of the calculation of the one-year limitation period to enjoy paid annual leave in accordance with Spanish legislation.

With regard to the *limitation of periods of accrual of leave*, case law has stated that EU law does not apply to national provisions or practices (such as

collective agreements) that limit after the lapse of a period of time (fifteen months) the accumulation of rights to such leave of a worker who is incapable of work during several consecutive periods of accrual of leave ECJ 22 November 2011), KHS AG (C-214/10).

— *Claim for financial compensation for paid annual leave not taken if the worker has not submitted a request for paid annual leave before the termination of the employment relationship.* The ECJ has addressed issues of expiry of the enjoyment of paid annual leave in two judgments of the same date (ECJ, 16 November 2018, Kreuziger cases, C-619/16, EU:C:2018:872 and Max-Planck-Gesellschaft zur Förderung der Wissenschaften, C-684/16, EU:C:2018:874). The factual data in both cases are of interest in understanding the court's response.

- Case C-619/16 Kreuziger deals with the case of Mr Kreuziger (a trainee lawyer), who had completed his traineeship in preparation for the exercise of the legal profession in Berlin, in the context of a training programme under public law, but without being subject to the civil service rules, which he completed after the relevant traineeship. He decided not to take paid annual leave between 1 January 2010 and the date of termination of his training contract. At the end of the employment relationship, he submitted a request for financial compensation for them, which was denied. Having been dismissed at first instance and in the corresponding appeals, the Higher Administrative Court of Berlin-Brandenburg referred a question for a preliminary ruling. The ECJ considers that European Union legislation precludes national legislation that provides for the automatic loss of the right to take leave if the worker has not requested to exercise his right to paid annual leave before the date of termination of the employment relationship, and without prior verification of whether the employer has effectively allowed him to exercise his right to annual leave before such termination, specifically, informing him in an appropriate manner of the days of paid annual leave to which he was entitled under EU law when that termination occurred, and, consequently, his entitlement to an allowance in lieu of paid annual leave not taken. Therefore, in this sense, the proactive or diligent attitude of the employer is valued, who must demonstrate that the worker deliberately abstained from taking his annual leave despite having been able to do so, which if proven would not be contrary to EU law the loss of the right (including its monetary equivalent).

- Max-Planck-Gesellschaft zur Förderung der Wissenschaften C-684/16 deals with the case of Mr Shimizu who worked for Max-Planck under a number of fixed-term contracts. The institution sent him a letter inviting him to take his paid annual leave (without imposition of days) before the employment relationship was terminated, and Mr. Shimizu took two days. He subsequently requested payment of financial compensation for the 51 days of annual leave not taken corresponding to the years 2012 and 2013, suing Max-Planck for the amount owed for this concept, which was upheld in the first instance and appealed by the defendant. In this context, the German Supreme Labour Court asks the ECJ whether Article 7(1) of Directive 2003/88 or Article 31(2) of the Convention on the Functioning of the European Union preclude a national legislation such as that of the German State which, as a condition for the enjoyment of the right to leave, provides that the worker must request it by indicating his wishes as to the dates of entitlement, so as not to lose their right at the end of the accrual period without the possibility of compensation, and which does not oblige the employer to establish on its own initiative, unilaterally and in a binding manner for the worker the paid annual leave schedule within the accrual period. The ECJ concludes by pointing out that, if the national legislation according to which the fact that a worker has not requested to exercise his right to paid annual leave, during the reference period, has the automatic consequence that said worker loses that right and, correlatively, his right to financial compensation for paid annual leave not taken in the event of termination of the employment relationship, is contrary to EU legislation. On the other hand, it makes an important qualification: if the worker inhibited himself, deliberately and with full knowledge of the facts, as to the consequences that could arise from his abstention from taking his paid annual leave after having been able to effectively exercise his right to it, EU legislation does not preclude the loss of the right or, in the event of termination of the employment relationship, to the consequent lack of financial compensation for paid annual leave not taken, without the employer being required to impose on him the effective exercise of that right, it being for the national court to ascertain whether its legislation is capable of being the subject of such an interpretation.

— Having transferred all this doctrine of the ECJ on periods of exercise and accumulability of paid annual leave of the ECJ to our national legal system, both in its substantive and procedural scenario, the question is served: *Is*

the right to paid annual leave denied by the company affected by a statute of limitations? It is a question of determining to what extent this doctrine of the ECJ (judgments of 29 November 2017, King, C-214/16, EU:C:2017:914 and 6 November 2018, Max-Planck-Gesellschaft zur förderung der Wissenschaften, C-684/16, EU:C:2018:874) affects the institution of the statute of limitations and allows a claim for financial compensation for paid annual leave not taken beyond the last year of work, in those cases in which the employer does not prove that he has acted with the diligence referred to in the judgments of the ECJ. Undoubtedly, the King C 214/16 case advanced in relevant aspects on the conditions of exercise of the right to take leave and the possibility of claiming cumulatively, via financial compensation, periods not taken. The impact of this pronouncement on national laws is significant. The impact of the ECJ's doctrine in the King case could allow "false self-employed", or workers with very flexible, occasional and intermittent contract conditions, to at least disrupt – if it does not repeal, although it seems complex that this is the case from what we will say – the moment of setting the *dies a quo* of the calculation of the one-year limitation period to enjoy paid annual leave as is the case with Spanish legislation. It is clear that this judgment left this loose end, among other reasons, because it was not the subject of the consultation, and it did not have to go further. As explained above, the ECJ has subsequently addressed two issues on the revocation of the enjoyment of paid annual leave in two judgments of the same date (Kreuziger cases C-619/16 and 6 November 2018, Max-Planck-Gesellschaft zur förderung der Wissenschaften C-684/16). The qualification contained in the Max-Planck judgment C-684/16 provides some clues to clarify this problem. As a general rule, national legislation may lay down conditions for the exercise of the right to paid annual leave and provide in its internal rules for the loss of such right at the end of a reference period, provided that the worker who loses his or her right to paid annual leave has actually had the opportunity to exercise that right (ECJ 10 September 2009, Vicente Pereda, C-277/08, paragraph 19 and the case-law cited, EU:C:2009:468). Therefore, there is nothing to prevent national legislation from regulating time limits for claiming that financial compensation in cases where the employment relationship has been terminated. In this regard, the national courts must specify the way in which the *dies a quo* is to be determined for the calculation of the limitation period for the action brought to seek the right to financial compensation in situations in which a worker, who was unable to take his paid annual leave because he was on medical leave, For a long period, he is entitled to such financial compensation from the moment of the termination of the employment relationship, which took place as a result of his declaration in a

situation of permanent incapacity for his usual profession. It should be borne in mind that collective bargaining may be the appropriate way to regulate, in accordance with the provisions of Article 9 of ILO Convention No. 132, the period of enjoyment of paid annual leave, their expiry, possible postponement and accumulation with paid annual leave periods of successive years. In this regard, the following basic premises should be considered: (a) that it is one thing to prevent national legislation from providing rules for the loss of rights (rules on the time limit for bringing an action, for the purposes of limitation), which is not contrary to EU law because of what has already been indicated in relation to the general rule; and (b) that it is quite another thing that in situations such as the indicated problem, relating to the fact that it had been declared proven that the company did not provide the right to enjoy the worker's paid annual leave, it can be assessed as a solution in accordance with EU law that it shifts the *dies quo* of that annual period until the time of verification of that company's breach of duty towards the worker in relation to the exercise of the enjoyment of paid annual leave. The latter would give the possibility of claiming financial compensation corresponding to periods not taken for reasons attributable to the employer. This last consideration would lead to the assessment as an interpretation in accordance with EU law of the fact that it would be possible to claim financial compensation for paid annual leave not taken beyond the last year of work, since the action would not be time-barred if it was requested within a period of one year from the declaration of such non-compliance. Apart from this conclusion, the casuistry on this point is enormously varied: from the simplest cases, such as a declaration of an employment relationship which had not been recognised until now, or requests not made in situations of contractual precariousness. Therefore, the factual data are decisive and relevant for these purposes. However, in general terms, doubts remain, and these would not rule out that the ECJ may be consulted on this issue in many national legal systems. It could be argued that the rest responds not to an economic aspect but to a physiological need that must be fulfilled within each year, so it would not be appropriate to compensate for the lack of cash enjoyment or to accumulate in a single year those not enjoyed in previous years, if there was no agreement in relation to the latter extreme. We must bear in mind that the ECJ went further by pointing out that although the positive effect of paid annual leave on the safety and health of the worker is fully deployed when it is taken in the year foreseen, i.e. during the current year, that rest time does not lose interest in this respect if it is taken in a later period (ECJ 6 April 2006, *Federatie Nederlandse* C-124/05, EU:C:2006:244,

and 20 January 2009, Schultz-Hoff and Others C-350/06 and C-520/06, EU:C:2009:18).

— *The narrow margin of application of the limitation periods and the proactive duty of information on the right to leave by the company.* Once again, it is the German Supreme Labour Court (Bundesarbeitsgericht) that has referred three questions, two of them joined, on periods of exercise of the right to leave. The ECJ follows in the footsteps of the Conley King case, ratifies the postulates of the Max-Planck doctrine and once again reinforces the guarantee for the enjoyment of paid annual leave.

- This is the judgment of the ECJ of 22 September 2022 Fraport and St. VincenzKrankenhaus GmbH, C-518/20 and 727/19, respectively, EU:C:2022:707. The data of both cases are specified, on the one hand, in the claim of a driver affected by persistent disability, from December 2014 to August 2022, who claims that paid annual leave not taken for the year in which it was declared, and, on the other hand, that of a hospital employee who falls ill in 2017 with 14 days of paid annual leave pending, without the company warning him that at the end of 2019 his right lapses. The ECJ states in this judgment: (i) that EU law precludes paid annual leave accrued before incapacity (permanent or temporary) from being lost at the end of a period of carry-over, even if the employer has not offered the worker, at the appropriate time, the possibility of exercising that right; (ii) an acquired right to paid annual leave cannot be extinguished at the end of the reference period or a carry-over period laid down by national law where the worker has not been able to take his leave.
- The second judgment, also of the same date (ECJ Judgment of 22 September 2022 TO v. LB, C-120/21, EU:C:2022:718), addresses the issue of the limitation period for the right to leave. This is the claim of a worker who provided services to the company from November 1996 to July 31, 2017 and who at the end of the contract claims financial compensation for the 101 days of paid annual leave accumulated between 2013 and 2017 that he had not enjoyed. The ECJ makes two key pronouncements openly questioning the national regulations on the limitation of the action by providing: (i) EU law precludes accrued paid annual leave from expiring at the end of a three-year period that begins to run at the end of the year in which that right arose, when the employer has not enabled the worker to exercise such right effectively: and (ii) to avoid this consequence, the employer can comply with its obligations of information and proactivity, thus promoting legal certainty.

- Three conclusions can be drawn from these judgments: 1) EU law precludes the expiry of accrued paid annual leave within a period of three years (from the end of the year in which that right arose) if the employer has not enabled the worker to exercise that right effectively. (2) The right to leave may not be terminated at the end of the reference period or a carry-over period laid down by national law where the worker has not been able to take his leave. 3) If the company does not give the possibility of exercising the right effectively, it cannot invoke the legal prescription either, as this would give rise to unjust enrichment.

The cornering of the statute of limitations in this area is evolving at the instigation of the German Supreme Labour Court and has tended responses in this regard from the ECJ. The doctrine of the ECJ places the obligation on the employer to inform and be proactive in the exercise of a right (that of paid annual leave) that corresponds to the worker. Along these lines, the ECJ judgment of 27 April 2023, FI and Bayerische Motoren Werke AG, C-192/22 EU:C:2023:347, addresses the situation of accrued paid annual leave that could not be taken due to a short-term illness before the termination of the employment relationship (due to retirement) when there is an exemption from going to work. In this case, the right does not expire before the termination of the employment relationship as it cannot deploy its purpose and can be replaced by the aspect of economic compensation when the termination arrives. The consequence is clear: the doctrine of the ECJ clearly impacts the legal regime of paid annual leave articulated in terms of deadlines in each national legislation.

IV. REMUNERATION

If there is relevant and consolidated case law of the ECJ, both in terms of figures and subject diversity, it is that which refers to the right to paid annual leave. A doctrinal compendium on the remuneration system gives us the following result:

— *Objective.* The purpose of the obligation to pay for paid annual leave is to place the worker, during those paid annual leave, in a situation which, from the point of view of wages, is comparable to periods of work (ECJ 16 March 2006, C.D. Robinson-Steele and Others C-131/04 and 257/04 EU:C:2006:177).

— *The impact of the ECJ's doctrine on jurisprudential doctrine:* limitation of the margin for collective autonomy in this matter. The ECJ has spec-

ified that all the components of the overall remuneration inherent to the personal and professional status of the worker must be maintained during his or her paid annual leave. In this way, the allowances related to their status as hierarchical superior, their seniority and their professional qualifications had to be maintained, where appropriate.

— *Amount. Rule.* According to the case-law of the Court, the expression 'paid annual leave' in *Article 7(1) of Directive 2003/88* means that, during annual leave within the meaning of that directive, the remuneration must be maintained and, in other words, that the worker must receive the normal remuneration for that rest period (ECJ 20 January 2009, Schultz-Hoff and Others, C-350/06 and C-520/06, paragraph 58, cit., EU:C:2009:18). The worker retains the right to receive ordinary remuneration during the minimum annual leave guaranteed by Union law also in the event that he or she has suffered periods of reduced working time for business reasons, and this general rule may not be subject to an exception by collective agreement. In this sense, the provisions of a collective agreement – in the case of construction – which establish rules for calculating paid annual leave remuneration in cases of reduction of working time for business reasons (in this case, it was an inactive shutterer for half the year, for business reasons), and which entail a reduction in ordinary remuneration, are contrary to Art.7.1 of Dir. 2003/88 of 4 November and Art. 31.2 of the CFREU (ECJ 13 December 2018, Hein, C-385/17 EU:C:2018:1018). In the aforementioned judgment, the ECJ points out that the temporal effects of the judgment (despite the fact that it contradicts national jurisprudence) cannot be limited by invoking legal certainty or legitimate expectations in the authorities.

— *Concepts included and excluded.* As a general rule, the remuneration for paid annual leave must include the ordinary concepts that remunerate the performance of the work usually carried out and exclude extraordinary and those of a indemnifying and/or compensatory nature for the specific expenses or damages caused as a result of the work performance. In this regard, Spanish case-law states that the fixing or establishment of the "normal or average" remuneration for paid annual leave by collective bargaining admits an understandable degree of discretion, since the expression "calculated in the form..." that uses Article 7.1 of ILO Convention 132 cannot reach the distortion of that concept... to the point of making it unrecognisable, since it is an indeterminate legal concept which, as such, offers areas of certainty and areas of doubt which, by force, imposes on the Courts a case-by-case examination of each specific case in order to reach a conclusion that respects the legal, national and EU requirements, but which at the same time satisfies the purpose of the effective

rest pursued by the figure of paid leave, and without encouraging or contributing in any way to dissuade or discourage workers from enjoying it, which, in accordance with the doctrine of the ECJ (Lock case), would be contrary to Article 7 of the Directive. Remuneration for the guaranteed paid annual leave period should only include overtime when it is very foreseeable and customary (ECJ, 13 December 2018, Hein, C-385/17, EU:C:2018:1018).

— *Employees seconded by temporary work agencies and amount for paid annual leave not taken*: EU law precludes the compensation for unused paid annual leave (or the associated extra pay) of staff seconded by a temporary employment agency, who, after having provided services for two years and seeing their employment relationship terminated, such compensation is lower than that which they would obtain in the event of direct recruitment by the user company (ECJ of 12 May 2022, Luso Temp C-426/20, EU:C:2022:373).

— *Partial payments: prohibitions, exceptions and burden of proof*. Article 7 of Council Directive 93/104/EC precludes: (i) a part of the salary paid to the worker for the work performed from being set off against the remuneration of annual leave without the worker receiving, for this reason, an additional amount to that paid to him for the work performed, and no exceptions to this right can be established in a contract; (ii) it also precludes the remuneration of minimum annual leave within the meaning of that provision being the subject of partial payments in instalments over the corresponding annual period of work which are added to the remuneration for the work carried out and not of a payment for a specific period in which the worker has actually taken the leave. However, partial payments are possible when the amounts have been paid, in a transparent and understandable manner, with the burden of proof in this regard falling on the employer (ECJ 16 March 2006, C.D. Robinson-Steele and Others C-131/04 and 257/04 EU:C:2006:177).

— *Overtime supplement for paid annual leave: the hours that could be worked during their enjoyment are computed*. With regard to the accrual of a supplement for overtime in the remuneration of paid annual leave, the case-law has stated that a mechanism for accounting for the hours worked, which takes as a reference in the monthly unit, by virtue of which the enjoyment of a paid annual leave may entail a reduction in the worker's remuneration, by eliminating from it the supplement provided for overtime actually worked, may deter the worker from exercising his or her right to paid annual leave during the month in which he or she has worked overtime, which is a matter for the referring court in the main proceedings to determine (ECJ, 13 January 2022, DS and Koch Personaldienstleistungen GmbH, C514/20, EU:C:2022:19). This is because, as indicated in the aforementioned judgment, any practice or

omission by an employer and collective agreement regulations that has a potentially deterrent effect and that constitutes an economic disadvantage in the enjoyment of annual leave by a worker is incompatible with the purpose of the right to paid annual leave in accordance with the provisions of the Charter of Fundamental Rights of the European Union, Art. 31.2. and Article 7 of Directive 2003/88. In contrast to the case-law in *Hein*, 13 December 2018, *Hein*, C-385/17, paragraph 47, EU:C:2018:1018ECJ, in which the ECJ addressed the question of the need to take into account overtime worked by a worker in calculating the ordinary remuneration due in respect of paid annual leave and also examined the requirements for the calculation of such overtime for the purposes of determining ordinary remuneration, so that the worker enjoys, during such paid annual leave, economic conditions comparable to those enjoyed in the exercise of his work; In the present case, the question concerns the threshold for triggering the payment of a supplement for the overtime actually worked by the worker in a given monthly period. The impact of the aforementioned judgment of the ECJ of 13 January 2022, *DS and Koch Personaldienstleistungen GmbH*, C514/20, EU:C:2022:191, *on the interpretative criteria of national labour courts, must be considered*. The ECJ modulates – by not using the expression, limits – the margin of collective autonomy in this matter. We have been able to observe this in the approach to the question by the German labour Supreme Court, when it refers to favourable interpretative results, of non-interference by the employer, and other dissuasive results, in the compatibility with EU regulations and doctrine of the ECJ of the applicable conventional provision. In this sense, it will reconsider the criteria of reiteration and predictability, and average calculations for the inclusion of overtime in the paid annual leave remuneration and will open the door to introducing other assessment parameters such as that of the reference unit of calculation (in this case, monthly), if they occur in the regulation and with the circumstances that are defined. Finally, new mechanisms of interpretative warning or of canons reinforced in the argumentation must be present in the reasoning of the national courts, namely: the criterion of the economic disadvantage in the exercise of the right to paid annual leave together with the criterion of prohibition of any provision that, even when formulated in a neutral manner, entails a potentially deterrent effect on the exercise of said right.

— *Impact of previous temporary disability on paid annual leave remuneration*. As a general rule, the remuneration for paid annual leave must be equivalent to that which is ordinarily received. During periods of temporary disability, the right to paid annual leave continues to accrue, but it is possible that the economic payments are lower than those of periods of real work. In

these cases, doubts have arisen in the national courts as to whether the paid annual leave after those periods of sick leave should be remunerated considering the income actually received in the previous months or that which would correspond to the performance of the actual work. This is the case of the judgment referred to in the ECJ judgment of 9 December 2021 XXXX against the Dutch Secretary of State for Finance, C-217/20, EU:C:2021:987) in which a worker from the Netherlands claims from his company full salary during the paid annual leave having been on long-term partial leave due to illness, with reduced working hours for this, but that the employer limits itself to paying him the paid annual leave in accordance with that situation and he claims the full salary. The answer to this question leads to the following conclusions: (i) the assimilation of periods of activity and medical leave for paid annual leave purposes: the occurrence of a disability for work due to illness is, in principle, unforeseeable and beyond the control of the worker concerned, it must be considered, with regard to the right to paid annual leave, that workers who are on sick leave during the reference period are treated in the same way as those who have actually worked during that period. (ii) the innocuousness of the lower remuneration received during the medical leave, that is, in these cases, the right to leave depends on the periods actually worked, without taking into account the fact that the amount of that remuneration has been reduced as a result of a situation of medical leave.

CHAPTER 28

**EMPLOYMENT ASPECTS OF THE TRANSFER
OF UNDERTAKINGS
(COUNCIL DIRECTIVE 2001/23/EC OF 12 MARCH 2001)**

MARÍA LOURDES ARASTEY SAHÚN AND CRÍSTIAN ORÓ MARTÍNEZ

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I. THE LEGAL FRAMEWORK ON THE EMPLOYMENT EFFECTS OF THE TRANSFER OF UNDERTAKINGS IN EUROPEAN UNION LAW

The approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses dates back to the time of entry into force of Council Directive 77/187/EEC of 14 February 1977¹ on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. The aim of the Directive was to overcome the existing differences in the legislation of Member States as regards the protection of workers in the event of a change of their employer. The goal sought by the (then) European Economic Community in balancing out these differences was to prevent them from blocking or hindering the functioning of the common market.

The extensive case law of the Court of Justice (ECJ) in subsequent years dealing with the concept of 'transfer' highlighted the difficulties with the definition of this concept. This justified the adoption of Directive 98/50/EC of 29 June 2003 amending Directive 77/187.

Similarly, Directive 98/50 also introduced the obligation for the Commission to submit to the Council an analysis of the effects of the directive and to propose any amendment it deemed necessary (Article 7 (b))².

The current Directive 2001/23/EC of 12 March 2001³, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses is the result of the codification of the two previous directives.

All these directives have given rise to a number of judgments of the ECJ delivered in infringement proceedings. Some of these judgments were based on the failure to transpose the relevant directive provisions within the prescribed period (judgments of 15 April 1986, *Commission v Belgium* (C-237/84,

¹ OJ 1977, L 61, p. 26.

This directive is part of a set of EU rules on corporate restructuring. In addition to the transfer of undertakings, those rules dealt with collective redundancies (Directive 75/129, now replaced by Directive 98/59) and the protection of employees in the event of the insolvency of their employer (Directive 80/987, now replaced by Directive 2008/94).

² The same provision now appears in Article 10 of Directive 2001/23/EC.

See Commission Report on Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0334:FIN:EN:PDF>).

³ OJ 2001, L 82, p. 16.

EU:C:1986:149); of 10 July 1986, *Commission v Italy* (C-235/84, EU:C:1986:303), and of 10 June 2004, *Commission v Luxembourg* (C-333/03, EU:C:2004:369)). In the judgment of 8 June 1994, *Commission v United Kingdom*, C-382/92, (EU:C:1994:233), the ECJ found that the United Kingdom had failed to provide a mechanism for the designation of employees' representatives where the employer did not consent to the designation and had also failed to apply the protection of the directive to non-profit undertakings. Moreover, it had failed to oblige transferors or transferees who envisage measures in relation to their employees to consult in good time with their employees' representatives with a view to seeking an agreement. Furthermore, the United Kingdom had also failed to provide for effective sanctions in the event that an employer failed to inform and consult the employees' representatives. Finally, in judgment of 11 June 2009, *Commission v Italy* (C-561/07, EU:C:2009:363), the Court found that Italy had incorrectly transposed the directive by excluding undertakings in critical difficulties.

As regards the validity of the directives, the judgment of 17 April 1997, *Burdalo Trevejo and Others* (C-336/95, EU:C:1997:204), points out that their provisions cannot be relied on in relation to a transfer of an undertaking which took place at a time when the directive had not yet begun to produce legal effects in the Member State concerned.

II. THE SCOPE OF THE DIRECTIVE

1. The notion of “employer”

For the purposes of the directive, the transferor and the transferee can be any natural or legal person who can be qualified as an employer [Article 2(1) (a) and (b) of the directive].

It is apparent from the wording of the above-mentioned provision that the transferor is the party which, by reason of a transfer, within the meaning of Article 1(1) of that Directive, loses the capacity of employer (judgment of 21 October 2010, *Albron Catering* (C-242/09, EU:C:2010:625)). The transferee will therefore be the person who becomes the employer.

The notion of employer implies the existence of a contract of employment or of an employment relationship. However, the Directive does not define these notions. National laws have a certain leeway for defining the concept of worker, as the ECJ noted in the judgments of 11 July 1985, *Foreningen af Arbejdsledere i Danmark* (C-105/84, EU:C:1985:331), and of 20 July 2017, *Pis-*

carreta Ricardo (C-416/16, EU:C:2017:574). The ECJ's starting point in this regard is that the directive does not seek a complete harmonisation that would set aside national legislation. As a consequence, the protection guaranteed by the directive covers those who are considered as employees under national legislation [Article 2(1)(d) of the Directive].

Nevertheless, in the event of a transfer, within the meaning of Directive 2001/23, of an undertaking belonging to a group to an undertaking outside that group, it is also possible to regard as a 'transferor', within the meaning of Article 2(1)(a) of that Directive, the group company to which the employees were assigned on a permanent basis without however being linked to the latter by a contract of employment, even though there exists within that group an undertaking with which the employees concerned were linked by such a contract of employment (judgment of 21 October 2010, *Albron Catering* (C-242/09, EU:C:2010:625)).

2. The notion of "economic entity" for the purposes of a transfer

In the various language versions of Article 1(1)(a) of Directive 2001/23, the object of the transfer is referred to in the following terms: (a) undertaking (English), empresa (Spanish and Portuguese), virksomhed (Danish), Unternehmen (German), entreprise (French), impresa (Italian), επιχείρηση (Greek), onderneming (Dutch), yrittys (Finnish), företag (Swedish); and (b) business (English), centro de actividad (Spanish), bedrift (Danish), Betrieb (German), établissement (French), stabilimento (Italian), εγκατάσταση (Greek), vestiging (Dutch), estabelecimento (Portuguese), verksamheter (Swedish) (judgment of 15 October 1996, *Henke* (C-298/94, EU:C:1996:382)). The Directive applies to cases of transfer of these objects, but in order to determine when the existence of such objects is established, Article 1(1)(b) uses the notion of 'economic entity', that has to be assessed both before and after the transfer.

For the purposes of defining an economic entity, the ECJ has used a common concept, essentially derived from the area of competition law, which includes any stable entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed (e.g. judgment of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376)).

This definition also applies to the interpretation of the transfer Directive (judgments of 8 June 1994, *Commission v United Kingdom* (C-382/92, EU:C:1994:233) and of 14 September 2000, *Collino and Chiappero* (C-343/98, EU:C:2000:441), and order of 26 May 2005, *Sozialhilfverband Rohr-*

bach (C-297/03, EU:C:2005:315)). In *Collino and Chiappero*, which concerned telecommunications services in the administration of the State, the Court extended to the field of the directive the doctrine –established in the field of competition law– according to which the management of public facilities and the fact of placing them at the disposal of users on payment of a fee must be regarded as a business activity, including where the relevant activity is carried out by a public authority.

Indeed, under Article 1(1)(c) of Directive 2001/23, the scope of this Directive extends to all undertakings, whether public or private, which are engaged in economic activities, whether or not they are operating for gain.

In short, the determination of the object of the transfer is based on the notion of 'economic entity', which is defined as any organised grouping of persons and of assets enabling the exercise of a sufficiently structured and autonomous economic activity and pursuing a specific objective (e.g.: judgments of 10 December 1998, *Hernández Vidal and Others* (C-127/96, C-229/96 and C-74/97, EU:C:1998:594), of 26 September 2000, *Mayeur* (C-175/99, EU:C:2000:505), and of 29 July 2010, *UGT-FSP* (C-151/09, EU:C:2010:452)).

In order to determine whether the condition relating to the existence of 'an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary,' is in fact satisfied, it is necessary to carry out an overall assessment of the circumstances of the case. The ECJ has held that it is necessary to consider all the facts characterising the transaction in question, 'including in particular the type of undertaking or business, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended' (judgments of 26 November 2015, *Aira Pascual and Others* (C-509/14, EU:C:2015:781), and of 19 October 2017, *Securitas* C-200/16, EU:C:2017:780)). In the judgment of 19 October 2017, *Securitas* (C-200/16, EU:C:2017:780), the ECJ accepted that, in the case of a music school, the economic activity is based on the material resources (musical instruments, facilities and premises) – and not on manpower– so that the transmission of those resources constitutes a transfer within the meaning of the directive.

The transfer of intangible elements may also entail the transfer of an undertaking if the transferee does not have to provide other elements that are in-

dispensable for carrying out the activity (judgment of 8 May 2019, *Dodič* (C-194/18, EU:C:2019:385)). This may be the case with Artificial Intelligence, applications or algorithms.

Some elements illustrating the concept of ‘economic entity’ can be summarised as follows:

— The Directive applies to the transfer of activities, such as the running of a canteen, that are ancillary to the main business of the transferor: judgment of 12 November 1992, *Watson Rask and Christensen* (C-209/91, EU:C:1992:436)).

— The transfer must relate to a stable organised entity (judgment of 19 September 1995, *Rygaard* (C-48/94, EU:C:1995:290)). Although the requirement of stability does not mean that the pursuit of an activity by the transferee must be unlimited in time, it does preclude the transfer from being carried out with an abusive or fraudulent intention, that is to say with the intention of progressively bringing about the liquidation of the transferred entity (judgment of 13 June 2019, *Ellinika Nafpigeia* (C-664/17, EU:C:2019:496)).

— The entity must already exist before the transfer (judgment of 6 March 2014, *Amatori and Others* (C-458/12, EU:C:2014:124)). This means that there is no transfer of an undertaking, for the purposes of the directive, where the production unit is created just before the transfer and with the aim of laying off the staff.

Since the concept of ‘economic activity’ covers any activity consisting of offering goods or services on a given market, the provision of services qualifies as an economic activity. This is so even where that activity is carried out in the public interest and for a non-profit-making purpose, in competition with those offered by operators seeking to make a profit, in so far as that activity does not fall within the exercise of public powers (judgments of 23 April 1991, *Höfner and Elser* (C-41/90, EU:C:1991:161), and of 26 September 2000, *Mayeur* (C-175/99, EU:C:2000:505)).

Furthermore, the fact that both the transferred staff and the activities are integrated into the public administration does not constitute a circumstance capable, in itself, of excluding the application of the directive, as long as the members of the staff have the status of employees within the meaning of national legislation (judgments of 11 July 1985, *Foreningen af Arbejdsledere i Danmark* (C-105/84, EU:C:1985:331)⁴; of 10 December 1998, *Hidalgo*

⁴ The doctrine established in this judgment gave rise to the wording of Article 2(1)(d) of Directive 98/50, which corresponds to the same Article of the current directive.

and Others (C-173/96 and C-247/96, EU:C:1998:595); and of 14 September 2000, *Collino and Chiappero* (C-343/98, EU:C:2000:441)).

Consequently, the mere fact that the employer is a public authority is not sufficient to preclude the application of the directive. It is only where the activity transferred involves the exercise of public powers that the transfer will be excluded from the protection of the directive. This is the case of the exclusion laid down in Article 1(1)(c) of Directive 2001/23, which concerns the administrative reorganisation of public administrative authorities and the transfer of administrative functions between public administrative authorities. In its judgment of 15 October 1996, *Henke* (C-298/94, EU:C:1996:382), the ECJ held that that exclusion applies even if the transfer concerns public-power activities that also have economic aspects, if those aspects are merely ancillary.

However, in the judgment of 6 September 2011, *Scattolon* (C-108/10, EU:C:2011:542), concerning a case of auxiliary services at Italian State schools that were transferred by the State administration to the municipalities, the ECJ did not apply the exclusion relating to the administrative reorganisation of public administrative authorities and therefore held there was a transfer.

Finally, pursuant to Article 1(3) of Directive 2001/23, as amended by Directive (EU) 2015/1794⁵, the Directive does not apply where the object of the transfer consists exclusively of one or more seagoing vessels, but does apply to a transfer of a seagoing vessel that is part of a transfer of an undertaking, business or part of an undertaking or business, provided that the transferee is situated, or the transferred undertaking, business, or part of an undertaking or business remains, within the territorial scope of the Treaty.

3. The notion of “transfer”

The notion of ‘transfer’ has been controversial since the adoption of the original Directive 77/187. It is precisely that difficulty which justified its amendment by Directive 98/50, in order to adapt Article 1 to its current wording.

The debates that led to the adoption of that amendment highlighted the danger that situations involving the subcontracting of ancillary activities might be excluded from the notion of ‘transfer’. The Economic and Social Committee warned⁶ that in those sectors there was a large volume of female employ-

⁵ Directive (EU) 2015/1794 of the European Parliament and of the Council, of 6 October 2015, amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers (OJ 2015, L 263, p. 1).

⁶ OJ 1995, C 133, p. 13.

ees, and that depriving this group of the protection afforded by the Directive could result in a discrimination on the grounds of sex.

In order to ascertain the existence of a transfer, a number of aspects must be taken into account

3.1 LEGAL ACT THAT GIVES RISE TO THE TRANSFER

The transfer of an undertaking or business may result from a legal transfer or merger. In view of the differences between the language versions and between the concepts used by the domestic legislation of the Member States (judgment of 7 February 1985, *Abels* (C-135/83, EU:C:1985:55)), the ECJ has given the concept of legal transfer a sufficiently flexible interpretation. This has allowed the Court to safeguard the objective of the Directive, namely protecting employees in the event of a transfer of their undertaking (judgments of 19 May 1992, *Redmond Stichting* (C-29/91, EU:C:1992:220), and of 7 March 1996, *Merckx and Neuhuys* (C-171/94 and C-172/94, EU:C:1996:87)).

The Directive therefore covers all cases of change, in the context of contractual relationships, of the natural or legal person responsible for operating the undertaking (judgments of 15 June 1988, *Bork International and Others* (C-101/87, EU:C:1988:308), and of 10 December 1998, *Hernández Vidal and Others* (C-127/96, C-229/96 and C-74/97, EU:C:1998:594)). In short, it covers any change in the person or the position of the employer (judgment of 2 December 1999, *Allen and Others* (C-234/98, EU:C:1999:594)).

Thus, the Court has held that the fact that the transfer results from unilateral decisions of public authorities and not from an agreement does not exclude the application of the Directive (see, in particular, judgments of 19 May 1992, *Redmond Stichting* (C-2); of 14 September 2000, *Collino and Chiappero* (C-343/98, EU:C:2000:441), and of 29 July 2010, *UGT-FSP* (C-151/09, EU:C:2010:452)).

Transfers by *inter vivos* acts may take place by any legal act capable of directly or indirectly transferring rights: sale, industrial lease, acquisition by auction, usufruct, donation, reversion, merger or acquisition, transfer of public bodies from one entity to another, etc. The main element is not the form of the legal act, but the pursuit of the same business activity. This means that there will be a transfer even where an operation is formally presented as if the old undertaking had ceased to operate and the new undertaking was completely independent from the former (judgments of 19 May 1992, *Redmond Stichting* (C-29/91, EU:C:1992:220), of 11 March 1997, *Süzen* (C-13/95, EU:C:1997:141), and of 14 September 2000, *Collino and Chiappero* (C-343/98, EU:C:2000:441)).

The Court has also held that the Directive applies to the following cases:

- where the owner takes over the operation of a leased undertaking following a breach of the lease by the lessee (judgment of 17 December 1987, *Ny Mølle Kro* (C-287/86, EU:C:1987:573));

- where, upon the termination of the lease agreement of an undertaking such as a restaurant, the owner concludes a new lease agreement with a new transferee (judgment of 10 February 1988, *Foreningen af Arbejdsledere i Danmark* (C-324/86, EU:C:1988:72);

- the transfer of an undertaking, such as a bar, under a lease-purchase agreement and the retransfer of that undertaking as a result of the termination of that agreement by judicial decision, irrespective of whether or not ownership was transferred (judgment of 5 May 1988, *Berg and Busschers* (C-144/87 and C-145/87, EU:C:1988:236));

- where, upon termination of a lease and the cessation of the undertaking's operations, the lease is taken over by the owner of that undertaking, in order to transfer it subsequently to a third party who shortly afterwards resumes its operations, with just over half of the staff employed by the previous lessee, provided that the undertaking in question retains its identity (judgment of 15 June 1988, *Bork International and Others*, 101/87, (EU:C:1988:308));

- a transfer between two companies in the same group with the same owners, the same management, the same premises and working on the same site. Thus, in the judgment of 2 December 1999, *Allen and Others* (C-234/98, EU:C:1999:594), the directive was declared applicable to a situation in which a company belonging to a group decided to subcontract mining work to another company in the same group, in so far as the transaction involved the transfer of an economic entity between the two companies;

- the transfer of an economic entity to several transferees, in which case the transfer of the rights and obligations to each of the transferees must be carried out in proportion to the tasks performed by the worker, provided that the applicable national law authorises such a division of the contract of employment and that this division does not adversely affect the conditions of employment (judgment of 26 March 2020, *ISS Facility Services* (C-344/18, EU:C:2020:239));

- a situation in which a notary, who is a public official and the private-sector employer of the employees posted to his or her practice, succeeds the previous holder of such a practice, takes over his or her records and an essential part of the staff who were employed by him or her and continues to carry out the same activity on the same premises with the same material re-

sources, provided that the identity of that practice is retained, which it is for the referring court to determine, taking into consideration all the relevant circumstances (judgment of 16 November 2023, *NC (Transfer of a Spanish notary's office)* (C-583/21 to C-586/21, EU:C:2023:872) and order of 22 October 2024, *KI (Transfer of a Portuguese notary's office II)* (C-603/23, EU:C:2024:930)).

What is more, in order to assess the existence of a transfer, a direct contractual link between transferor and transferee is not required (judgment of 16 February 2023, *Strong Charon* (C-675/21, EU:C:2023:108)). Thus, in its judgment of 19 May 1992, *Redmond Stichting* (C-29/91, EU:C:1992:220), the ECJ held that the Directive applies to a situation in which a public authority (a municipality in that case) decides to terminate the grant of subsidies to a legal person (the Redmond Stichting foundation, which provided assistance to drug addicts), thereby causing its activities to cease fully and definitively (since those subsidies were its sole resources), and to transfer those subsidies to another legal person pursuing a similar purpose.

The ECJ insisted on this in its judgment of 19 October 2017, *Securitas* (C-200/16, EU:C:2017:780), stating that the lack of a contractual link between two undertakings successively entrusted with managing the surveillance and security of port facilities has no bearing on the question as to whether or not Directive 2001/23 is applicable.

This brings about the issue of the legal classification of the subrogation of undertakings imposed in collective agreements, a situation which arises in particular as regards the succession of contracts for the provision of services.

The ECJ stated that there would be a transfer only where, in such a situation, other relevant elements for the existence of an ‘economic entity’ are also transferred (including the workforce, where that is relevant for the activity of the undertaking). Indeed, for the ECJ, the mere loss of a service contract to a competitor does not by itself indicate the existence of a transfer of an undertaking or business within the meaning of Directive 2001/23 (judgment of 11 March 1997, *Süzen* (C-13/95, EU:C:1997:141)).

It is precisely for that reason that some collective agreements seek to ensure continuity of employment by including mandatory subrogation clauses for cases of succession of service contracts.

In such cases, the subrogation is based on the collective agreement, which leads to the question whether, although that agreement is a legal act which has not been voluntarily concluded between the transferor and the transferee, the final result – consisting in the takeover of the staff – should lead to the activation of the provisions of the Directive.

In this regard, the judgment of 19 October 2017, *Securitas* (C-200/16, EU:C:2017:780), concerns the compatibility with the directive of a clause of a collective agreement that expressly excluded from the concept of transfer the loss of a customer by an operator following the award of a service contract to another operator. The ECJ notes that such a clause in the collective agreement, in so far as it contains a general exclusion from the concept of transfer, is contrary to the Directive: indeed, the analysis of whether or not there is a transfer must, in any event, be carried out by taking into consideration all the facts which characterise the situation in question.

This issue seems to have been definitively solved by the judgment of 11 July 2018, *Somoza Hermo and Ilusión Seguridad* (C-60/17, EU:C:2018:559), which finds that there is a transfer in a situation where the transferee takes over the staff of the transferor as regards an activity that is essentially based on manpower, a conclusion that is not affected by the fact that the takeover took place on the basis of a collective agreement.

3.2 RETENTION OF IDENTITY

On the basis of Article 1(1) of Directive 2001/23, the retention of identity is the decisive factor in determining whether there is a transfer (judgment of 18 March 1986, *Spijkers* (C-24/85, EU:C:1986:127)). That factor refers to the identity of the activity, provided it is supplemented by the transfer of significant tangible or intangible assets (judgments of 14 April 1994, *Schmidt* (C-392/92, EU:C:1994:134), and of 11 March 1997, *Süzen* (C-13/95, EU:C:1997:141)).

In its judgment of 9 September 2015, *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565), the ECJ clarified that what is relevant for the purpose of finding that the identity of the transferred entity has been preserved is not the retention of the specific organisation imposed by the employer on the various elements of production which are transferred, but rather the retention of the functional link of interdependence and complementarity between those elements. Thus, the concept of a ‘transfer of a business’ encompasses a situation in which an undertaking active on the charter flights market is wound up by its majority shareholder, which is itself an air transport undertaking, and the latter undertaking then takes the place of the undertaking that has been wound up by taking over aircraft leasing contracts and ongoing charter flight contracts, carries on activities previously carried on by the undertaking that has been wound up, reinstates some employees that have hitherto been seconded to that undertaking, assigning them tasks identical to those previously per-

formed, and takes over small items of equipment from the undertaking that has been wound up.

As mentioned above, in order to determine whether there is a situation of retention of identity, the ECJ requires a global assessment of concurring elements such as the type of undertaking or business concerned (judgments of 26 November 2015, *Aira Pascual and Others* (C-509/14, EU:C:2015:781), and of 9 September 2015, *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565)), whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer (judgment of 7 March 1996, *Merckx and Neuhuys* (C-171/94 and C-172/94, EU:C:1996:87)), and the period, if any, for which those activities were suspended (judgment of 18 March 1986, *Spijkers* C-24/85, EU:C:1986:127)). It must also be born in mind that activities of a particular nature which constitute independent tasks may, where appropriate, be treated as a business or parts of a business within the meaning of the directive (judgment of 19 May 1992, *Redmond Stichting* (C-29/91, EU:C:1992:220)). In any event, the identity of an economic entity necessarily implies functional autonomy which, while it may be limited, must be retained after the transfer (judgment of 13 June 2019, *Ellinika Nafpigeia* (C-664/17, EU:C:2019:496)).

Where the economic activity carried out by an entity is based mainly on intangible assets, the transfer of which is subject to the express or tacit acceptance of the clients, the identity can be considered to have been maintained only where the existence of a transfer of clients is established (judgment of 8 May 2019, *Dodič* (C-194/18, EU:C:2019:385)).

It is for the national court to evaluate, on a case-by-case basis and by means of a global assessment, all the relevant circumstances. The importance to be attached to each of the criteria establishing the existence of a transfer within the meaning of Directive 2001/23 is necessarily linked to the activity carried on, or even to the production or operating methods employed, in the relevant undertaking, business or part of a business.

Thus, the scope of the directive covers a situation in which a public undertaking, responsible for the economic activity of handling intermodal transport units, entrusts, by a public service operating agreement, the performance of that activity to another undertaking, by providing to the latter undertaking the necessary infrastructure and equipment, which it owns, and subsequently decides to terminate that agreement without taking over the staff of the latter

undertaking, on the ground that it will now perform that activity itself with its own staff (judgment of 26 November 2015, *Aira Pascual and Others* (C-509/14, EU:C:2015:781)). The fact that the tangible assets essential to the performance of the activity in question have always belonged to the entity which takes back that activity is irrelevant for the purposes of the application of Directive 2001/23 (this idea is reiterated in the judgment of 7 August 2018, *Colino Sigüenza*, C-472/16, (EU:C:2018:646)).

Moreover, the scope of that directive covers all cases where, in the context of contractual relations, there is a change in the natural or legal person who is responsible for carrying on the undertaking and who thereby enters into the obligations of an employer towards employees of the undertaking, irrespective of whether ownership of the tangible assets has been transferred. Already in the judgment of 20 November 2003, *Abler and Others* (C-340/01, EU:C:2003:629), the ECJ held that the fact that the tangible assets taken over by the new contractor did not belong to its predecessor but were merely provided by the contracting authority cannot preclude the existence of a transfer of an undertaking within the meaning of the Directive (see also judgment of 20 January 2011, *CLECE* (C-463/09, EU:C:2011:24)). Similarly, the judgment of 7 August 2018, *Colino Sigüenza* (C-472/16, EU:C:2018:646), held that the application of the directive cannot be ruled out on the ground that the assets essential to the activity of the undertaking have been made available to the new contractor by another entity.

3.3 THE SECTORS IN WHICH THE ACTIVITY IS ESSENTIALLY BASED ON MANPOWER

A structured group of workers, notwithstanding the absence of significant tangible or intangible assets, is capable of constituting an economic entity within the meaning of the directive. In a sector where the activity is based essentially on manpower, the identity of an economic entity cannot be retained if the majority of its employees are not taken on by the presumed transferee. This is the case, for example, of cleaning and surveillance services: see judgments of 10 December 1998, *Hidalgo and Others* (C-173/96 and C-247/96, EU:C:1998:595), of 10 December 1998, *Hernández Vidal and Others* (C-127/96, C-229/96 and C-74/97, EU:C:1998:594). This case-law was confirmed in the judgments of 24 January 2002, *Temco* (C-51/00, EU:C:2002:48), of 20 November 2003, *Abler and Others* (C-340/01, EU:C:2003:629), and of 20 January 2011, *CLECE* (C-463/09, EU:C:2011:24).

This requires determining whether a group of workers is sufficiently autonomous. In the context of EU legislation relating to the safeguarding of em-

ployees' rights, the concept of autonomy refers to the powers, granted to those in charge of the group of workers concerned, to organise, relatively freely and independently, the work within that group and, more particularly, the powers to give orders and to allocate tasks to employees belonging to the group in question, without direct intervention from other organisational structures of the employer (as is the case of the judgment of 29 July 2010, *UGT-FSP* (C-151/09, EU:C:2010:452)). While it is true that the existence of a sufficiently autonomous entity within an undertaking is not affected by the fact that the employer imposes specific obligations on that group of workers and thus has a wide influence on its activities, that group must still retain a certain freedom, albeit reduced, to organise and provide its services (judgments of 10 December 1998, *Hidalgo and Others* (C-173/96 and C-247/96, EU:C:1998:595)).

The number of employees taken on by the transferee must be significant, so it is not necessary to use a strictly numerical and majority criterion. However, in case of transfer of an existing production unit, the number of workers initially taken on by the new employer is irrelevant.

In the judgment of 19 September 1995, *Rygaard* (C-48/94, EU:C:1995:290), the ECJ stated that the fact that an undertaking continues, with the consent of the contracting authority, work begun by another undertaking and takes over two apprentices and an employee who had already worked on the construction site, together with the materials assigned to those works, does not constitute a transfer of an undertaking, business or part of a business within the meaning of Article 1(1) of the Directive, because the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract.

Cases in which the activity is based essentially on manpower may be treated in the same way as cases where the tangible assets are not essential to the proper functioning of the economic entity, or even to cases where the labour and tangible assets have the same importance for the proper functioning of that entity, provided that the transferee takes over most of the staff (judgment of 24 June 2021, *Obras y Servicios Públicos and Acciona Agua* (C-550/19, EU:C:2021:514)).

A contrario, where the activity is not essentially based on manpower, it is necessary to require that there be a transfer of assets and, in that case, the mere recruitment of staff will not result in the directive becoming applicable (judgment of 25 January 2001, *Liikenne* (C-172/99, EU:C:2001:59)).

However, in the judgment of 15 December 2005 *Güney-Görres and Demir* (C-232/04 and C-233/04, EU:C:2005:778), the ECJ stated that the transfer of assets is only a partial aspect of the overall assessment which must be carried out by the national court when examining whether there has been a

transfer of an undertaking or business within the meaning of the directive. That case involved a change of contractor for the passenger control service at Düsseldorf airport, in which the new contractor had engaged only part of the workforce and the service continued to be provided with the security equipment put in place by the State.

Moreover, in the judgment of 27 February 2020, *Grafe and Pohle* (C-298/18, EU:C:2020:121), the ECJ examined a case in which the new contractor for a bus transport service had to comply with new technical and environmental standards imposed by the contracting authority which prevented it, in practice, from using the previous successful tenderer's bus fleet. Therefore, the new contractor did not take over those buses. The Court held that those circumstances did not necessarily preclude the classification of that takeover of activity as a transfer of an undertaking, provided that there were other factual circumstances which indicated that the identity of the economic entity was maintained. In that regard, the transport service remained essentially the same and the new contractor had taken on most of the drivers operating the service until then.

4. Workers covered by the directive

According to Article 2(2), the Directive applies to all types of contracts of employment or employment relationships, irrespective of the number of working hours performed or to be performed as well as of the type of contract of employment (permanent, fixed-duration, or temporary).

Therefore, a person recruited to hold a position of trust must be regarded as an employee within the meaning of the directive in so far as national law classifies the contract at issue as a contract of employment. In that regard, it is irrelevant that the level of protection provided for such employees by national law, for example in relation to termination of the contract, is lower than that provided for other employees (judgment of 13 June 2019, *Correia Moreira* (C-317/18, EU:C:2019:499)).

That being said, the directive only applies to existing employment relationships and hence does not apply to employees who have ceased their activity. The directive covers the obligations of a transferor resulting from a contract of employment or employment relationship that arose prior to the date of the transfer (judgment of 7 February 1985, *Abels* (C-135/83, EU:C:1985:55)). In other words, where the fixed-term employment contract of a temporary worker has ended, due to expiry of the agreed term, on a date prior to that of

the transfer, the non-renewal of this contract because of that transfer does not violate the directive (order of 15 September 2010, *Briot* (C-386/09, EU:C:2010:526)).

The judgment of 7 February 1985, *Wendelboe and Others* (C-19/83, EU:C:1985:54), concerned the question whether the new employer had to assume the former employer's debts for the holiday pay and compensation of employees whose contracts had been terminated before the transfer. The ECJ held that the directive does not oblige Member States to lay down rules under which the transferee of an undertaking becomes liable in respect of obligations concerning holiday pay and compensation to employees who were not employed in the undertaking on the date of the transfer (see also judgment of 11 April 2013, *Della Rocca* (C-290/12, EU:C:2013:235)).

Pursuant to the judgment of 20 July 2017, *Piscarreta Ricardo* (C-416/16, EU:C:2017:574), the role of national law consists not only in defining the concept of employee, but also in determining whether in case of unpaid leave the employment relationship is deemed to be maintained.

Finally, where a transfer does not cover an entire undertaking but only a business thereof, it stems from the case-law of the ECJ that the directive only protects only employees assigned to carry out their duties in that business (judgment of 7 February 1985, *Botzen and Others* (C-186/83, EU:C:1985:58); see also judgment of 12 November 1992, *Watson Rask and Christensen* (C-209/91, EU:C:1992:436)).

5. The specificity of transfers in the event of insolvency proceedings

The safeguarding of employees' rights (including the protection in case of dismissal) provided for in Articles 3 and 4 of the directive does not apply where the transfer occurs in the context of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority)' (Article 5(1) of the Directive).

The requirement that proceedings must have been instituted for the purposes of the liquidation of the transferor's assets is not met in the case of proceedings aimed at ensuring the continuation of the activity of the undertaking concerned (judgments of 25 July 1991, *d'Urso and Others* (C-362/89, EU:C:1991:326), of 7 December 1995, *Spano and Others* (C-472/93, EU:C:1995:421), and of 16 May 2019, *Plessers* (C-509/17, EU:C:2019:424)). A procedure is deemed to aim at

ensuring the continuation of the activity where it is designed to preserve the operational character of the undertaking or of its viable units. Conversely, proceedings for the liquidation of assets are aimed at maximising the satisfaction of creditors' collective claims (judgment of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others* (C-126/16, EU:C:2017:489)).

However, according to Article 5(4), Member States may take appropriate measures to prevent misuse of insolvency proceedings with the aim of depriving employees of their rights.

In this regard, the judgments of 7 February 1985, *Abels* (C-135/83, EU:C:1985:55), judgment of 7 February 1985, *Industriebond FNV and Federatie Nederlandse Vakbeweging* (C-179/83, EU:C:1985:57), and of 7 February 1985, *Botzen and Others*, (C-186/83, EU:C:1985:58), distinguished between bankruptcy proceedings and proceedings for the administration of assets supervised by a court and held that the exclusion set out under Article 5(1) of the Directive concerned only the former.

The ECJ also held that, in so far as Article 5(1) of the directive renders inapplicable the provisions for the protection of employees in the case of certain transfers of undertakings, it must be interpreted strictly (judgment of 4 June 2002, *Beckmann*, (C-164/00, EU:C:2002:330)). Therefore, a procedure that prepares for insolvency but does not result in insolvency does not fall within the scope of the exclusion of Article 5. On the contrary, a procedure prepared before the declaration of insolvency but executed after this declaration is covered by that exclusion (judgment of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others* (C-126/16, EU:C:2017:489)). Similarly, in the interest of legal certainty, procedures preparing for the transfer of an entity before its declaration of insolvency fall within the scope of the exclusion in Article 5 only if they are governed by statutory or regulatory provisions, but not if they are governed exclusively by a national practice derived from case-law (judgment of 28 April 2022, *Federatie Nederlandse Vakbeweging (Pre-pack procedure)* (C-237/20, EU:C:2022:321)).

III. THE PURPOSE OF THE DIRECTIVE

1. Safeguarding of “employees” rights

Directive 2001/23 aims to protect employees in the event of a change of employer following the transfer of the undertaking and, to that aim, it identifies the rights and obligations that protect the persons concerned by the trans-

fer. It seeks to avoid that the employees end up in a less favourable position than before the transfer. By contrast, the directive cannot be invoked to obtain an improvement in working conditions (judgment of 26 March 2020, *ISS Facility Services* (C-344/18, EU:C:2020:239)).

Consequently, the person or undertaking to whom the transfer is made becomes the employer in respect of the undertaking that is transferred. That means that employees retain both their rights and their obligations, in accordance with the provisions of their contract of employment or their employment relationship at the time of the transfer of ownership. However, the ECJ has noted that the directive does not intend to establish a uniform level of protection in all Member States, but to ensure that employees enjoy the same rights that they enjoyed before the transfer under the legislation of the Member State concerned (judgments of 10 February 1988, *Foreningen af Arbejdsledere i Danmark* (C-324/86, EU:C:1988:72), and of 12 November 1992, *Watson Rask and Christensen* (C-209/91, EU:C:1992:436)). Furthermore, the rights and obligations retained by the employee are those arising from the contract in force at the time of the transfer, without there being any need to take into account, for the purposes of the directive, any other previous contract (judgment of 24 June 2021, *Obras y Servicios Públicos and Acciona Agua* (C-550/19, EU:C:2021:514))⁷.

The date of the transfer of obligations corresponds to the precise date of the transfer of the undertaking and cannot be postponed to another date at the will of the the transferor and the transferee (judgment of 14 November 1996, *Rotsart de Hertaing* (C-305/94, EU:C:1996:435)), nor of the employees concerned (judgments of 25 July 1991, *d'Urso and Others* (C-362/89, EU:C:1991:326), and of 26 May 2005, *Celtec* (C-478/03, EU:C:2005:321)).

1.1 MANDATORY LAW

The rules of the Directive are mandatory, in the first place, for the Member States, which may not provide for exceptions to the detriment of the protection of employees other than those expressly laid down by the Directive itself (judgment of 9 September 2020, *TMD Friction and TMD Friction EsCo* (C-674/18 and C-675/18, EU:C:2020:682)).

⁷ Without prejudice to the fact that such previous contracts may produce effects under other provisions of Union law, in particular the framework agreement on fixed-term work (Directive 1999/70/EC).

Moreover, the safeguards provided for by the Directive cannot be derogated from by the transferor, the transferee, the employees' representatives, or even the employees themselves (judgments of 25 July 1991, *d'Urso and Others* C-362/89, EU:C:1991:326), of 7 December 1995, *Spano and Others* (C-472/93, EU:C:1995:421), of 12 March 1998, *Dethier Équipement* (C-319/94, EU:C:1998:99)).

Contracts of employment and employment relationships existing on the date of the transfer of an undertaking are automatically transferred from the transferor to the transferee by the mere fact of the transfer, regardless of whether the transferor or the transferee object and of whether the latter refuses to fulfil his obligations (judgment of 14 November 1996, *Rotsart de Hertaing* (C-305/94, EU:C:1996:435)).

It is therefore not possible for the transferee to offer employees' conditions that are less favourable than those previously offered to them by the transferor, including where employees have accepted those less favourable conditions (judgment of 6 November 2003, *Martin and Others* (C-4/01, EU:C:2003:594)).

However, the employee cannot be forced to remain in the undertaking (judgments of 16 December 1992, *Katsikas and Others* (C-132/91, C-138/91 and C-139/91, EU:C:1992:517), and of 12 November 1998, *Europièces* (C-399/96, EU:C:1998:532)).

1.2 MAINTENANCE OF WORKERS' LENGTH OF SERVICE

The consequences of the transfer as regards the length of service acquired by employees with the transferor may be summarised as follows:

— With regard to salary: the length of service acquired with the transferor does not as such constitute a right which they may assert against the transferee; however, where that length of service serves to determine certain financial rights of employees, those rights must, in principle, be maintained by the transferee in the same way as by the transferor (judgment of 6 September 2011, *Scattolon* (C-108/10, EU:C:2011:542)).

— With regard to termination payment: in calculating rights of a financial nature such as a termination payment, the transferee must take into the entire length of service of the employees transferred, in so far as that obligation arises from the employment relationship between those employees and the transferor, and in accordance with the terms agreed in that rela-

tionship (judgment of 14 September 2000, *Collino and Chiappero* (C-343/98, EU:C:2000:441)).

— With regard to the notice period for termination of the contract on objective grounds: if the granting of an extended period of notice depends on the length of service, the transferee must take into account the length of service which the relevant employee acquired with the transferor (judgment of 6 April 2017, *Unionen*, C-336/15, EU:C:2017:276).

1.3 THE POSSIBILITY OF PROVIDING FOR JOINT AND SEVERAL LIABILITY OF THE TRANSFEROR AND THE TRANSFEE

Under Article 3(1) of Directive 2001/23, the rights and obligations that must be safeguarded are those existing on the date of the transfer.

However, Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer, provided that they arose from a contract of employment or an employment relationship existing on the date of the transfer.

Therefore, after the date of transfer, the transferor ceases to be bound by the obligations arising from the contract of employment or employment relationship, even where the employees do not consent to that effect or even oppose it, without prejudice for the Member States to provide for the joint and several liability of the transferor and the transferee after the date of the transfer (judgment of 5 May 1988, *Berg and Busschers* (C-144/87 and 145/87, EU:C:1988:236)).

1.4 SUPPLEMENTARY SOCIAL PROTECTION

Under the directive, the rights and obligations of employees registered in supplementary pension schemes (Article 3(4)) are not safeguarded in case of transfer. This exception concerns employees' rights to old-age, invalidity or survivors' benefits under such supplementary schemes outside the statutory social security schemes.

The ECJ held that this exception should be interpreted restrictively and therefore concerns only benefits granted outside the statutory social security schemes exhaustively listed in Article 3(4)(a) of the directive (judgment of 11 June 2009, *Commission v Italy* (C-561/07, EU:C:2009:363)).

However, the directive imposes an obligation on Member States to safeguard acquired old-age rights and survivors' benefits (Article 3(4)(b) of the directive).

Where the transfer of an entity takes place after the opening of insolvency proceedings, the protection of those acquired rights must be at least equivalent to the level of protection required by Directive 2008/94 on the protection of employees in the event of the insolvency of their employer (judgment of 9 September 2020, *TMD Friction and TMD Friction EsCo* (C-674/18 and C-675/18, EU:C:2020:682)).

1.5 THE CONTINUATION OF A COLLECTIVE AGREEMENT AND ITS LIMITS

The guarantee provided for in Article 3(3) of Directive 2001/23 entails the maintenance of the terms and conditions agreed in a collective agreement with the undertaking transferred during the duration of that agreement, i.e. until its termination or expiry or until the entry into force of another collective agreement that replaces it.

However, in its judgment of 9 March 2006, *Werhof* (C-499/04, EU:C:2006:168), the ECJ held that Article 3(1) does not preclude, where the contract of employment refers to a collective agreement binding the transferor, that the transferee, who is not party to such an agreement, is not bound by collective agreements subsequent to the one in force at the time of the transfer of the business. Hence, the directive did not intend to bind the transferee to collective agreements other than the one in force at the time of the transfer and, therefore, to impose upon the transferee an obligation to amend the working conditions pursuant to a new collective agreement concluded after the transfer.

As regards so-called 'dynamic clauses', by virtue of which the transferee may be bound not only by the collective agreements in force at the time of the transfer, but also by collective agreements negotiated and adopted after the date of that transfer, the ECJ held that the directive precludes Member States from providing that such clauses are enforceable against the transferee where the latter does not have the possibility of participating in the negotiation process of such collective agreements concluded after the transfer (judgment of 18 July 2013, *Alemo-Herron and Others* (C-426/11, EU:C:2013:521)).

However, if the transferor and the employees have freely agreed on a dynamic contractual clause and if that clause is in force on the date of the

transfer, Article 3 of Directive 2001/23 supposes, in principle, that that obligation arising from a contract of employment is binding on the transferee (judgment of 27 April 2017, *Asklepios Dienstleistungsgesellschaft* (C-680/15 and C-681/15, EU:C:2017:317)).

In the case of a dynamic contractual clause, Directive 2001/23 aims not only to safeguard the interests of employees, but also to ensure a fair balance between the interests of those employees and those of the transferee. It follows that the transferee must be in a position to make, after the date of transfer, the adjustments and changes necessary to carry on its operations (judgments of 18 July 2013, *Alemo-Herron and Others* (C-426/11, EU:C:2013:521), and of 11 September 2014, *Österreichischer Gewerkschaftsbund* (C-328/13, EU:C:2014:2197)). The dynamic clause agreed with the transferor is therefore binding on the transferee, if national law allows the transferee to make adjustments both consensually and unilaterally (judgment of 27 April 2017, *Asklepios Dienstleistungsgesellschaft* (C-680/15 and C-681/15, EU:C:2017:317)).

The terms and conditions laid down in a collective agreement which, under the law of a Member State, despite the rescission of that agreement, continue to produce their effects as regards the employment relationship which was governed by them before the agreement was terminated, constitute ‘terms and conditions agreed in any collective agreement’ within the meaning of Article 3(3) of the Directive, so long as that employment relationship is not subject to a new collective agreement or a new individual agreement is not concluded with the employees concerned (judgment of 11 September 2014, *Österreichischer Gewerkschaftsbund* (C-328/13, EU:C:2014:2197)).

However, the second subparagraph of Article 3(3) of the Directive allows Member States to limit the period for observing such terms and conditions, as long as that period is of at least one year after the transfer.

1.6 DIFFERENCES BETWEEN MEMBERS OF STAFF AFTER THE TRANSFER

The existence of differences in remuneration between the transferred employees and those who were already employed by the transferee at the time of the transfer is not contrary to the Directive, although other legal instruments and principles of law might be relevant for examining the legality of these differences (judgment of 6 September 2011, *Scattolon* (C-108/10, EU:C:2011:542)).

1.7 THE LIMITS ON SUBSTANTIAL CHANGES IN WORKING CONDITIONS

What the directive prohibits is that the transfer of an undertaking is in itself the reason for a substantial change in working conditions (judgments of 10 February 1988, *Foreningen af Arbejdsledere i Danmark* (C-324/86, EU:C:1988:72), and of 12 November 1992, *Watson Rask and Christensen* (C-209/91, EU:C:1992:436)).

This is based, on the one hand, on Article 4(1) of Directive 2001/23 which prohibits dismissals justified by the transfer in itself, but not dismissals motivated by objective reasons relating to the undertakings (economic, technical or organisational); and, on the other hand, on Article 4(2), according to which, in case of termination of a contract of employment or employment relationship because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for that termination.

In principle, the directive does not preclude, in the event of a transfer of an undertaking from a legal person governed by private law to the State, the latter, as new employer, from reducing the amount of the remuneration of the employees concerned in order to comply with the national public service rules. However, the authorities responsible for applying and interpreting those rules must take into account in particular the employee's length of service, in so far as the national rules governing the position of State employees take a State employee's length of service into consideration for calculating his remuneration. If that calculation results in a substantial reduction in the remuneration of the person concerned, that reduction constitutes a substantial change in working conditions to the detriment of the employees, in the sense of Article 4(2) of the directive (judgment of 11 November 2004, *Delahaye* (C-425/02, EU:C:2004:706); similarly judgment of 27 November 2008, *Juuri* (C-396/07, EU:C:2008:656)).

On the other hand, where the activities carried out by a public undertaking are in-sourced to a public administration, the directive precludes employees from being required to undergo a public selection procedure in order to be admitted to the civil service, where that entails a reduction in their salary for a significant period of time. This is indicated in the judgment of 13 June 2019, *Correia Moreira* (C-317/18, EU:C:2019:499), in a case where employees in-sourced by a municipality who were successful in the selection procedure were included in the first step of the civil service, with the obligation to remain there for at least ten years. The ECJ noted that such requirements altered the

terms and conditions of employment agreed with the transferor and placed the employees in a less favourable position than they were before the transfer.

Similarly, in the judgment of 12 November 1998, *Europièces* (C-399/96, EU:C:1998:532), the ECJ recalled that Article 3(1) of the Directive does not preclude a worker employed by the transferor on the date of the transfer of the undertaking from objecting to the transfer of his contract of employment or employment relationship, provided that the employee takes that decision freely. It is for the national court to determine whether the contract of employment proposed by the transferee involves a substantial change in working conditions to the detriment of the employee in the sense of Article 4(2) of the directive.

Similarly, where a transfer is made to several transferees and it is not possible to divide the contract of employment or such a division would adversely affect the rights of the employee, the latter may request termination of the contract, and the transferees will nevertheless be regarded as being responsible for that termination (judgment of 26 March 2020, *ISS Facility Services* (C-344/18, EU:C:2020:239)).

2. Protection against dismissal

The transfer of an undertaking cannot constitute grounds for dismissal by the transferor or by the transferee (Article 4(1) of the directive). In other words, the transfer cannot itself entail the termination of the employment relationship (judgments of 10 February 1988, *Foreningen af Arbejdsledere i Danmark* (C-324/86, EU:C:1988:72), and of 14 November 1996, *Rotsart de Hertaign* (C-305/94, EU:C:1996:435), and order of 15 September 2010, *Briot* (C-386/09, EU:C:2010:526)).

That being said, dismissals may take place for economic, technical or organisational reasons entailing changes in the workforce, as set out in Article 4(1) of the directive (judgment of 11 June 2009, *Commission v Italy* (C-561/07, EU:C:2009:363)). However, the directive requires that these grounds be invoked with regard to the workers who are made redundant. Therefore, national legislation cannot provide that the transferee must rely only on technical, economic or organisational reasons in order to choose the employees that it wishes to take on in its staff (judgment of 16 May 2019, *Plessers* (C-509/17, EU:C:2019:424)).

However, in order to avail itself of this possibility, the transferor or the transferee must be able to justify the need for an objective or collective redun-

dancy. The use of this possibility is hence banned in case of fraudulent tactics, such as cases where an undertaking uses dismissals precisely in order to avoid the obligation to maintain employment relationships.

IV. THE INTERVENTION OF REPRESENTATIVES OF THE EMPLOYEES

1. The notion of “representatives of the employees”

Directive 77/187 excluded from its scope of application the representatives of employees who were ‘members of administrative, governing or supervisory bodies of companies who represent employees on such bodies in certain Member States’. However, this derogation was subsequently eliminated and replaced by a broad reference to the notion of ‘representatives of employees’ or related expressions, as provided for by national legislation (Article 2(1)(c) of the directive).

2. The preservation of the term of office of representatives of the employees

After a transfer, the representatives of the employees shall continue to perform their duties until a new designation can be made, subject to the conditions laid down in the first subparagraph of Article 6(1) of Directive 2001/23.

This provision requires the undertaking or business preserves its autonomy. The issue of the preservation of autonomy was addressed in the judgment of 29 July 2010, *UGT-FSP* (C-151/09, EU:C:2010:452). In that case, after a number of outsourced public services were taken over in-house by a Spanish municipality, the latter integrated into its staff the employees who had been in charge of those services. Those employees remained in the same posts and carried out the same duties as before the takeover. By contrast, the municipality did not grant to the representatives of the employees a time off in which to carry out their duties, arguing that the transfer had led to the termination of their term of office.

The judgment points out that, since Directive 2001/23 is intended to safeguard the rights of employees in the event of a change of employer by allowing them to continue to work for the new employer on the same conditions as those agreed with the transferor, the right of employees to be represented is not an

exception and, consequently, that representation must not, as a general rule, be affected by the transfer.

For the ECJ, an economic entity preserves its autonomy, within the meaning of Article 6(1) of the directive, provided that the powers granted to those in charge of that entity, within the organisational structures of the transferor (namely the power to organise, relatively freely and independently, the work within that entity in the pursuit of its specific economic activity and, more particularly, the powers to give orders and instructions, to allocate tasks to employees of the entity concerned and to determine the use of assets available to the entity, all without direct intervention from other organisational structures of the employer), remain, within the organisational structures of the transferee, essentially unchanged.

What is more, the mere change of those in the highest level of hierarchy cannot in itself be detrimental to the autonomy of the entity transferred, except where they have the power to organise directly the activities of the employees of that entity and therefore to substitute their decision-making within that entity for that of those immediately in charge of the employees.

3. Guarantees for information and consultation of employees

Under Article 7(1) of Directive 2001/23, both the transferor and the transferee must in good time inform the representatives of the employees about: the date or proposed date of the transfer; the reasons for the transfer; the legal, economic and social consequences of the transfer for the employees; and any measures envisaged in relation to the employees. Article 7(6) of the directive also provides that, where there are no representatives of the employees, the same information must be provided to the employees likely to be affected by the transfer. It should be emphasised that these obligations concern both the transferor and the transferee. This implies that the transferee may have to assess the consequences of the transfer – which has not yet taken place – on its own employees, who are not the employees who will be transferred. Such consequences may include the possibility of subsequent staff adjustments or substantial changes in working conditions as a result of possible duplications of staff duties.

CHAPTER 29

COLLECTIVE REDUNDANCIES
(COUNCIL DIRECTIVE 98/59/EC OF 20 JULY 1998)

IGNACIO GARCÍA-PERROTE ESCARTÍN

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I. PRECEDENTS FOR DIRECTIVE 98/59: COUNCIL DIRECTIVE 75/129/EEC OF 17 FEBRUARY 1975 AND ITS AMENDMENT BY COUNCIL DIRECTIVE 92/56/EEC OF 24 JUNE 1992.

The reference to "a Directive on the approximation of the Member States' legislation on collective dismissals" is stated, for the first time, in Council Resolution 1974/C 13/1 on a social action programme (21-1-74, OJEC 12.2.74), a provision which had the so-called oil crisis of 1973 very much in mind when referring to the "serious threats to employment which may arise from the situation obtaining at the time of the adoption of this Resolution". But, at the same time, the aforementioned Council Resolution stated that, "without prejudice to the results of any future studies or measures" it was important for the (then) Community to decide on "the objectives and priorities to be given to its action in the social field over the coming years".

This gave rise to Dir 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies (OJEC 22-2-75) - hereinafter referred to as "Dir 75/129/EEC" - a Directive repealed by the current Dir 98/59. Dir 75/129/EEC expressly mentioned the above Council Resolution 1974/C 13/1.

Dir 75/129/EEC stated, firstly, that "it is important that greater protection should be afforded to workers in the event of collective redundancies while

taking into account the need for balanced economic and social development within the Community"; secondly, that "despite increasing convergence, differences still remain between the provisions in force in the Member States of the Community concerning the practical arrangements and procedures for such redundancies and the measures designed to alleviate the consequences of redundancy for workers"; thirdly, that "these differences can have a direct effect on the functioning of the common market". From these three premises, and after mentioning Council Resolution 1974/C 13/1 (which, as mentioned above, referred to "a directive on the approximation of the laws of the Member States relating to collective redundancies"), Dir 75/129/EEC concluded that "this approximation must therefore be promoted while the improvement is being maintained within the meaning of Article 117 of the Treaty".

The current Directive 98/59/EC maintains all the above statements. Council Directive 92/56/EEC of 24-6-92 (OJEC 26-8-92) (hereinafter "Dir 92/56/EEC") amended Dir 75/129/EEC.

The first thing to note about Directive 92/56 is the reference it makes to the Community Charter of the Fundamental Social Rights of Workers of 9-12-89, and in particular to certain paragraphs of points 7, 17 and 18 thereof:

"7. The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community.
(. .).

The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies.

Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States.

(. .)

Such information, consultation and participation must be carried out in good time and, in particular, in the following cases:

(- . .)

(- . .)

- in cases of collective redundancy procedures".

Dir 92/56/EEC then considers that the following amendments should be made to Dir 75/129/EEC:

Firstly, "in order to calculate the number of redundancies provided for in the definition of collective redundancies within the meaning of Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, other forms of termination of employment contracts on the initiative of the employer should be equated to

redundancies, provided that there are at least five redundancies ". This resulted in the addition of a new last paragraph to art.1.1 of Dir 75/129/EEC, which is logically retained in the current Dir 98/59/EC.

Secondly, Dir 92/56/EEC considered that "it should be stipulated that Directive 75/129/EEC applies in principle also to collective redundancies resulting where the establishment's activities are terminated as a result of a judicial decision", which resulted in the deletion of paragraph 2(d) of Dir 75/129/EEC, a deletion maintained by the current Dir 98/59/EC.

Thirdly, Dir 92/56/EEC understands that " Member States should be given the option of stipulating that workers' representatives may call on experts on grounds of the technical complexity of the matters which are likely to be the subject of the informing and consulting ". This was carried over to the second paragraph of the reworded Art. 2.2 of Dir 75/129/EEC, stating that "Member States may provide that the workers' representatives may call upon the services of experts in accordance with national legislation and/or practice", a provision which is maintained in the current Dir 98/59/EC.

Fourthly, Dir 92/56/EEC states that "the provisions of Directive 75/129/EEC should be clarified and supplemented as regards the employer's obligations regarding the informing and consulting of workers' representatives", which led to a new wording of Art. 2 of Dir 75/129/EEC, a new wording which is maintained in the current Dir 98/59/EC and which will be described below. It is worth anticipating now that the following expressions have been introduced into the provision, which are maintained in Dir 98/59/EC: "working time"; "y recourse to accompanying social measures aimed, in particular, at assisting the redeployment or retraining of the redundant workers"; "during the course of the consultations and in good time"; "all relevant information"; "draft" redundancies; "categories" of workers; "the criteria taken into account for designating the workers to be made redundant, if national legislation and/or practice confers on the employer powers in this respect"; "the method of calculation of any redundancy payments other than those resulting from national legislation and/or practice"; and, finally, the specification of the content of the copy of the written communication to be transmitted to the public authority.

Fifthly, Dir 92/56/EEC considers that "it is necessary to ensure that employers' obligations as regards information, consultation and notification apply independently of the fact that the decision on collective redundancies emanates from the employer or from an undertaking which controls that employer", which led to the new paragraph 4 of Dir 75/129/EEC, a paragraph maintained by the current Dir 98/59/EC, with the addition of a new second subparagraph to that paragraph, also maintained by Dir 98/59/EC, which reads

as follows: "In considering alleged breaches of the information, consultation and notification requirements laid down by this Directive, account shall not be taken of any defence on the part of the employer on the ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies".

Sixthly, Dir 92/56/EEC states that "Member States should ensure that workers' representatives and/or workers have at their disposal administrative and/or judicial procedures in order to ensure that the obligations laid down in Directive 75/129/EEC are fulfilled". This led to a new Art.5a of Dir 75/129/EEC which is now Art.6 of Dir 98/59/EC.

Additional amendments made to Dir 75/129/EEC by Dir 92/56/EEC, and maintained by the current Dir 98/59/EC, were as follows.

On the one hand, the new second paragraph of art.3.1 of Dir 75/129/EEC: "However, Member States may provide that in the case of planned collective redundancies arising from termination of the establishment's activities as a result of a judicial decision, the employer shall be obliged to notify the competent public authority in writing only if the latter so requests".

Secondly, the new paragraph 4 added to Article 4: "Member States need not apply this Article to collective redundancies arising from termination of the establishment's activities where this is the result of a judicial decision".

And finally, the sentence added to Art.5 of Dir 75/129/EEC: "or to promote or to allow the application of collective agreements more favourable to workers".

In terms of seafarers, Directive 2015/1794/EU of 6-10-2015 deleted Article 1(2)(c) of Directive 1998/59/EC and added a new third paragraph to Article 3(1) of Directive 1998/59/EC.

II. THE RIGHT TO PROTECTION IN THE EVENT OF UNJUSTIFIED DISMISSAL AND THE FREEDOM TO CONDUCT A BUSINESS IN THE EU CHARTER OF FUNDAMENTAL RIGHTS: THE ECJ "AGET IRAKLIS" JUDGEMENT AND THE ADMINISTRATIVE AUTHORISATION OF COLLECTIVE REDUNDANCIES

Dir 98/59/EC predates not only the Treaty on European Union and the Treaty on the Functioning of the European Union ("TFEU"), the current consolidated versions of which are published in the OJEU of 7-6-16, but also the Charter of Fundamental Rights of the European Union (hereinafter, the "CFREU"), the current text of which is published in the same OJEU.

And it is important to recall, in this regard, that art.30 ("protection in the event of unjustified dismissal") of the CFREU, located in its Title IV ("Solidarity"), establishes that "every worker has the right to protection in the event of unjustified dismissal, in accordance with Union law and national laws and practices". It should also be recalled that Art.16 ("Freedom to conduct a business") of the CFREU, located in its Title II ("Freedoms") recognises "the freedom to conduct a business in accordance with Union law and national laws and practices."

Well, the important judgement of the Court of Justice of the European Unión (hereinafter "ECJ") of 21-12-16, AGET Iraklis C-201/15, EU:C:2016:972 ("AGET Iraklis") makes important considerations on articles 16 and 30 of the CFREU, on the relationship between the freedom to conduct a business and collective redundancies, on Dir 98/59/EC, and, finally, on the freedom of establishment proclaimed in article 49 of the TFEU.

The "AGET Iraklis" case rules on a reference for a preliminary ruling from the Greek Council of State seeking an interpretation of Directive 98/59/EC in the context of a dispute between the Greek Ministry of Labour and the company AGET Iraklis, a cement producer whose main shareholder is the French multinational group Lafarge. The dispute concerned the Greek Ministry of Labour's decision not to authorise the collective redundancies which AGET Iraklis was seeking to implement.

Under Greek law, in the absence of agreement with the workers' representatives on a plan for collective redundancies, an employer may carry out such redundancies only if the competent labour authority to which the plan must be notified does not - within the period prescribed by that legislation and after examining the file and assessing the conditions on the labour market, the situation of the undertaking and the interests of the national economy - adopt a reasoned decision refusing authorisation to carry out all or part of the planned redundancies. In the case referred for a preliminary ruling, the Greek Ministry of Labour decided not to authorise the planned collective redundancies. It is interesting to note that in the case, the workers' trade union decided not to participate in the consultation period of the collective redundancy, which is often the case, as AGET Iraklis argued, because the labour authority usually refuses to authorise collective redundancies.

The first conclusion reached by the ECJ in the "AGET Iraklis" case is that the aforementioned Greek legislation does not preclude, "in principle" Directive 98/59/EC, although the ECJ then adds that this is not the case if it appears that, taking into account the three assessment criteria indicated in the aforementioned legislation (as already mentioned, the conditions of the labour mar-

ket, the situation of the undertaking and the interest of the national economy) and the specific way in which it applies them (the labour authority) under the control of the competent courts, such legislation has the consequence of depriving the provisions of that Directive of their useful effect, the situation of the undertaking and the interests of the national economy) and the specific way in which they are applied (by the labour authority) under the supervision of the competent courts, such legislation has the effect of depriving the provisions of that directive of any useful effect, which is a matter for the referring court to determine, where appropriate. In order to reach this first conclusion, and without prejudice to other considerations on Dir 98/59/EC to which reference will be made below, the ECJ judgement in "AGET Iraklis" starts from the premise that "the substantive conditions to which the ability of the employer to effect or refrain from effecting collective redundancies might be subject are not covered, in principle, by the provisions of Directive 98/59 and consequently remain a matter for the Member States" (nr. 33), so that that Directive remains within the competence of the Member States (nr. 39), so that the Directive, which concentrates, it could be said, on the 'procedure' for dismissal, does not affect the "employer's freedom to effect or refrain from effecting collective redundancies" (nr. 30), since the Directive does not specify, in particular, "the circumstances in which the employer must contemplate collective redundancies and in no way affect his freedom to decide whether and when he must formulate plans for collective redundancies" (nr. 31).

However, having said that, the ECJ ruling in 'AGET Iraklis' warns that the conclusion would be different if the practical application of national legislation, such as the Greek legislation, which in principle does not conflict with Dir 98/59/EC, were ultimately to render that directive ineffective (nr. 34), which would be the case if 'any effective possibility for the employer to carry out such collective redundancies' were excluded in reality (nr. 38), since 'collective redundancies must at least continue to be possible, even if only on condition that certain objective requirements laid down by the applicable national legislation are met' (nr. 38). 38), since, in the final analysis, 'collective redundancies must at least remain possible, even if only on condition that certain objective requirements laid down, where appropriate, by the applicable national legislation are met' (nr. 41), assessments and points which it is for the referring court to verify, where appropriate, (nr. 43 and 44).

But if in relation to Dir 98/59/EC its conclusion is nuanced, more emphatic is the "AGET Iraklis" judgement on whether the Greek legislation on administrative authorisation of collective redundancies is contrary to the freedom of establishment of Art.49 TFEU and the freedom to conduct a business of Art.16

CFREU. The ECJ held that, in a situation such as that at issue in the main proceedings, those provisions preclude the Greek legislation (paras. 102-104).

The premises of this conclusion are as follows. The ECJ ruling in 'AGET Iraklis' notes, first, that freedom of establishment entails, in principle, not only "the freedom to determine the nature and extent of the economic activity that will be carried out in the host Member State, in particular the size of the fixed establishments and the number of workers required for that purpose", but also, 'the freedom subsequently "the freedom subsequently to scale down that activity or even the freedom to give up, should it so decide, its activity and establishment" (nr. 53), as well as the "freedom to decide whether and when they should formulate plans for collective redundancies on the basis, in particular, of factors such as a cessation or reduction of the activity of the undertaking or a decline in demand for the product which they manufacture, or as a result of new working arrangements within an undertaking unconnected with its level of activity " (nr. 55).

This being the case, and the decision to carry out collective redundancies being "a fundamental decision in the life of the undertaking" (nr. 54), the ECJ ruling in "AGET Iraklis" considers that the Greek legislation may "render access to the Greek market less attractive" and "may constitute a serious obstacle to the exercise of freedom of establishment in Greece" (nrs. 56 and 57) and constitute "a limitation on exercise of the freedom to conduct a business enshrined in Article 16 of the Charter" (CFREU) (nr. 66), given that according to settled case-law "a restriction on freedom of establishment is permissible only if it is justified by overriding reasons in the public interest" and it is therefore necessary to examine whether "the restriction should be appropriate for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective the restriction is justified by the existence of "overriding reasons of general interest" (nr. 61), bearing in mind, moreover, that "the fundamental rights guaranteed by the CFREU must be applied in all situations governed by EU law and must therefore "be complied with where national legislation falls within the scope of EU law" (nr. 62). The "AGET Iraklis" judgement recalls that "Article 52(1) of the CFREU "accepts that limitations may be imposed on the exercise of rights enshrined by the Charter as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, in accordance with the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others " (nr. 70).

In order to determine whether there are "overriding reasons of general interest" and the required "proportionality", the ECJ ruling in "AGET Iraklis" examines

the three criteria of the Greek legislation on the basis of which the labour authority may refuse to authorise collective redundancies: labour market conditions, the situation of the company and the interest of the national economy (nr. 71).

The "AGET Iraklis" case rejects that the criterion of the interest of the national economy can serve as a justification (nr. 72) but accepts that the other two criteria of "the protection of workers" (nr. 73) and "the promotion of employment and recruitment", which, "with the aim of reducing unemployment, constitutes a legitimate social policy objective" (nr. 74), can serve as a justification, since "the Union has not only an economic but also a social purpose" (TFEU art.147 and 151) (nr. 77).

Accordingly, the ECJ ruling in "AGET Iraklis" examines, from the perspective of proportionality, whether "the restrictions on freedom of establishment and the freedom to conduct a business" which the Greek legislation entails can be justified on the grounds of "the protection of workers and employment" (nr. 79).

The ECJ, in the "AGET Iraklis" ruling, assumes that the Greek legislation on administrative authorisation of collective redundancies does not, in principle, conflict with the freedom of establishment (TFEU Art. 49) and the freedom to conduct a business (Art. 16) (nr. 83). The latter, according to the ECJ: "is not absolute, but must be viewed in relation to its social function" (nr. 85); b. "differs from the wording of the other fundamental freedoms enshrined in Title II thereof, yet is similar to that of certain provisions of Title IV of the" CFREU (nr. 86); and, finally, "may be subject to a broad range of interventions on the part of public authorities that may limit the exercise of economic activity in the public interest" (nr. 86).

In this regard, the ECJ judgement in "AGET Iraklis" states, on the one hand, that the Greek legislation "does not have, in any way, the consequence of entirely excluding, by its very nature, the ability of undertakings to effect collective redundancies, since it is designed solely to impose a framework on that ability" (nr. 88). On the other hand, it recalls that "Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights enshrined by the Charter as long as, in particular, in accordance with the principle of proportionality, they are necessary and genuinely meet recognised objectives of general interest or the need to protect the rights and freedoms of others. As regards such rights and freedoms, it is to be noted that Article 30 of the Charter states that every worker has the right to protection against unjustified dismissal, in accordance with EU law and national laws and practices " (nr. 89).

However, recognising all of the above, the ECJ judgement in 'AGET Iraklis' finds that the criteria in the Greek legislation on the protection of workers and employment which allow the labour authority to refuse to authorise collective

redundancies are formulated in a very general and imprecise manner and it is 'settled case-law' that "where powers of intervention of a Member State or a public authority, such as the powers of opposition with which the minister is vested in the present instance, are not qualified by any condition, save for a reference to such criteria formulated in general terms, without any indication of the specific objective circumstances in which those powers are to be exercised, this results in serious interference with the freedom concerned which may have the effect — when, as in the present instance, decisions are involved whose fundamental nature in the life of an undertaking has already been pointed out in paragraph 54 of this judgment — of excluding that freedom altogether" (nr. 99).

The ECJ judgement in 'AGET Iraklis' goes on to reason that "Even though the national legislation at issue in the main proceedings states that the power not to authorise collective redundancies with which the public authority is vested in the present instance must be exercised by analysing the documents in the file, while taking account of the situation of the undertaking and the conditions in the labour market, and must result in a reasoned decision, it is clear that, in the absence of details of the particular circumstances in which the power in question may be exercised, as the situations allowing its exercise are potentially numerous, undetermined and indeterminable and leave the authority concerned a broad discretion that is difficult to review. Such criteria which are not precise and are not therefore founded on objective, verifiable conditions go beyond what is necessary in order to attain the objectives stated and cannot therefore satisfy the requirements of the principle of proportionality" (par. 100).

With regard to the indispensable judicial review, the "AGET Iraklis" case appreciates that the Greek legislation "fails to provide the national courts with criteria that are sufficiently precise to enable them to review the way in which the administrative authority exercises its discretion " (nr. 101).

The ECJ ruling in "AGET Iraklis" concludes, on the one hand, that "a regime providing for scrutiny and opposition such as the regime established by the legislation at issue in the main proceedings fails, on account of its particular detailed rules, to comply with the requirements recalled in paragraph 61 of this judgment and accordingly infringes Article 49 TFEU" (nr. 102) and, on the other hand, and "on identical grounds, such legislation also fails to comply with the principle of proportionality laid down in Article 52(1) of the Charter and, therefore, with Article 16 thereof" (nr. 103).

Furthermore, the ECJ ruling in "AGET Iraklis" considers that if "the context in a Member State may be one of acute economic crisis and a particularly high unemployment rate ", this does not affect the conclusions reached (nr. 108, in conjunction with nrs. 105-107).

III. PURPOSE OF DIRECTIVE 98/59/EC

In sections I and II of this paper, in line with the considerations contained in Dir 98/59/EC itself (and its precedents), as well as the grounds of the important "AGET Iraklis" ruling, the main aims and objectives of that Directive have already been explained to a large extent.

But it is appropriate to set out what the ECJ itself has said on the matter.

And from what it has said, it is interesting to note, first of all, that the Directive seeks to ensure comparable protection of workers' rights in the various Member States and to equalise the burdens which these rules of protection impose on undertakings in the Community (now the Union) (ECJ 8-6-94, *Commission v. United Kingdom* C-382/92, EU:C:1994:233 (app. 16); ECJ 18-1-07, *Confédération Générale du Travail and others ("CGT")* C-385/05, EU:C:2007:37 (App. 43); 9-7-15, *Balcaya* C-229/14, EU:C:2015:455 (App. 32); 13-5-15, *Lyttle and others ("Little")* C-182/13, EU:C:2015:317, and "AGET Iraklis" (App. 32).

And, secondly, that the main objective of Dir 98/59/EC is "to make collective redundancies subject to prior consultation with the workers' representatives and prior notification of the competent public authority" ("AGET Iraklis", nr. 28). This is reiterated in ECJ judgement of 17-03-21, *Consulmarketing, SpA*, C-652/19, EU:C:2021:208 ("Consulmarketing").

It should be pointed out, however, that, as will be reiterated later in section VII of this paper, this comparable protection and this equalisation of the "burdens" for EU companies cannot make us forget that the Directive establishes a "minimum" protection ("as regards information and consultation") and that Article 5 of Directive 98/59/EC admits that the Member States may adopt more favourable national measures for the protection of workers ("AGET Iraklis", nr. 32). The consequence of the above is that in fact there is no such equalisation either in the protection (of workers) or in the burdens (of companies).

Dir 98/59/EC is eminently procedural (consultation) and not so much causal, as it does not impose on Member States that collective redundancies have to be causal, but simply considers as collective redundancies, for the purposes of the obligation to consult and inform, terminations decided by the company for any reason not related to the individual workers that exceed certain thresholds in a reference period of time.

In short, as the ECJ judgement "Consulmarketing" states, "Directive 98/59 ensures only partial harmonisation of the rules for the protection of workers in the event of collective redundancies, that is to say, the procedure to be followed in order to carry out such redundancies. Thus, the Court of Justice

has already had occasion to make it clear that this Directive does not seek to establish a general mechanism for financial compensation at EU level in the event of loss of employment, nor to harmonise the arrangements for the definitive cessation of an undertaking's activities (order of 4 June 2020, Balga, C32/20-, unpublished, paragraph 31 and case-law cited)". For example, as the ECJ ruling in "Consulmarketing" itself warns, "the system of protection to be afforded to a worker who is the subject of an unfair collective redundancy as a result of failure to comply with the criteria on the basis of which the employer must determine which workers are to be made redundant is manifestly alien to the notification and consultation obligations arising from Directive 98/59. Neither that regime nor those selection criteria fall within the scope of that directive. They therefore remain a matter for the Member States (see, to that effect, order of 4 June 2020, Balga, C32/20-, unpublished, paragraph 32)".

IV. CONCEPT OF COLLECTIVE REDUNDANCIES ("DEFINITIONS AND SCOPE OF APPLICATION"; ART.1)

1. Dismissals by an employer

The dismissals covered by Dir 98/59/EC are "dismissals effected by an employer" (art.1.1) and not terminations of employment contracts not "effected" by the employer, such as, for example, termination by mutual agreement or voluntary resignation of the employee.

Additionally, it must be taken into account that, in accordance with the last paragraph of art.1.1 of Dir 98/59/EC, "For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies.". This concept of terminations of employment contracts on the "initiative of the employer" is of interest. The important ECJ judgments 21-9-17, Ciupa and Others ("Ciupa") C-429/16, EU:C:2017:711 (nr. 26) and 21-9-17, Socha and Others ("Socha") C-149/16, EU:C:2017:708 (nr. 24) underline this distinction in the last paragraph of art.1.1 of Dir 98/59/EC between dismissals and terminations on the initiative of the employer. In the terms of Directive 98/59/EC, it should be noted that dismissals are "effected" by an employer (first paragraph of art.1.1.a) whereas similar terminations are "at the initiative" of the employer (second paragraph of art.1.1).

In any event, the concept of dismissal in Art.1.1, first paragraph, a) of Dir 98/59/EC is "a concept of Union law which cannot be defined by reference to the legislation of the Member States" and, in principle, includes "any termination of contract unwanted by the employee and, consequently, without his consent" (ECJ's judgement of 11-11-15, Pujante Rivera C-422/14, EU:C:2015:743, and the judgments cited therein).

2. **"Reasons - one or more - not related" to the individual workers: not "causal" but "procedural" Directive (information and consultation rights)**

2.1 REASONS NOT RELATED TO THE INDIVIDUAL WORKERS, NOR ECONOMICAL, TECHNICAL, ORGANISATIONAL OR PRODUCTIVE.

It has already been stated, firstly, that the main objective of Dir 98/59/EC is 'to ensure that collective redundancies are preceded by consultation of the workers' representatives and information of the competent public authority' ('AGET Iraklis', nr. 28). Secondly, that the Directive does not specify 'the circumstances in which the employer must contemplate collective redundancies and in no way affect his freedom to decide whether and when and when he must formulate plans for collective redundancies' ('AGET Iraklis', nr. 31). And, finally, that "the substantive conditions to which the ability of the employer to effect or refrain from effecting collective redundancies might be subject are not covered, in principle, by the provisions of Directive 98/59 and consequently remain a matter for the Member States" ('AGET Iraklis', nr. 33). Consequently, the regulation of the grounds for collective redundancies is a matter which falls within the competence of the Member States. Hence, it is said that Dir 98/59/EC is procedural and not causal, in that it "merely" establishes that there must be information and consultation, if the redundancies (carried out by the employer or on his initiative) exceed a certain number in a given period of time, without the Directive establishing the grounds on the basis of which the employer may carry out these terminations.

However, it is a different matter that Dir 98/59/EC establishes that "collective redundancies" means redundancies effected by an employer, for one or more reasons not related to the individual workers", so that it is not compatible with the Directive to limit the concept of collective redundancies, for example, to redundancies for economic, technical, organisational or production reasons, or, in any case, to exclude in national law from that concept the termination of employment contracts for reasons not related to the workers.

The ruling of the ECJ of 12-10-04, *Commission v Portugal* C-55/02, EU:C:2004:605, declared Portugal to be in breach of Dir 98/59/EC for limiting the concept of collective redundancies to redundancies for structural, technological or cyclical reasons and not having extended the concept to all redundancies for reasons not related to the individual workers. This ECJ ruling affirmed that the concept of redundancy must be subject to an "autonomous" and uniform interpretation for the purposes of the Directive, as it has "Community scope" and there is no reference to the law of the States as there is in the case of representatives (see Dir 98/59/CE art.1.1 b) - ECJ's *Commission v Portugal*, ap. 44, 45 and 49 and ECJ's ruling of 27-1-05, *Junk* C-188/03, EU:C:2005:59, ap. 29 and 30-. In short, the concept of collective redundancies is a concept of EU law.

With regard to the Spanish concept of collective redundancy, the judgment of the ECJ of 13-5-15, *Rabal Cañas*, C-392/13, EU:C:2015:318, refused to answer the first question referred by the Spanish court on Dir 98/59/EC, since the ruling considered that Dir 98/59/EC was not applicable to the case at the origin of the question referred for a preliminary ruling. Be that as it may, in that first question, the Spanish court asked whether Dir 98/59/EC, by including within its scope all "dismissals carried out by an employer, for one or more reasons not related to the individual workers", prevents or opposes the national transposition or transposition rule restricting its scope to only certain types of terminations, those that respond to "economic, technical, organisational or productive" reasons, as the Spanish law does, as the Court affirmed.

However, it should be made clear that the Advocate General understood that the reference in Spanish law only to "termination of employment contracts on economic, technical, organisational or production grounds" only does not conflict with Dir 98/59/EC because that law adds that the calculation must also take into account any other termination of contract occurring at the employer's initiative for reasons other than the termination of employment contracts concluded for a limited period of time or for the performance of a specific task.

On the other hand, the Advocate General considered that the provision in the Spanish legislation that the number of such terminations for reasons not related to the individual workers "shall be at least five" was contrary to Dir 98/59/EC.

However, the ECJ's judgement of 11-11-15, *Pujante Rivera* C-422/14, EU:C:2015:743 has established that, in order to prove the existence of a "collective redundancy", within the meaning of Dir 98/59/EC, which determines the application of that Directive, "the condition laid down in the second subparagraph of that provision that 'there [be] at least five redundancies' must be

interpreted as relating not to terminations of employment contracts that may be assimilated to redundancies but only to redundancies *sensu stricto* ".

The following section will examine the case law of the Court of Justice on whether or not the death and retirement of the natural person employer is to be considered as collective redundancy. We will also look at the aforementioned "Ciupa" and "Socha" judgments.

In any event, according to the ECJ (C-589/22), the obligation to inform and consult provided for in Article 2(1) of Directive 98/59/EC arises from the moment at which the employer, in the context of a restructuring plan, considers or plans a reduction in the number of jobs likely to exceed the thresholds for redundancies laid down in Article 1(1)(a) of the directive, and not at the point at which, having taken measures to reduce that number, the employer is certain that it will actually have to lay off a number of workers in excess of those thresholds.

2.2 THE DEATH AND RETIREMENT OF THE EMPLOYER WHO IS A NATURAL PERSON: THE ECJ "RODRÍGUEZ MAYOR" AND "PLAMARO" RULINGS.

According to the ECJ 10-12-09, *Rodriguez Mayor and Others* C-323/08, EU:C:2009:770, it is not contrary to Directive 98/59/EC for national legislation not to treat as collective redundancies the termination of the employment contracts of several employees whose employer is a natural person as a result of his death, just as it is not contrary to that Directive that the compensation may be different in the event of termination of the employment contract and loss of employment as a result of the death of an employer or of a collective redundancy.

On the other hand, the ECJ (*Plamaro*, C-196/23, EU:C:2024:596), handed down in a case in which fifty-four employment contracts were terminated, establishes that Articles 1(1) and 2 of Directive 98/59/EC, read together, must be interpreted as precluding national legislation under which the termination of the employment contracts of a number of workers exceeding that provided for in Article 1(1) does not qualify as a 'collective redundancy' and, therefore, does not constitute a 'collective redundancy', 1(1), by reason of retirement by the employer, is not classified as 'collective redundancies' and, therefore, does not give rise to the information and consultation of the employees' representatives provided for in Article 2. However, the ECJ states that EU law must be interpreted as not requiring a national court hearing a dispute between private individuals to disapply national legislation, such as that referred to above, where it is contrary to Articles 1(1) and 2 of Directive 98/59/EC.

3. Reference time period and threshold for redundancies

Article 1(1)(a) of Directive 98/59/EC, after stating that "collective redundancies" means "redundancies effected by an employer for one or more reasons not related to the individual workers", gives Member States a double choice when determining the "number of redundancies effected", and allows Member States to choose between:

- (i) "For a period of 30 days" that the number of redundancies is
 - at least 10 in establishments normally employing more than 20 and less than 100 workers;
 - at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers;
 - at least 30 in establishments normally employing 300 workers or more.
- (ii) "or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question".

ECJ's judgement of 11-11-20, *Marclean Technologies, S.L.U.* C-300/19, EU:C:2020:898, has held that point (a) of the first subparagraph of Article 1(1) of Directive 98/59/EC must be interpreted as meaning that, for the purposes of assessing whether a contested individual dismissal forms part of a collective redundancy, the reference period laid down in that provision for determining the existence of a collective redundancy must be calculated by taking into account any period of 30 or 90 consecutive days during which that individual redundancy took place and during which the largest number of redundancies effected by the employer for one or more reasons not relating to the person of the workers, within the meaning of that provision, occurred.

4. Establishment and not undertaking: the ECJ "Rabal Cañas" judgment

4.1 THE DIRECTIVE USES THE CONCEPT OF A ESTABLISHMENT RATHER THAN AN UNDERTAKING.

The concept of establishment in the Directive is a concept of EU law (ECJ 7-12-95, *Rockfon* C-449/93, EU:C:1995:420; ECJ 15-2-07, *Athinaïki Chartopoïa* C-270/05, EU:C:2007:101 (nr. 23 f.); 30-4-15, *USDAW* C-80/14; 13-5-15, *Lyttle* C-182/13, and "*Rabal Cañas*"), being a "very broad" definition

with the aim of "limiting as far as possible the cases of collective redundancies which are not subject" to the Directive, without the need for legal, economic, financial, administrative or technological autonomy (ECJ's *Athinaïki Chartopoïa* ruling, nr. 26). It is worth noting that this idea of limiting the cases of collective redundancies not subject to the Directive has not been achieved in the cases examined by the ECJ's "USDAW" and "Lyttle" judgments.

Indeed, the USDAW ECJ ruling accepts that redundancy procedures "which resulted in the dismissal on grounds of redundancy of thousands of employees across the United Kingdom" (nr. 24) and in which "approximately 4,500 former employees were denied protective award on the ground that they had worked at stores with fewer than 20 employees, and that each store was to be regarded as a separate establishment" (nr. 30) falling outside the scope of Dir 98/59/EC.

As the *Rockfon* ECJ ruling (nr. 33) recalls, the initial proposal of Dir 75/129/EEC dealt with the concept of undertaking (not establishment), but in the end it was the latter concept that was taken into the Directive. The ECJ *Rockfon* judgment opted for a very broad concept of location. Subsequently, the ECJ "*Athinaïki Chartopoïa*" ruling handled a less broad concept, requiring a certain permanence and stability, organisation, means and performance of tasks, but insisting that there is no need for legal, economic, financial, administrative or technological autonomy, nor a management that can carry out collective redundancies.

The aforementioned USDAW ECJ ruling states that it is irrelevant whether the plural or the singular (workplace or workplaces) is used according to the language versions of the Directive, while the *Lyttle* ECJ judgement states that the workplace must be a distinct entity within the company and insists that the calculation of 20 terminations must be made for each workplace.

4.2 THE ECJ JUDGEMENT IN "RABAL CAÑAS"

The judgment of the ECJ in the "*Rabal Cañas*" case established that Dir 98/59/EC "precludes national legislation which introduces, as the sole unit of reference, the undertaking and not the establishment, where the application of that criterion entails an obstacle to the information and consultation procedure", whereby, "if the establishment were used as the unit of reference, the redundancies in question would have to be classified as collective redundancies", reasoning that "the replacement of the term 'establishment' by the term 'undertaking' can only be considered favourable to workers if that element is

an addition and does not imply the abandonment or reduction of the protection conferred on workers in cases where, if the concept of establishment were applied, the number of redundancies required" by "Directive 98/59/EC to apply the classification of 'collective redundancies' would be reached". Already the ECJ judgement in "CGT" (nr. 45) stated that the thresholds of Art.1.1 of Dir 98/59/EC are "minimum requirements which the Member States may derogate from only by provisions which are more favourable to workers".

The "Rabal Cañas" ECJ ruling held that Directive 1998/59 was not applicable because, in the present case, the redundancies in question ... did not reach the threshold laid down in (the applicable national legislation) at the level of the undertaking, nor did the workplace (of Mr Rabal) employ, during the period in question, more than 20 workers *ex* Dir 98/59/EC. However, just as, despite its non-applicability, the ECJ did answer this question of the preliminary ruling, it should be recalled that this was not the case with regard to another question of the same question, which the ECJ refused to answer precisely because of the argument that Dir 98/59/EC was not applicable to the case. The truth is that, if Dir 98/59/EC is not applicable in the Rabal case, which is why the ECJ did not answer the first question, it seems difficult to understand why the Rabal Cañas ruling decided to rule on the compatibility with Dir 98/59/EC of the concept of company (and not workplace) used by national legislation.

5. Terminations treated as redundancies

5.1 TERMINATIONS FOR REASONS THAT ARE NOT RELATED TO THE INDIVIDUAL WORKERS, PROVIDED THAT THE "REDUNDANCIES" ARE "AT LEAST 5".

It has already been stated that, in accordance with the second paragraph of art.1.1 of Dir 98/85/EC, "for the purposes of the thresholds, terminations at the initiative of the employer on the basis of one or more reasons not related to the workers are assimilated to redundancies, provided that there are at least 5 redundancies, having declared the ECJ in the "Pujante Rivera" case that the latter expression must be interpreted as referring, not to terminations of employment contracts assimilated to a redundancy, but exclusively to redundancies in the strict sense of the term.

The ECJ's "Ciupa" (nr. 26) and "Socha" (nr. 24) judgments have also been mentioned, which point out that the second paragraph of Art. 1.1 of Directive 98/59/EC distinguishes "dismissals" from terminations of employment

contracts at the initiative of the employer on the basis of one or more reasons not related to the individual worker.

5.2 TERMINATIONS OF FIXED-TERM CONTRACTS THAT TAKE PLACE ON THE DATE OF TERMINATION ARE NOT TO BE TAKEN INTO ACCOUNT. WORKERS WITH SUCH CONTRACTS ARE "USUALLY" EMPLOYED AT THE RESPECTIVE ESTABLISHMENT.

Art.1.2 of Dir 98/59/EC provides that the Directive does not apply to "collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts".

Accordingly, the Rabal Cañas ECJ ruling states that Directive 1998/59 must be interpreted as meaning that, for the purposes of assessing whether there has been a 'collective redundancy' within the meaning of that provision, individual terminations of contracts of employment concluded for a specific duration or for a specific task are not to be taken into account where such terminations take place on the date on which the contract of employment comes to an end or the task assigned to it is completed. The "Rabal Cañas" judgment thus rejects the question referred for a preliminary ruling which, noting that the provision of the Directive refers to "collective" dismissals, asked whether the Directive could be applied to "individual" terminations.

Furthermore, the judgement of the ECJ of 11-11-15 Pujante Rivera C-422/14 states that Dir 98/59/CE must be interpreted as meaning that workers with a contract concluded for a specific duration or for a specific task must be considered to be included among the workers habitually employed in the establishment in question.

Incidentally, it is worth recalling that the ECJ 11-11-15, Pujante Rivera C-422/14 stated that Union law has held that persons whose contracts of employment are concluded for a fixed period or for a specific task and whose contracts are regularly terminated by the expiry of the term of the contract or by the completion of the assigned task do not need to be protected in the same way as workers employed for an indefinite period. Pursuant to Article 1(2)(a) of Directive 98/59, the first group of persons may nevertheless enjoy the same protection as is granted to workers employed for an indefinite period if they are in a similar situation, that is to say, if the employment relationship is terminated before the end of the term of the contract or before the task for which they were engaged has been completed.

5.3 THE ECJ JUDGEMENT IN "PUJANTE RIVERA" AND THE ECJ RULING IN "CIUPA" AND "SOCHA".

The ECJ's "Pujante Rivera" judgement has established that Dir 98/59/EC must be interpreted as meaning that the fact that an employer makes, unilaterally and to the detriment of the employee, a substantial modification of essential elements of the contract of employment for reasons which are not related to the employee falls within the concept of 'dismissal' used in Article 1(1)(a) of the Directive.

Citing the ECJ's "Pujante Rivera" ruling, the important ECJ judgments "Ciupa" (paras. 27, 28 and 31 and operative part) and "Socha" (paras. 25, 26 and 32 and operative part) state that:

"As regards the concept of 'redundancy' in point (a) of the first subparagraph of Article 1(1) of Directive 98/59, the Court has held that that directive must be interpreted as meaning that the fact that an employer, unilaterally and to the detriment of the employee, makes significant changes to essential elements of his employment contract for reasons not related to the individual employee concerned falls within that concept" (par. 27).

"It follows that, if an employer, unilaterally and to the detriment of the employee, makes a non-significant change to an essential element of the contract of employment for reasons not related to the individual employee concerned, or makes a significant change to a non-essential element of that contract for reasons not related to the individual employee, that may not be regarded as a 'redundancy' within the meaning of that directive" (par. 28) "In any event, even if the referring court were to consider that the notice of amendment at issue in the main proceedings is not covered by the concept of 'dismissal', a termination of the contract of employment following the employee's refusal to accept a change such as that proposed in the notice of amendment must be regarded as constituting a termination of an employment contract which occurs on the employer's initiative for one or more reasons not related to the individual workers concerned, within the meaning of the second subparagraph of Article 1(1) of Directive 98/59, so that it must be taken into account for calculating the total number of redundancies" (par. 31).

The company "should logically have foreseen that a certain number of workers would not accept the modification of their working conditions and that their contract would be terminated as a result".

Consequently, the ECJ concludes that "Article 1(1) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted as meaning that a unilateral amendment of conditions of pay by the employer, to the detriment of the employees, which, in the event of an employee's refusal, entails the termination of the contract of employment is capable of being regarded as a 'redundancy' within the meaning of that provision, and Article 2 of that directive must be inter-

preted as meaning that an employer is required to carry out the consultations provided for in Article 2 where he contemplates effecting such a unilateral amendment of the conditions of pay, in so far as the conditions laid down in Article 1 of the directive are satisfied, which is for the referring court to ascertain”.

It should therefore be emphasised that the case law of the ECJ seems to consider, firstly, that the unilateral substantial modification by the company to the detriment of the employee is itself covered by the concept of dismissal in the first paragraph of art. 1.1.1 a) of Dir 98/59/EC. Secondly, that if this modification is not substantial, it cannot be classified as a dismissal within the meaning of this Directive. And, finally, that if the judicial body of the Member State considers that the modification does not fall within the concept of dismissal in the first paragraph of art. 1.1 a) of Dir 98/59/EC..1 a) of Dir 98/59/EC (it must be understood that because it is not substantial, for example), the termination of the employment contract derived from the worker's refusal to accept the modification must be considered as termination of the employment contract, produced on the employer's initiative, for one or more reasons not related to the individual worker, for the purposes of the second paragraph of art.1.1 of Dir 98/59/EC.

6. Concept of worker and the impossibility of excluding from the calculation, even temporarily, a certain category of workers

The important ECJ "Balkaya" ruling emphasises that the concept of worker in Dir 98/59/EC is a concept of Union law.

The "Balkaya" ECJ judgement ruled in a case in which national legislation or practice did not take into account, in the calculation of the number of employees provided for in Dir 98/59/EC, a member of the management of a corporation who carries out her activity under the direction and control of another body of the company, who receives remuneration in exchange for her activity and who does not herself hold any shareholding in that company. However, the ruling of the ECJ in "Balkaya" declares that this is contrary to art. 1.1.1 a) of Dir 98/59/EC.

The ECJ "Balkaya" judgement also states that a person must be considered to be a worker for the purposes of Article 1.1.1 a) of Directive 98/59/EC (as was the case here), who carries out a practical activity in a company, as a work placement, in order to acquire or improve knowledge or to follow vocational training, without receiving remuneration from the employer but receiv-

ing financial assistance from the public body responsible for promoting employment for this activity, recognised by that body.

Moreover, the ECJ "CGT" ruling (nr. 49) had already stated that it is not possible to exclude, even temporarily, a certain category of workers from the calculation of the number of workers employed for the purposes of Art. 1.1.1 a) of Dir 98/59/EC.

As regards the concept of entrepreneur or undertaking, ECJ judgement of 16-10-03, Commission v Italy C-32/02, EU:C:2003:555, stated at the time that Dir 98/59/EC applies to and includes not-for-profit entrepreneurs.

7. The Directive does not apply to workers in public administrations, the case of seafarers and the closure of military bases.

Art.1.2 b) of Dir 98/59/EC states that this Directive does not apply to employees of public administrations or institutions governed by public law (or equivalent entities in Member States where this concept is not known).

And the third paragraph of Article 3(1) of Dir 98/59/EC provides that "if the planned collective redundancies concern the crew members of a seagoing ship, the employer shall notify the competent authority of the flag State".

For its part, ECJ judgement of 18-10-12, Nolan C-583/10 establishes that the closure of a military base, whether of a Member State or of a third State, is not a factual situation that falls within the scope of Dir 98/59/EC. Consequently, the rules laid down in EU law for collective redundancies do not apply in such circumstances and the ECJ has no jurisdiction to interpret any discrepancies.

V. INFORMATION AND CONSULTATION (ART.2)

1. Consultation in "good time" with workers' representatives, when the employer "intends" to carry out collective redundancies, with a view to reaching an "agreement".

Art.2.1 of Dir 98/59/EC states that where " an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement".

The ECJ "Junk" ruling (nr. 36 f.) already warned that dismissals cannot already have been adopted, since the consultation and notification ob-

ligations arise "prior" to the company's decision to dismiss; otherwise the provision (see next section) that the aim of the consultation period is to avoid dismissals would not make sense. Equally, ECJ judgement of 10-9-09, *Akavan Erityisalojen Keskusliitto AEK and Others ("AEK ry")* C-44/08, EU:C:2009:533 (nr. 36 f.) and the ECJ "*Ciupa*" (nr. 32) and "*Socha*" (nr. 29) judgement.

With a view to reaching an "agreement", Dir 98/59/EC establishes an "obligation to negotiate" (ECJ "*Junk*", nr. 43, and ECJ "*AGET Iraklis*", nr. 39).

The ECJ judgement of 5-10-23, *SC Brink's Cash Solutions SRL* C-496/22, EU:C:2023:741, has established that Directive 98/59/EC does not preclude national legislation which does not impose an obligation on an employer to consult individually the workers affected by a plan for collective redundancies, where they have not appointed workers' representatives, and which does not oblige those workers to make such an appointment, provided that such legislation makes it possible, in circumstances beyond the control of the workers themselves, to ensure the full effectiveness of the provisions of Directive 98/59.

The ECJ recalls that "the right to information and consultation provided for in Directive 98/59 is intended for workers' representatives, and not for individual workers".

2. Object or purpose of consultations and the use of "experts".

According to Art.2.2, first paragraph of Dir 98/59/EC, "consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant". Reference is made, inter alia, to the ECJ *Consulmarketing* judgement, nr. 40. It should be noted, on the one hand, that the expressions "avoiding or reducing" collective redundancies and "mitigating" their consequences and, on the other hand, that the social measures must be aimed in particular at readapting or retraining the redundant workers, with a view - it should be understood - to their finding another job or undertaking another activity as soon as possible, so that they remain unemployed for only as long as is necessary.

The second paragraph of Art.2.2 of Dir 98/59/EC provides that "Member States may provide that employees' representatives may have recourse to experts in accordance with national laws and/or practices".

3. The employer's information obligations "during" the course of the consultations and in "good time" to enable the employees' representatives to make "constructive proposals".

The first paragraph of Art. 2.3 of Dir 98/59/EC states that, in order “to enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations” and in good time, make the following proposals:

- a) supply them with all relevant information, and
- b) in any event notify them in writing:
 - (i) the reasons for the projected redundancies;
 - (ii) the number of categories of workers to be made redundant;
 - (iii) the number and categories of workers normally employed;
 - (iv) the period over which the projected redundancies are to be effected;
 - (v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer;
 - (vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

Firstly, the expression "all" the "relevant" information; secondly, that the employer must fulfil this obligation "during" the course of the consultations (although nothing prevents this being done earlier) and in "good time"; and, especially, that the workers' representatives must be able to make "constructive proposals".

4. Communication to the public authority

The second paragraph of art.2.3 of Dir 98/59/EC provides that " employer shall forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), subpoints (i) to (v) " of the first paragraph of art.2.3(b) of Dir 98/59/EC.

In other words, the competent public authority must be informed in writing of everything that Dir 98/59/EC requires the employer to communicate to the employees' representatives, with the exception of the "method of calculating any severance pay other than the directives of national laws or practices".

5. The group of companies

Article 2.4 of Dir 98/59/EC provides that the information and consultation obligations of the Directive apply "irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer", adding, as regards infringements of the information, consultation and notification obligations laid down in Dir 98/59/EC, that "account shall not be taken of any defence on the part of the employer on the ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies. " (Art.2.4, paragraph 2).

Of great interest is, in this respect, the ECJ "AEK ry" judgement widely cited by the subsequent ECJ judgements of 7-8-18, Bichat, Chlubna and Walkner C-61/17, C-62/17 and C-72/17, EU:C:2018:653.

According to the ECJ Bichat, Chlubna and Walkner judgements, the first paragraph of Article 2(4) of Directive 98/59 must be interpreted as meaning that the concept of "undertaking exercising control over the employer" covers any undertaking linked to the employer by a shareholding in the employer's capital or by other legal ties which enable it to exercise a decisive influence over the employer's decision-making bodies and to compel the employer to consider or plan collective redundancies.

VI. THE ROLE OF THE PUBLIC AUTHORITY AND THE EFFECTS OF COLLECTIVE REDUNDANCIES

1. Notification to the public authority and to the workers' representatives and their possible observations (art.3)

1.1 NOTIFICATION TO THE PUBLIC AUTHORITY

The first paragraph of art.3.1 of Dir 98/59/EC provides that "employers shall notify the competent public authority in writing of any projected collective redundancies. ". The use of the word "projected" is noteworthy.

However, the second paragraph of art.3.1 of Dir 98/59/EC allows Member States to "provide that in the case of planned collective redundancies arising from termination of the establishment's activities as a result of a judicial decision, the employer shall be obliged to notify the competent public authority in writing only if the latter so requests ". Of interest in this respect is ECJ

judgement of 3-3-11, Claes C-235/10, EU:C:2011:119, relevant to the difference between the death of the natural person (the case examined by the aforementioned ECJ "Rodriguez Mayor" ruling) and a legal person in liquidation.

We have already seen that the third paragraph of Article 3.1 of Dir 98/59/EC provides that "if the planned collective redundancies concern the crew members of a seagoing ship, the employer shall notify the competent authority of the flag State".

The notification of the draft collective redundancies to the competent public authority must contain all relevant information concerning the draft collective redundancies and the consultations with the workers' representatives provided for in art.2 of Dir 98/59/EC, in particular the reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are expected to be effected (Dir 98/59/EC art.3.1, 3rd paragraph). As the ECJ Consulmarketing judgement points out, the competent public authority must be provided with all "the data and reports referred to in those provisions" (order of ECJ judgement of 4 June 2020, Balga, C32/20-, EU:C:2020:441, unpublished, paragraph 30 and case law cited).

1.2 THE NOTIFICATION OF THE WORKERS' REPRESENTATIVES AND ANY POSSIBLE CONSIDERATIONS BY THEM.

The employer is obliged to provide the employees' representatives with a copy of the notification provided for in Art. 3.1 and the employees' representatives may submit any comments to the competent public authority (Dir 98/59/EC Art. 3.2).

2. **Effects of collective redundancies, the search for solutions by the public authority, the power to extend the effective date and the possible non-application of the above in certain cases (art.4).**

2.1 THE EFFECTS OF COLLECTIVE REDUNDANCIES

Collective redundancies whose draft has been notified to the competent public authority shall take effect no earlier than 30 days after the notification provided for in art. 3(1) of Dir 98/59/EC, without prejudice to the provisions governing individual rights as regards notice periods (Dir 98/59/EC art.4.1, 1st paragraph).

Member States may grant the competent public authority the power to reduce the above deadline (Dir 98/59/EC art.4.1, paragraph 2).

2.2 THE SEARCH FOR SOLUTIONS BY THE PUBLIC AUTHORITY

The competent public authority shall use the 30-day period to "seek solutions" to the problems raised by the collective redundancies in question (Dir 98/59/EC art.4.2).

Dir. 98/59/EC thus assigns a relevant role to the competent public authority. Indeed, as has already been seen, the draft collective redundancies must be notified to that authority (Article 3(1) of the Directive), and the Directive provides - as stated in the previous paragraph - that the competent public authority shall use the period provided for in Article 4(1) to "seek solutions to the problems raised by the projected collective redundancies" (Article 4(2)).

The ECJ judgements of 30 April 2015 (C-80/14, *USDAW*), 13 May 2015 (C-182/13, *Lyttle*) and 13 May 2015 (C-392/13, *Rabal Cañas*), recall that in paragraph 28 of the *Athinaiki Chartopoiia* judgment (ECJ 15 February 2007, C-270/05), the Court of Justice referred to the fact that the aim pursued by Directive 98/59 takes particular account of the socio-economic consequences which collective redundancies could have in a given local context and social environment.

2.3 THE POWER OF EXTENSION BY THE PUBLIC AUTHORITY.

Insofar as the initial period provided for in art. 4.1 of Dir 98/59/EC is less than 60 days, Member States may grant the competent public authority the power to extend the initial period by up to 60 days following notification, where the problems raised by the projected collective redundancies are not likely to be solved within the initial period (Dir 98/59/EC art.4.3, 1st paragraph).

Member States may grant the competent public authority wider powers of extension (Dir 98/59/EC art.4.3, 2nd paragraph).

The employer must be informed of the extension and the grounds for it before the expiry of the initial period provided for in art.4.1 of Dir 98/59/EC (Dir 98/59/EC art.4.3, 3rd paragraph).

2.4 COLLECTIVE REDUNDANCIES RESULTING FROM THE CESSATION OF THE ESTABLISHMENT'S ACTIVITY FOLLOWING A JUDICIAL DECISION.

Member States are not obliged to apply Art. 4 Dir. 98/59/EC to collective redundancies resulting from the cessation of the establishment's activities where this is the result of a judicial decision (Dir 98/59/EC Art.4.4). On this

point, the aforementioned judgement of the ECJ in “Claes” is of interest, as it has already been said that it is relevant for the difference between the death of the natural person and a legal person in liquidation.

VII. GREATER FAVOURABILITY OPEN TO STATES AND COLLECTIVE BARGAINING (ART.5)

It has already been anticipated that art.5 of Dir 98/59/EC states that the Directive "shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers".

Reference is made, for example, to CETS CGT judgement (para. 44) and to ECJ USDAW (paras. 65-67), Lyttle (paras. 46-48) and AGET Iraklis (para. 32) judgements .

VIII. ADMINISTRATIVE AND/OR JUDICIAL PROCEDURES AVAILABLE TO WORKERS' REPRESENTATIVES OR WORKERS' REPRESENTATIVES (ART.6)

Art.6 of Dir 98/59/EC provides that "Member States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under this Directive are available to the workers' representatives and/or workers".

Reference is made to ECJ “CGT” judgement (paragraph 44). Also of interest in this regard is the ECJ judgement of 16-7-09, Mono Car Styling C-12/08, EU.C:2009:466, which admits limitations to individual challenges by workers (but not by their representatives), without this violating effective judicial protection.

As the ECJ Consulmarketing judgement points out, Article 6 of Directive 98/59/EC does not impose a specific measure on the Member States in the event of failure to comply with the obligations laid down by Directive 98/59, but leaves them free to choose between the various solutions capable of achieving the objective pursued by that directive, according to the different situations which may arise. However, as the ECJ Consulmarketing ruling states, such measures must ensure effective and efficient judicial protection under Article 47 of the Charter and have a genuine deterrent effect (order of 4 June 2020, Balga, C32/20-, unpublished, paragraph 33, and case-law cited).

For its part, ECJ judgement of 7-8-18, *Colino Sigüenza* C-472/16, EU:C:2018:646, declared inadmissible the third question referred for a preliminary ruling by the judicial body of the Member State, on the grounds that that body had not provided the ECJ with the information necessary to reply effectively to that question.

That third question asked, in essence, whether Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (in particular the first subparagraph of Article 4(1) thereof) and the right to effective judicial protection under Article 47 of the CDFU must be interpreted as precluding national legislation on the effects of *res judicata*, such as that at issue in the main proceedings, which prohibits the national courts from ruling on a challenge, based on Directive 2001/23/EC, to the individual dismissal of an employee in the context of a collective redundancy, on the ground that a judicial decision has already been given in the collective redundancy proceedings, in which only the employees' representatives have legal standing to bring proceedings.

The ECJ "*Colino Sigüenza*" judgement considers that collective dismissal is admissible in this case, provided that the circumstances that caused it and the delay in appointing a new contractor do not form part of a fraudulent scheme.

IX. STATE AID AUTHORISED BY THE EUROPEAN COMMISSION ALLOWS COMPENSATION FOR COLLECTIVE REDUNDANCIES HIGHER THAN THE LEGAL MINIMUM: THE ECJ "*IGLESIAS GUTIÉRREZ*" JUDGMENT.

The ECJ judgement of 15-10-05, *Iglesias Gutiérrez* C-352/14, EU:C:2005:691, which resolves the question referred for a preliminary ruling by a labour court of Terrassa on the compensation agreed in the consultation period of the collective dismissal of a financial institution (higher than the legal minimums), establishes that the compensation agreed in the consultation period of the collective dismissal of a financial institution (higher than the legal minimums), establishes that the compensation agreed in the consultation period of the collective dismissal of a financial institution (higher than the legal minimums), is not the same as the compensation agreed in the consultation period:

" Commission Decision C(2012) 8764 final of 28 November 2012 concerning the aid granted by the Spanish authorities for the restructuring and re-capitalisation of the BFA Group, and Articles 107 TFEU and 108 TFEU, which form the basis for that decision, do not preclude the application, in proceedings relating to a collective redundancy that is within the scope of that decision, of national legislation under which the compensation payable to an employee whose dismissal is held to be unfair is set at an amount higher than the legal minimum ".

X. PREGNANT WORKER AND DISMISSAL: THE ECJ JUDGEMENT IN "PORRAS GUISADO".

A pregnant worker was dismissed as part of the collective redundancy of a Spanish financial institution and the relevant court referred for a preliminary ruling a question on the interpretation of art. 10 of Dir 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of art. 16(1) of Dir 89/391/EEC).

Art.10(1) ("Prohibition of dismissal") of Directive 92/85 provides that:

" Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent".

Well, the ECJ judgement of 22-02-2018, C-103/16, "Porras Guisado", EU:2018:99, states that:

Article 10(1) of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) must be interpreted as not precluding national legislation which permits the dismissal of a pregnant worker because of a collective redundancy within the meaning of Article 1(1)(a) of Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

2. Article 10(2) of Directive 92/85 must be interpreted as not precluding national legislation which allows an employer to dismiss a pregnant

worker in the context of a collective redundancy without giving any grounds other than those justifying the collective dismissal, provided that the objective criteria chosen to identify the workers to be made redundant are cited.

3. Article 10(1) of Directive 92/85 must be interpreted as precluding national legislation which does not prohibit, in principle, the dismissal of a worker who is pregnant, has recently given birth or is breastfeeding as a preventative measure, but which provides, by way of reparation, only for that dismissal to be declared void when it is unlawful.
4. Article 10(1) of Directive 92/85 must be interpreted as not precluding national legislation which, in the context of a collective redundancy within the meaning of Directive 98/59, makes no provision for pregnant workers and workers who have recently given birth or who are breastfeeding to be afforded, prior to that dismissal, priority status in relation to being either retained or redeployed, but as not excluding the right of Member States to provide for a higher level of protection for such workers.

The Directive is addressed to the Member States (Dir 98/59/EC art.10).

CHAPTER 30

INSOLVENCY OF THE EMPLOYER

JOAQUÍN GARCÍA MURCIA AND IVÁN ANTONIO RODRÍGUEZ CARDO

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I. KEY FEATURES OF THE EU SYSTEM FOR PROTECTING WAGE CREDITS

1. Coordination of Member States' insolvency procedures

The EU has addressed employer insolvency through two distinct regulatory pathways. The first one is primarily concerned with trade and business, with Commercial Law at its core. The second pathway is connected to social rights, particularly those of the affected employees. However, the commercial aspects of insolvency procedures also have significant implications for social rights, as demonstrated by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)¹.

This Regulation, which recasts earlier regulations adopted for similar purposes, such as Regulations 1346/2000 and 1215/2012, does not create a unified European insolvency procedure. Instead, it aims to coordinate national insolvency procedures. Its primary objective is to ensure the proper functioning of the internal market by preventing “forum shopping”, a practice where parties transfer assets or judicial proceedings from one Member State to another to gain a more favourable legal position (Recital 5).

Regulation 2015/848 applies to public collective proceedings, including interim ones, provided they meet certain specific criteria. According to Article 1, these proceedings, aimed at rescue, adjustment of debt, reorganization, or liquidation, must result in one of the following scenarios: (a) The debtor is wholly or partially divested of its assets, and an insolvency practitioner is appointed; (b) The debtor's assets and affairs are placed under the control or supervision of a court; or (c) A temporary stay of individual enforcement proceedings is granted by a court or by operation of law to allow negotiations between the debtor and its creditors. This stay must include suitable measures to protect the general body of creditors, and if no agreement is reached, must be preliminary to one of the proceedings referred to in points (a) or (b).

The list of national proceedings that meet these requirements is included in Annex A of the Regulation.

¹ It is worth mentioning Regulation (EU) 2017/353, which replaced Annexes A and B, and Commission Implementing Regulation (EU) 2017/1105 of 12 June 2017 establishing the forms referred to in Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings.

To facilitate coordination, the Regulation establishes rules on international jurisdiction and applicable law. Also important are the rules on the recognition of insolvency proceedings, which require that any judgment opening insolvency proceedings by a court in one Member State be recognized in all other Member States (Article 19). The Regulation also contains provisions on the effects of these proceedings (Article 20), the right of “any foreign creditor” to be informed and to lodge claims (Article 53), as well as the requirement for cooperation and communication between the bodies involved in different Member States (insolvency practitioners and courts) in cases of main and secondary insolvency proceedings concerning the same debtor².

Regulation 2015/848 explicitly highlights its goal of protecting “employees and jobs” (Recital 72). According to Recital 72, this objective influences the rules on applicable law and international jurisdiction. Specifically, Article 13(1) provides that “the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment”. In terms of international jurisdiction, Article 13(2) clarifies that “the courts of the Member State in which secondary insolvency proceedings may be opened shall retain jurisdiction to approve the termination or modification of the contracts referred to in this Article, even if no insolvency proceedings have been opened in that Member State”.

Therefore, the effects of insolvency proceedings on the continuation or termination of employment, and on the rights and obligations of all parties involved, are not necessarily governed by the law applied to the insolvency proceedings. Instead, they are governed by the law applicable to the employment agreement. Furthermore, when the termination of employment contracts requires approval by a court or administrative authority, the relevant rules and jurisdiction remain with the Member State in which the debtor’s establishment is located. However, for other matters, such as the preferential rights of employees’ claims, the applicable law is that of the Member State in which the insolvency proceedings have been opened.

The employment-related aspects of insolvency proceedings are distinct from the requirements imposed by the EU for the protection of employees’ claims, which are addressed through a separate regulatory framework. While

² According to ECJ judgment of 19 September 2024, *DL* (C-501/23, EU:C:2024:776), the concept of ‘principal place of business’ for an individual pursuing an independent business or professional activity does not correspond to that of an ‘establishment’. In that case, it was held that, in the absence of evidence to the contrary, the individual’s centre of main interests is presumed to be located at their principal place of business, even where the activity does not involve any human resources or assets.

this framework will be discussed shortly, it is important to note that Regulation 2015/848 includes a specific provision concerning local creditors in secondary insolvency proceedings. According to Article 36(11), “an authority which is established in the Member State where secondary insolvency proceedings could have been opened and which is obliged under Directive 2008/94/EC of the European Parliament and of the Council to guarantee the payment of employees’ outstanding claims resulting from contracts of employment or employment relationships shall be considered to be a local creditor, where the national law so provides”.

2. Social context and economic background of EU rules

It is important to emphasize that the EU rules aimed at protecting wage credits seek to balance workers’ rights with economic considerations. Unpaid wage credits are a crucial factor in improving living and working conditions, one of the explicit objectives of the EU, as outlined in treaties and key texts, such as the 1989 Charter of the Fundamental Social Rights of Workers. However, this social dimension must also align with the goals of deepening the internal market. As the ECJ has noted, workers’ rights must be compatible with the need for balanced economic and social development³.

The Court has further clarified that these EU rules aim to establish a minimum level of protection for all workers in the event of employer insolvency. This protection can be enhanced at the national level, provided that the economic context and the need to maintain the financial stability of wage guarantee institutions are considered. While Member States may impose limits or reductions on worker protection, such measures must be interpreted restrictively⁴. As Article 11 of Directive 2008/94/EC stipulates, EU law cannot serve as a basis for a regression of the level of protection previously achieved in a Member State. Additionally, Member States have the authority to adopt measures necessary to prevent abuses, including the ability to refuse or reduce liability when there are special links between the employee and the employer (Article 12).

³ See ECJ judgment of 24 November 2016, *Webb-Sämann* (C-454/15, EU:C:2016:891).

⁴ See ECJ judgments of 14 July 1998, *Regeling* (C-125/97, EU:C:1998:358); 18 October 2001, *Gharehveran* (C-441/99, EU:C:2001:551); 11 September 2003, *Walcher* (C-201/01, EU:C:2003:450); 4 March 2004, *Barsotti and Others* (C-19/01, EU:C:2004:119); 16 July 2009, *Visciano* (C-69/08, EU:C:2009:468); 28 November 2013, *Gomes Viana Novo and Others* (C-309/12, EU:C:2013:774). Regarding social security rights, see ECJ judgments of 25 January 2007, *Robins and Others* (C-278/05, EU:C:2007:56) and of 25 April 2013, *Hogan and Others* (C-398/11, EU:C:2013:272).

3. **Specific protection of wage credits in the event of employer insolvency**

Article 153(5) of the TFEU excludes certain matters from the powers of the EU, including “pay”. However, the concept of “pay” does not extend to the protection of wages, particularly in cases of employer insolvency. Legal measures in this area predate those addressing commercial aspects, and directives, rather than regulations, have been the primary legal instrument used. Initially, the EU did not aim to coordinate different national systems but sought to establish a minimum level of protection across all Member States, making directives a more suitable choice. More recently, coordination measures have been introduced due to the increasing frequency of wage claims resulting from work performed in multiple countries.

As previously mentioned, EU measures focused on commercial issues regulate all aspects of insolvency proceedings, except those related to workers’ rights. In contrast, measures aimed at the social dimension specifically address the protection of wage claims. These rules provide special protection for employees’ wages, without affecting other areas of insolvency law. As a result, Article 13 of Regulation 2015/848 remains unaffected by these provisions.

The protection of unpaid wage credits can theoretically be achieved through two methods: insurance or giving employees preference over other creditors. The EU chose the insurance method, an innovative and arguably more protective approach at the time. While giving preference to employee credits could be undermined by the debtor’s precarious financial situation, the insurance mechanism introduced by EU law has been a significant achievement, later adopted by ILO conventions.

The first legal instrument for this purpose was Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. This directive emerged from the social action programs of the 1970s, which aimed to improve working conditions, particularly the protection of workers during economic hardship⁵. The Directive was first amended in 1987 by Council Directive 87/164/EEC, and again in 2002 by Directive

⁵ The Directive does not specify the elements or particular reasons that needed a legal provision at that time. It is likely that the protection of wage credits in the event of employer insolvency was a result of the Social Action Program adopted by the Council on 21 January 1974 (published in the Journal on 12 February). This program also led to the directives on collective redundancies (1975) and equal pay (1976), and was related to other provisions in subsequent years, such as the directive on the transfer of undertakings (1977) and various measures on health and safety at work.

2002/74/EC. The 2002 amendment significantly expanded the Directive's scope to include fixed-term and part-time work. It also extended protection to severance payments in cases of contract termination and introduced a new chapter addressing transnational issues. The succession of these provisions raised concerns, leading the ECJ to clarify that the implementation of the 2002 Directive did not hinder the protection of credits derived from compensation for termination of employment contracts where national rules already provided statutory protection through a guarantee institution in the event of employer insolvency⁶.

All these provisions were codified in 2008 through Directive 2008/94/EC, which is the current law in force⁷. The codified version refined the original rules and expanded their scope, particularly focusing on transnational situations to ensure coordination between wage institutions. It also introduced rules on applicable law and international jurisdiction.

4. The role of the ECJ in shaping and applying wage protection rules in the event of employer insolvency

The application, implementation, and enforcement of these directives have raised various issues and concerns, prompting the Court to establish a significant body of case law. Although legal systems differ in their rules for insolvency proceedings and wage credit protection, the Court has clarified the scope and rules of the directives. Some legal amendments to the original texts have emerged from this case law.

The Court has defined the personal, material, and temporal scope of the Directives, outlined the characteristics of insolvency leading to proceedings and protection, and addressed the effects of formal requirements. It has also clarified the protection of social security contributions and the rules on applicable law. Furthermore, the Court has reviewed not only the directives themselves but also their correct transposition by Member States.

From a broader perspective, ECJ case law on wage credit protection has not only facilitated a more accurate application of the relevant directives but has also contributed to the development of a general doctrine on the nature and implementation of EU law, particularly in cases of provisions aimed at harmo-

⁶ See ECJ judgment of 7 September 2006, *Cordero Alonso* (C-81/05, EU:C:2006:529).

⁷ These provisions prompted the intervention of the ILO through Convention No. 173 (1992), which also regulated the preference of wage credits over other claims.

nization. These conflicts have led to a more nuanced doctrine regarding interpretation in conformity by national judges, the extent of direct effect, Member States' duty of transposition, the principles to be observed in transposition, state liability for inadequate transposition, the characteristics of preliminary rulings, the ECJ's authority to assess a Member State's legal system, and the impact of the EU Charter of Fundamental Rights⁸.

5. Configuration options for wage guarantee institutions

According to Article 5 of Directive 2008/94/EC, Member States must establish rules for the organization, financing, and operation of guarantee institutions while adhering to three key principles. Firstly, the "assets of the institutions must be independent of the employers' operating capital and be inaccessible to proceedings for insolvency". Secondly, "employers must contribute to financing, unless it is fully covered by the public authorities". And thirdly, "the institutions' liabilities must not depend on whether or not obligations to contribute to financing have been fulfilled".

In its ruling *Francovich*⁹, the ECJ emphasized that Member States are "required to organize an appropriate institutional guarantee system". While Member States have broad discretion regarding the organization, operation, and financing of these institutions—and the Directive allows for full public financing—this does not mean that the State itself can be held directly liable for unpaid claims. Liability rests with the guarantee institutions, meaning individuals cannot enforce their rights against the State in national courts if no "implementing measures are adopted within the prescribed period".

Moreover, different wage guarantee systems may be established for different categories of employees. For instance, while higher management staff may not be excluded from the Directive's scope, protection may not necessarily be provided by the same guarantee institution as for other categories of employees¹⁰.

⁸ See ECJ judgments of 19 November 1991, *Francovich* (C-6/90, EU:C:1991:428); 16 December 1993, *Wagner-Miret* (C-334/92, EU:C:1993:945); 10 July 1997, *Maso and Others* (C-373/95, EU:C:1997:353); 4 March 2004, *Barsotti and Others* (C-19/01, EU:C:2004:119); 16 December 2004, *Olaso Valero* (C-520/03, EU:C:2004:826); 7 September 2006, *Cordero Alonso* (C-81/05, EU:C:2006:529); 17 January 2008, *Velasco Navarro* (C-246/06, EU:C:2008:19); 21 February 2008, *Robledillo Núñez* (C-498/06, EU:C:2008:109); 16 July 2009, *Visciano* (C-69/08, EU:C:2009:468); 25 April 2013, *Hogan and Others* (C-398/11, EU:C:2013:272).

⁹ Judgment of 19 November 1991 *Francovich* (C-6/90, EU:C:1991:428).

¹⁰ See ECJ judgment of 16 December 1993, *Wagner-Miret* (C-334/92, EU:C:1993:945).

6. Rules on prevention of abuses

According to Article 12 of Directive 2008/94, Member States may implement “measures necessary to avoid abuses”. This Article outlines two specific situations involving a particular connection between the employee and the employer. Firstly, Member States can refuse or reduce the liability of the guarantee institution if fulfilling the obligation is unjustifiable due to special links between the employee and the employer, which may suggest collusion. Secondly, liability may be reduced if the employee, or their close relatives, owned a significant part of the employer’s business and had considerable influence over its activities. Additionally, other anti-abuse measures are possible, such as rules prohibiting the aggregation of amounts from different sources, which will be discussed below.

The ECJ has clarified that Member States do not have unlimited discretion in this regard. Measures to prevent abuse must not undermine the uniform application of EU law or compromise the Directive’s objectives. Such exceptions must be interpreted restrictively and with consideration of the Directive’s social purpose¹¹. For instance, “the fact that a person performing the duties of CEO of a trading company is also a member of the statutory body of that company does not, in itself, allow for the presumption or exclusion of the existence of an employment relationship or the classification of that person as an employee within the meaning of Directive 2008/94”¹². The Court has also noted that restrictions are unjustified if the national system already has sufficient controls to prevent abuse in these situations¹³.

II. PERSONAL SCOPE OF THE GUARANTEE

1. General rules

According to Article 1(1), Directive 2008/94/EC applies to “employees’ claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency”. In addition to the anti-abuse measures outlined in Article 12, already mentioned, Article 1(2) per-

¹¹ See ECJ judgment of 10 July 1997, *Maso and Others* (C-373/95, EU:C:1997:353); 14 July 1998, *Regeling* (C-125/97, EU:C:1998:358); 18 October 2001, *Gharehveran* (C-441/99, EU:C:2001:551); 4 March 2004, *Barsotti and Others* (C-19/01, EU:C:2004:119).

¹² See ECJ judgment of 5 May 2002, *HJ* (C-101/21, EU:C:2022:356).

¹³ See ECJ judgment of 21 February 2008, *Robledillo Núñez* (C-498/06, EU:C:2008:109).

mits Member States, “by way of exception, exclude claims by certain categories of employee from the scope of this Directive, by virtue of the existence of other forms of guarantee if it is established that these offer the persons concerned a degree of protection equivalent to that resulting from this Directive”. If such provisions were already in place in national legislation before the Directive came into force, Article 1(3) allows for the continued exclusion of share-fishermen and domestic servants employed by individuals. Consequently, the Directive applies only to employees under an employment contract, excluding self-employed individuals and those under administrative relationships.

The Directive does not provide a specific concept of “employee” but refers to the definition established by Member States. However, Member States cannot exclude certain categories of workers from protection. Article 2 mandates that part-time workers, fixed-term workers, and temporary agency workers be covered. Additionally, Member States cannot impose a minimum duration for the employment contract to qualify for claims, nor can they exclude workers under an employment contract based solely on presumptions of significant influence over the company’s activities¹⁴. Ultimately, the “concept of an employment relationship is a necessary factor in determining the guarantee period”, underscoring the need for a “uniform interpretation” as required by the ECJ¹⁵.

2. Workers with managerial responsibilities and/or shareholders

As mentioned earlier, Article 12 of Directive 2008/94/EC allows for the exclusion of workers who have “special links” with the employer. However, these exclusions must be applied narrowly and cannot be general or overly broad, as they must be interpreted strictly¹⁶. Consequently, a national provision that excludes the spouse –who is not a shareholder- of a company owner without further analysis exceeds the discretion granted to Member States, especially if the Directive has not been correctly implemented¹⁷.

Therefore, the exception must be construed narrowly and interpreted in a manner consistent with the social purpose of the Directive. The Court has not accepted presumptions or general exclusions, even when the employee was a

¹⁴ See ECJ judgment of 5 May 2002, *HJ* (C-101/21, EU:C:2022:356).

¹⁵ See ECJ judgments of 15 May 2003, *Mau* (C-160/01, EU:C:2003:280) and of 14 July 1998, *Regeling* (C-125/97, EU:C:1998:358).

¹⁶ See ECJ judgment of 2 February 1989, *Commission vs. Italy* (C-22/87, EU:C:1989:45).

¹⁷ See ECJ judgment of 18 October 2001, *Gharehveran* (C-441/99, EU:C:2001:551).

shareholder or even a chairman of the management board¹⁸. These restrictions aim to prevent abuse; thus, if no abuse is present, the exclusion is not justified¹⁹.

In contrast, an exclusion is justified when the employee had considerable influence over the undertaking's activities during the six months preceding the insolvency proceedings, particularly if that influence reasonably implies responsibility for the insolvency²⁰.

3. Protection of third-country workers

Directive 2008/94/EC does not specify or limit protection based on the nationality of workers. While other provisions, including the Treaties, affirm the right to equality and non-discrimination based on nationality, Member States might have a narrow margin of discretion. This margin is indeed very limited, even for third-country nationals who do not legally reside in a Member State.

The Court has clarified that the absence of recognition of the right to work for 'illegally staying third-country nationals' under national rules is not decisive. To align with the social objective of Directive 2008/94/EC, the status of "employee" should not be contingent upon immigration laws. The crucial factor is the entitlement to be paid. If national law grants third-country workers the right to payment, even in the absence of relevant administrative permits, they are entitled to claim outstanding wages under the protection of the Directive²¹.

III. MATERIAL SCOPE OF THE GUARANTEE

1. Claims protected: outstanding wages and unpaid social security contributions

According to Article 3 of Directive 2008/94/EC, protection extends to "outstanding claims resulting from contracts of employment or employment relationships," including severance pay upon termination. The Court has clarified that the claims must be related to salary. Consequently, periods during

¹⁸ See ECJ judgment of 5 May 2002, *HJ* (C-101/21, EU:C:2022:356).

¹⁹ See ECJ judgment of 11 September 2003, *Walcher* (C-201/01, EU:C:2003:450).

²⁰ See ECJ judgment of 10 February 2011, *Lotta Andersson* (C-30/10, EU:C:2011:66). The employee was married, and each spouse owned 50% of the company's shares. She was also a deputy member of the board of directors and was authorized to act as the sole signatory on behalf of the company.

²¹ See ECJ judgment of 5 November 2014 (*Tümer*, C-311/13, EU:C:2014:2337).

which the employment relationship is suspended and no remuneration is paid (e.g., child-rearing leave) are excluded from protection²².

In addition to outstanding wages, some social security rights are also covered. However, Article 6 allows Member States to exclude contributions due under national statutory social security schemes or supplementary occupational or inter-occupational pension schemes that fall outside the national statutory social security system. Despite this, the non-payment of compulsory contributions by the employer before insolvency proceedings should not adversely affect employees' entitlement to benefits from these insurance institutions, provided that the employees' contributions have been deducted at source from their remuneration.

Moreover, Member States must implement measures to protect the interests of employees and individuals who have already left the employer's undertaking or business at the onset of insolvency. This protection includes rights that confer immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary occupational or inter-occupational pension schemes outside the national statutory social security system.

Thus, while unpaid social security contributions could fall under covered claims, the Directive grants Member States considerable flexibility. Most measures taken may not affect the guarantee institutions directly but could be implemented through social security provisions. The Court has also permitted Member States to classify employees' outstanding claims, when paid by a guarantee institution, as 'social security benefits'²³.

It is important to note that the Directive does not cover claims of a different nature, even if they are related. Specifically, Directive 2008/94 does not apply to national provisions that offer employees more favourable protection as a result of the Member States' exclusive competence²⁴. Additionally, the Directive does not extend to every benefit granted or decision made by the guarantee institutions, as these institutions may have other responsibilities unrelated to the protection of wage credits, which remains outside the scope of Directive 2008/94²⁵.

2. Outstanding wages

The Directive grants Member States flexibility in designing the guarantee, and the Court has had numerous opportunities to clarify the scope of this

²² See ECJ judgment of 15 May 2003, *Mau* (C-160/01, EU:C:2003:280).

²³ See ECJ judgment of 16 July 2009, *Visciano* (C-69/08, EU:C:2009:468).

²⁴ See ECJ judgment of 10 July 2014, *Julián Hernández and Others* (C-198/13, EU:C:2014:2055).

²⁵ See ECJ judgment of 22 November 2007, *Spain v Lenzing* (C-525/04, EU:C:2007:698).

discretion regarding the protection of claims for outstanding wages. The Court has made general observations on key concepts, such as “pay,” to assess the protection of severance payments in cases of contract termination before the amendments to the 1980 Directive. Moreover, the Court has applied the principles of equality and non-discrimination to assess the protection of economic compensation arising from contract terminations that do not strictly constitute dismissals, such as resignations of the employee due to serious breaches by the employer, as well as compensation owed by the employer to the relatives of an employee who dies in an accident occurred at the workplace²⁶.

However, the rules on the periods covered have raised most of the issues. Article 3 specifies that protection covers “outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States”. Article 4 allows Member States to limit the liability of the guarantee institution. To this end, Member States must define the period during which outstanding claims will be covered by the guarantee institution, which must include the remuneration for the last three months of the employment relationship before and/or after the specified date mentioned in Article 3.

These three months must be interpreted as meaning three calendar months, because the “limitation of the guarantee to the last three months, whatever the date on which the event referred to in Article 4(2) of the Directive occurred, could have damaging consequences for the beneficiaries of the Directive if the onset of the insolvency did not occur on the last day of the month”²⁷. Consequently, the ECJ has stated that a national provision that does not guarantee wage claims for employees whose employment ended more than three months before the judicial decision initiating insolvency proceedings is entered into the commercial register does not violate the Directive²⁸. The Court also supports the limitation of outstanding salary claims to a period of three months falling within a reference period that includes the three months immediately preceding and the three months immediately following the date on which collective insolvency proceedings based on the employer’s insolvency are opened²⁹.

Additionally, this minimum period can be part of a reference period lasting no less than six months. In Member States with a reference period of at

²⁶ See ECJ judgments of 12 December 2002, *Rodríguez Caballero* (C-442/00, EU:C:2002:752); 16 December 2004, *Olaso Valero* (C-520/03, EU:C:2004:826); 25 June 2018, *Checa Honrado* (C-57/17, EU:C:2018:512); 25 November 2020, *Sociálna poisťovňa* (C-799/19, EU:C:2020:960); 22 February 2024, *Unedic* (C-125/23, EU:C:2024:163).

²⁷ See ECJ judgment of 10 July 1997, *Maso and Others* (C-373/95, EU:C:1997:353).

²⁸ See ECJ judgment of 25 July 2018, *Gabriel Guigo* (C-338/17, EU:C:2018:605).

²⁹ See ECJ judgment of 16 February 2023, *Agenția Județeană de Ocupare a Forței de Muncă Ilfov* (joined cases C-524/21 y C-525/21, EU:C:2023:100).

least 18 months, the guarantee institution may limit coverage to eight weeks. In such cases, the calculation of the minimum period must take into account the most favourable periods for the employee.

Regarding payment amounts, Member States may set ceilings on payments, provided these ceilings do not fall below a level consistent with the Directive's social objectives. The Court has clarified that such ceilings could be reduced *pro rata temporis* for part-time workers based on hours workers, without violating Directive 2006/54³⁰. Additionally, to determine the minimum guarantee, a Member State may use the date that results in the least liability for the guarantee institution, typically the onset of the employer's insolvency, that is, the date on which proceedings to satisfy creditors collectively are requested³¹. Member States are free to set the date before and/or after which outstanding wage claims must be covered by the guarantee institution³². However, Member States that have not correctly transposed the Directive cannot undermine workers' rights by using the option to limit the amount of the guarantee as if they had properly implemented the Directive³³.

Thus, Member States therefore have some discretion in shaping the guarantee and may exclude wage claims that become due more than six months before the commencement of insolvency proceedings. The Directive does not prohibit this exclusion, even if workers had initiated legal proceedings before that period to determine the amount of their claims and obtain an enforcement order for recovery³⁴.

This discretion allows Member States to establish rules for the recovery of sums unduly paid. However, these rules must adhere to the principles of equivalence and effectiveness. Specifically, the application of tax legislation by analogy is inconsistent with the social objective of the Directive if it results in less favourable conditions for employees compared to those for recovering benefits under national social protection laws, or if it makes it excessively difficult or even impossible for employees to claim their rights under Directive 2008/94³⁵.

³⁰ See ECJ order of 3 March 2021, *Fogasa* (C-841/19, EU:C:2021:159).

³¹ See ECJ judgment of 10 July 1997, *Maso and Others* (C-373/95, EU:C:1997:353).

³² See ECJ judgment of 28 November 2013, *Gomes Viana Novo and Others* (C-309/12, EU:C:2013:774).

³³ See ECJ judgments of 19 November 1991, *Francovich*, C-6/90; 10 July 1997, *Maso and Others* (C-373/95, EU:C:1997:353).

³⁴ See ECJ judgment of 28 November 2013, *Gomes Viana Novo and Others* (C-309/12, EU:C:2013:774).

³⁵ See ECJ judgment of 16 February 2023, *Agenția Județeană de Ocupare a Forței de Muncă Ilfov* (joined cases C-524/21 and C-525/21, EU:C:2023:100).

The Court has also clarified how the guarantee should operate when a worker has different claims against the employer, with some arising before and others during the reference period. In such cases, payments made by the employer during the reference period must take priority over earlier claims. Otherwise, the minimum protection guaranteed by the Directive could be undermined, as the outcome would depend on the employer's arbitrary or deliberate decision to make or withhold payments during the reference period³⁶.

However, the protection provided by Directive 2008/94/EC does not extend to all stages of insolvency proceedings. While Member States can choose to offer more extensive protection, they may also limit the guarantee to specific scenarios. For example, they could restrict it to claims arising before the decision to open insolvency proceedings is registered, even if the decision does not end the employer's activities. The ECJ has affirmed that the Directive does not mandate the cessation of the employer's activities and acknowledges Member States' discretion in determining the reference period for the guarantee³⁷.

The ECJ has also addressed rules against aggregation, which are intended to limit the liability of the guarantee institution and prevent abuse. However, these rules cannot be applied to all benefits or amounts owed to workers. For example, Member States cannot prohibit the aggregation of benefits meant to cover the needs of employees dismissed within three months of employment termination³⁸. Additionally, they cannot limit the liability of guarantee institutions to a sum that only covers the basic needs of the affected employees, while deducting payments made by the employer during the period covered by the guarantee. Although Member States may set a ceiling on liability for outstanding claims, they must ensure that, within this ceiling, all outstanding claims are paid, in line with the Directive's social objectives³⁹.

3. Social Security benefits and contributions

Article 8 of the Directive 2008/94/EC states that "Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights con-

³⁶ See ECJ judgment of 14 July 1998, *Regeling* (C-125/97, EU:C:1998:358).

³⁷ See ECJ judgment of 18 April 2013, *Mustafa* (C-247/12, EU:C:2013:256).

³⁸ See ECJ judgment of 10 July 1997, *Maso and Others* (C-373/95, EU:C:1997:353).

³⁹ See ECJ judgment of 4 March 2004, *Barsotti and Others* (joined cases C-19/01, C-50/01 and C-84/01, EU:C:2004:119).

ferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes".

This Article grants Member States flexibility in how they achieve the Directive's objectives. For instance, a Member State may choose to directly fund benefits, impose an obligation on employers to provide insurance, or establish a guarantee institution, for which the State will set detailed funding rules. Thus, the Directive applies to the entitlement of former employees to old-age benefits under a supplementary pension scheme set up by their employer. However, it does not cover State pension benefits, which are not considered in assessing whether a Member State has fulfilled its obligations⁴⁰. While Article 3 of the Directive focuses primarily on short-term claims, Article 8 addresses the long-term interests of workers. Therefore, Article 8 not only covers benefits but also extends to outstanding pension contributions not covered by Article 3, providing complementary protection⁴¹.

Article 8 applies if the pension scheme is underfunded as of the date of the employer's insolvency and the employer lacks the resources to cover the shortfall and fully satisfy the beneficiaries. The specific causes of the employer's insolvency or the underfunding of the supplementary occupational pension scheme are not relevant for the guarantee to take effect, and the economic situation of the Member State does not constitute an exceptional circumstance that would justify a lower level of protection⁴².

However, Article 8 does not mandate a full guarantee of the mentioned benefits, even though it does not explicitly permit limitations on the degree of protection. The Court has stated that the "general terms" of Article 8 give the Member States, "for the purposes of determining the level of protection, considerable latitude which excludes an obligation to guarantee in full". Nonetheless, the measures adopted must prevent substantial losses to workers' entitlements, so no system can be deemed sufficient if it fails to do so. The Court concluded that a guarantee covering less than half of workers' entitlements cannot be considered "protection" within the meaning of Article 8 of the Directive and granted direct effect to Article 8⁴³. Moreover, the appropriateness

⁴⁰ See ECJ judgment of 25 April 2013, *Hogan and Others* (C-398/11, , EU:C:2013:272).

⁴¹ See ECJ judgment of 24 November 2016, *Webb-Sämann*, C-454/15, EU:C:2016:891).

⁴² See ECJ judgment of 25 April 2013, *Hogan and Others* (C-398/11, EU:C:2013:272).

⁴³ See ECJ judgments of 25 January 2007, *Robins and Others*, C-278/05, EU:C:2007:56; 6 September 2018, *Hampshire* (C-17/17, EU:C:2018:674); 9 September 2020, *TMD Friction* (joined cases C-674/18 y C-675/18, EU:C:2020:682).

of the measures adopted depends not on their specific nature, but on their effectiveness in providing adequate protection. Even if workers do not receive their benefits in full, the Member State retains a margin of appreciation as long as it fulfils the obligation to ensure the minimum level of protection. The Court has clarified that the Directive does not require that, “in the event of employer insolvency, money withheld from a former employee’s salary converted into pension contributions, which that employer should have paid into a pension fund on behalf of that employee, be excluded from the scope of insolvency proceedings”⁴⁴.

IV. INSOLVENCY AS THE CAUSAL EVENT

1. Main features

The employer’s insolvency has long been recognized as the causal event triggering the guarantee of workers’ outstanding wage claims. However, the definition and specific criteria of insolvency have evolved since the original Directive 1980/987/EEC. Under Article 2(1) of the 1980 Directive, an employer was deemed insolvent in two specific situations:

1. When a request was made to initiate proceedings regarding the employer’s assets, as outlined by the relevant laws, regulations, and administrative provisions of the Member State. These proceedings must aim to satisfy creditors’ claims collectively and consider claims from employees arising from contracts of employment or employment relationships. This system established by the directive “requires a link between the insolvency and the outstanding wage claims”⁴⁵.

2. The competent authority decides to open proceedings or determines that the employer’s business has been definitively closed and that the available assets are insufficient to justify opening proceedings.

Article 2(1) of the Directive 2008/94/EC adopts a more straightforward definition of insolvency, eliminating alternatives. It states that “an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on insolvency of the employer,

⁴⁴ See ECJ judgment of 24 November 2016, *Webb-Sämann* (C-454/15, EU:C:2016:891).

⁴⁵ See ECJ judgment of 28 November 2013, *Gomes Viana Novo and Others* (C-309/12, EU:C:2013:774).

as provided for under the laws, regulations and administrative provisions of a Member State, and involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent pursuant to the said provisions has: (a) either decided to open the proceedings; or (b) established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings".

Additionally, Article 2(4) of the Directive allows Member States to extend employee protection to "other situations of insolvency, for example where payments have been *de facto* stopped on a permanent basis, established by proceedings" of those specifically created for the insolvency of the employer. The types of national insolvency proceedings and their amendments must be notified to the Commission (Article 13). If no such extension is made, these other proceedings do not result in a state of insolvency under Directive 2008/94⁴⁶.

The employer's insolvency serves as the causal event triggering the intervention of the guarantee institution. However, insolvency is not merely a factual occurrence; it must be either "formalized" through relevant proceedings or at least "certified" by the competent authority. As the ECJ has pointed out, the scope of the guarantee is limited. For an employer to be considered insolvent, four conditions must be met⁴⁷:

1. The laws, regulations, and administrative provisions of the Member State must provide for proceedings involving the employer's assets to satisfy creditors' claims collectively.
2. Employees' claims arising from contracts of employment or employment relationships must be taken into consideration in such proceedings.
3. A request must have been made to initiate these proceedings.
4. The competent authority must have either decided to open the proceedings or determined that the employer's business has been definitively closed and that the available assets are insufficient to warrant the opening of the proceedings.

However, the collective proceedings do not necessarily have to result in the termination of the employer's activity, as the definition of "insolvency" should also encompass insolvency proceedings other than liquidation⁴⁸.

⁴⁶ See ECJ judgment of 25 November 2020, *Sociálna poisťovňa* (C-799/19, EU:C:2020:960).

⁴⁷ See ECJ judgments of 9 November 1995, *Francovich* (C-479/93, EU:C:1995:372) and 10 July 1997, *Maso and Others* (C-373/95, EU:C:1997:353).

⁴⁸ See ECJ judgment of 18 April 2013, *Mustafa* (C-247/12, EU:C:2013:256).

2. The link between the state of insolvency and outstanding wages

The link between the state of insolvency and outstanding wages is conceptually logical, but some interpretative issues have arisen, particularly regarding the concept of the “onset of the employer’s insolvency”. The Court has clarified that, to determine the outstanding claims subject to the guarantee, a specific date must be set before which the reference periods specified in those articles apply. If this date is the onset of the employer’s insolvency, which has to be determined by the Member State, this moment cannot be purely and simply be the date when payment of wages ceases, nor can it rely on a particular national context. Instead, it requires a uniform interpretation. The Court identifies this date as the moment when proceedings to satisfy creditors collectively are requested, not the date the request is lodged. The Court further emphasized that the “guarantee cannot be provided prior to a decision to open such proceedings or to a finding that the business has been definitively closed down where the assets are insufficient”. However, Member States have the flexibility to implement more favourable provisions for employees, including covering unpaid wages for periods after the request for proceedings has been lodged⁴⁹.

3. Additional requirements imposed by Member States

Member States have considerable discretion in shaping guarantee institutions and determining the measures necessary to ensure payment of employees’ outstanding claims. However, these specific rules must not undermine workers’ rights or the social objectives of the Directive.

Conflicts have arisen regarding these additional requirements, and the Court has provided guidance on the extent of restrictions that Member States can impose. Notably, the Court has ruled against requiring registration as job-seekers as a prerequisite for fully asserting the right to payment of outstanding wage claims. While such a requirement could be justified to prevent abuse, it is not acceptable when applied automatically, as it could undermine the minimum level of protection intended by the Directive⁵⁰.

However, time limits for submitting an application for insolvency benefits are compatible with EU law. While the Directive does not specify a time

⁴⁹ See ECJ judgments of 10 July 1997, *Maso and Others* (C-373/95, EU:C:1997:353), and 15 May 2003, *Mau* (C-160/01, EU:C:2003:280).

⁵⁰ See ECJ judgment of 17 November 2011, *van Ardennen* (C-435/10, EU:C:2011:751).

limit for employees to lodge an application, these limitation periods can differ from those established for other similar claims but must adhere to the principle of equivalence, meaning they cannot be less favourable. Additionally, they must comply with the principle of effectiveness, which means they cannot be structured in a way that makes it practically impossible or excessively difficult for workers to exercise their rights. Very short time limits are problematic; while the Court has upheld a time limit of one year, it has expressed concerns about a time limit of two months. The Court also emphasized that to ensure legal certainty, a limitation period must be clearly defined in advance and specified as to when it begins⁵¹.

V. THE RELEVANT GUARANTEE INSTITUTION IN TRANSNATIONAL SITUATIONS

Following the 2002 amendment, EU rules on the protection of wage claims in the event of an employer's insolvency include specific provisions for undertakings with activities in multiple Member States. These rules address the applicable law to determine which legislation governs the conditions under which a Member State must guarantee an employer's liability for outstanding wage claims following insolvency. However, they do not regulate the contractual relationship between the employee and the employer. As a result, such conditions and requests for payment from a guarantee institution do not fall within the scope of Article 10 of the Rome Convention⁵².

The Court has clarified that the concept of "activities" does not require an undertaking established in one Member State to have a branch or fixed establishment in another. An undertaking is considered to perform "activities" in another Member State if there are factors indicating a degree of permanence, a "lasting presence of that employer in that Member State"⁵³, such as the ongoing employment of workers in that territory.

While the presence of physical infrastructure is necessary, a mere office may suffice for this purpose. However, new technologies, which allow communication between employee and employer, as well as remote payment of remuneration, mean that physical presence is not always strictly required. Ultimately, an undertaking is regarded as performing activities in other Member

⁵¹ See ECJ judgments of 19 September 2003, *Pflücke* (C-125/01, EU:C:2003:477), and 16 July 2009, *Visciano* (C-69/08, EU:C:2009:468).

⁵² See ECJ judgment of 25 February 2016, *Stroumpoulis and Others* (C-292/14, EU:C:2016:116).

⁵³ See ECJ judgment of 16 February 2023, *IEF Service* (C-710/21, EU:C:2023:109).

States when it has a stable economic presence, supported by human resources, in a Member State other than the one in which it is headquartered⁵⁴.

If “activities” are effectively carried out in multiple Member States, Article 9(1) of Directive 2008/94/EC stipulates that the institution responsible for meeting employees’ outstanding claims is the one in the Member State where the workers primarily, or at least habitually, perform their activities. This represents a significant change compared to Council Directive 80/987/EEC, which did not include rules on transnational situations

In that context, the Court ruled that if the undertaking employing the worker has no establishment in the Member State where the employee works but pays social security contributions in the Member State where it is established, the competent guarantee institution for paying employee claims resulting from the employer’s insolvency is the institution of the Member State where the employer’s winding-up was ordered⁵⁵.

Furthermore, the Court has stated that Directive 80/987 allows a Member State to extend access to its guarantee institution in transnational situations, either as an additional or alternative measure to the guarantee provided by the institution designated as competent under the Directive, provided it enhances worker protection⁵⁶. Although this criterion was developed for Directive 80/987, it could likely be extended to Directive 2008/94/EC.

It is important to note that the extent of employees’ rights depends on the law governing the relevant guarantee institution, as outlined in Article 9(2).

Seafarers raise specific concerns, primarily due to issues related to flags of convenience. This is not the problem addressed directly by Article 9, as most cases involve vessels flying the flag of a Third State, even when the employer’s headquarters are located in a Member State. In the event of the employer’s insolvency, the issue is not selecting the relevant guarantee institution, but rather determining the applicability of EU rules. This is because workers typically do not perform their activities within the territory of a Member State in the strict sense (e.g., they may be in international waters).

The Court has clarified that the mere fact that an employee’s activities take place outside the territory of the European Union does not, by itself, exclude the application of EU rules on the freedom of movement for workers,

⁵⁴ See ECJ judgment of 16 October 2008, *Holmqvist* (C-310/07, EU:C:2008:573), which applies these rules to a transport undertaking. The Court concluded that the mere fact that a worker employed by the undertaking in one Member State delivers goods between that State and another Member State, crossing additional Member States in the process, is not sufficient for the undertaking to be regarded as carrying out activities outside the Member State in which it is established.

⁵⁵ See ECJ judgment of 10 March 2011, *Defossez* (C-477/09, EU:C:2011:134).

⁵⁶ See ECJ judgment of 10 March 2011, *Defossez* (C-477/09, EU:C:2011:134).

provided the employment relationship maintains a sufficiently close link with the EU. For the purposes of Directive 2008/94/EC, various factors become relevant, such as the worker having signed their employment contract within a Member State, being a national of or residing in a Member State, or the employer's insolvency being declared by a court in a Member State based on the employer's operations and actual head office being located there⁵⁷.

Finally, there are rules in place to facilitate coordination among the institutions involved. In this regard, Article 9(3) requires that decisions taken in insolvency proceedings initiated in another Member State must be considered in determining the employer's insolvency status. Additionally, Article 10(1) mandates that relevant information must be shared between competent administrative authorities and/or guarantee institutions to ensure that the responsible institution is informed about employees' outstanding claims. Article 10(2) further obliges Member States to notify other Member States and the European Commission of the contact details of their competent administrative authorities and/or guarantee institutions, with the Commission responsible for making this information publicly accessible.

ANNEX I: REFERENCES

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CHAPTER 31

**EUROPEAN SOCIAL DIALOGUE AND INFORMATION
AND CONSULTATION RIGHTS
(DIRECTIVE 2002/14/EC OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL OF 11 MARCH 2002)**

ANA ALÓS RAMOS

INDEX: I. Introduction. 1. European Union Law. 2. Regulatory Aims. 3. Scope of Application. 4. Definitions of Concepts. II. Defined Rights. 1. Content. 2. Procedure. 3. Confidential Information. III. Guarantees. 1. Transposition. 2. Compliance. 3. Protection of Employees' Representatives. 4. Relationship between Directive and other National and EU Provisions. Bibliography

I. INTRODUCTION

The present chapter is focused on Directive 2002/14/EC of 11 March ("Directive 2002/14") that is intended to establish a general framework for informing and consulting employees in the European Union and case law that has analysed and interpreted it in at a EU level. The preamble to Directive 2002/14 explains that its basis is Articles 151 of the TFEU, which, with regard to social policy, establishes the promotion of social dialogue and the development of human resources as objectives of the Community and the Member States. To achieve these objectives, Article 153(1)(e) of the TFEU establishes

that the Community will support and complement the activities of the Member States in the field of informing and consulting workers. In addition, Article 27 of the CFREU recognises rights to information, consultation and participation for workers as fundamental social rights in the European Union, comprising an essential point of reference in the development of these rights. The judgment of 15 January 2014, *Association de médiation sociale* (“AMS”), C-176/12, EU:C:2014:2, is important with regard to this rule, and it is analysed in section II below.

Directive 2002/14 is an instrument to harmonise the Community model of workers’ right to participation, structured to establish minimum requirements in the exercise of those rights. Directive 2002/14 represents the culmination of a regulatory development process meaning that rather than being restricted to highly specific circumstances, information and consultation rights are more transversal tools in the future of companies. The States will be required to guarantee compliance with the Directive in each case; by respecting the standards it establishes through the transposition process.

1. European Union Law

Directive 2002/14 reflects the evolution of two declarations of social rights that recognise the role of social dialogue and of social partners. The first declaration is the Community Charter of the Fundamental Social Rights of Workers (CCFSRW). Though a mere declaration of principles, it inspired subsequent regulation and must be taken into account. Point 17 of the CCFSRW includes the rights of information, consultation and participation of workers, emphasising their importance in companies or groups of companies with establishments in several Member States of the European Community.

The second is the Charter of Fundamental Rights of the European Union (CFREU). This is essential in the process of implementing fundamental rights as part of the EU *acquis* and in consolidating social rights as part of fundamental rights. Article 27 of the CFREU establishes a workers’ right to information and consultation in good time in the cases and under the conditions provided for by EU law and national laws and practices. Its importance is indisputable despite its limitations. There is notably no reference to participation, a term that was included in the two preceding charters.

Directive 2002/14 also establishes a general framework that forms part of a broad regulatory spectrum specifically contemplating information, participa-

tion and consultation processes. Four general blocks can be distinguished (Schmid-Drüner, 2017):

a. Directives related to the financial performance and plans of undertakings that could have an impact on employment: Directive 75/129/EEC on collective redundancies, subsequently amended by Directives 92/56/EEC and 98/59/EC; Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, businesses; Directive 2002/14, which will be analysed below; Directive 2019/1023/EU on restructuring and insolvency; and Directive 2021/2101/EU on disclosure of income tax information by certain undertakings and branches.

b. Directives involving recognition of rights to information and consultation in situations with a transnational dimension: Directive 94/45/EC, amended by Dir 2009/38/EC, on the establishment of European Works Councils; Directive 2004/25/EU on takeover bids; Directive 2011/35/EU concerning mergers of public limited liability companies; and Directive 2019/2121/EU regarding cross-border conversions, mergers and divisions.

c. Directives granting rights to participate in decision-making: Directive 2001/86/EC, regulating the Statute for an European company; Directive 2003/72/EU, supplementing the Statute for a European Cooperative Society; and the repealed Directive 2005/56/EU on cross-border mergers of limited liability companies.

d. Finally, Dir 2008/104/EU on temporary agency work, and several directives on health and safety and concerning business insolvencies.

In this context, as will be seen below, Framework Directive 2002/14 does not affect regulations binding at the time of its approval, but as a general framework it aims to ensure certain general minimum requirements for the exercise of information and consultation rights.

The European Parliament has adopted various Resolutions urging the Commission to reinforce information and consultation rights, as regards social dialogue (Resolution of 1 June 2023), European Works Councils (Resolutions of 2 February 2023) and corporate social responsibility (Resolution of 10 March 2021).

There have also been European regulation on working through digital platforms and algorithms and concerning artificial intelligence, reinforcing the need of “human vigilance” developed by employees specially trained for it, (De Stefano and Wouters, 2022 and Pisani, 2023).

The latest EU regulatory proposals related to Directive 2002/14 show a continuing interest in developing and standardising these rights. In this regard,

there has been a Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/38/EC as regards the establishment and functioning of European Works Councils and the effective enforcement of transnational information and consultation rights, a Proposal for a Directive of the European Parliament and of the Council on improving and enforcing working conditions of trainees and combating regular employment relationships disguised as traineeships, and a Proposal for a Directive of the European Parliament and of the Council on European cross-border associations.

The judgment of 2 September 2021, C-928/19 *European Federation of Public Service Unions (EPSU)*, EU:C:2021:656, confirms the validity of the Commission's decision in refusing to submit to the EU Council a proposed decision that would, among other things, extend Directive 2002/14 to cover public servants and employees of central governmental authorities of Member States.

2. Regulatory Purpose

Directive 2002/14 is expressly intended to promote social dialogue and mutual trust within undertakings. Also emphasised is the need for this social dialogue to take place in advance, within a constructive and not reactive framework and in a spirit of cooperation. In this regard, the law is critical of the fact that existing Community-level (as listed in point I.A above) and national legal frameworks regarding worker information and consultation have adopted a more “*a posteriori approach to the process of change*”, supporting strategies based on the concepts of “prevention”, “anticipation” and “employability”.

3. Scope of Application

Article 3 of Directive 2002/14 defines the directive's scope of application based on two separate parameters: (i) undertakings with at least 50 employees in one Member State; or (ii) establishments with at least 20 employees in one Member State. Both definitions are subject to the discretion of the relevant national legislator.

Member States have complete discretion in this respect as this is not a conditional option. However, the choice of criteria may have an impact on the development of these rights.

Recital 19 of Directive 2002/14 appears to justify the reasons for this, identifying one of the framework's objectives as being to avoid administrative, financial or legal constraints that could hinder the creation and development of small and medium-sized undertakings. This is consistent with other provisions, such as Directive 98/59. Along the same lines, the Transitional Provision of Directive 2002/14 enabled Member States to limit its application to undertakings of a certain size during the maximum periods set out in the Directive.

In terms of the method for calculating employee thresholds, reference is made to the relevant provisions established by the Member States. No other specifications are provided, in contrast to other provisions, such as Directive 94/45 on the establishment of a European Works Council, which includes an express reference for calculation purposes to part-time employees and to the reference period to be taken into account for the calculation.

The ECJ has had cause to make statements on two occasions in this respect. The first time was the ECJ's judgment of 18 January 2007, *Confédération générale du travail (CGT) and Others* (C385/05, EU:C:2007:37), which interpreted Directive 2002/14 in addition to Directive 98/59 on collective redundancies. The proceeding filed by trade union organisations against the French Ministry of Employment sought the annulment of a domestic regulation (DLeg 892/2005 of 2 August 2005) that amended the rules for calculating the number of employees in an undertaking's workforce. The domestic regulation established that employees under 26 years of age were not to be taken into account in calculating the number of employees in an undertaking's workforce until they reached the age of 26, whatever the nature of their contract. The French legislator enacted this regulation in reaction to what it described as a worrying and exceptional employment situation in France, for which reason the application of the measure was limited in time to 31 December 2007. A dual time limit was hence established: until employees reached 26 years of age, and only until the end of 2007.

Two questions were referred to the ECJ, the first of which affected the interpretation of the Directive subject to analysis in this chapter. The ECJ was asked if the fact that the Directive entrusted the method for calculating the number of workers employed to Member States should be construed as "allowing those States to defer taking account" of specific categories of workers. The ECJ ruled that the power the Directive conferred on Member States concerns the method of calculating the number of employees and not the definition of the concept of employee, which is included in Article 2 of the Directive. This means that Member States cannot exclude a specific category of worker

that falls within the scope of application of the Directive. It has been argued in response that as the concept of employee is so loosely defined in Directive 2002/14, referring as it does directly to national law, the closed reasoning of the ECJ judgment could be called into question.

In addition, the French government's argument as to the exceptional nature of the employment situation and the need for transitional measures to help overcome it was considered to be incompatible with Article 11 of the Directive on transposition. All of the foregoing led to the conclusion that Directive 2002/14 must be interpreted as opposing a national law excluding a specific category of worker, even temporarily.

The Judgment of the General Court of 13 December 2016, *International and European Public Services Organisation in the Federal Republic of Germany (IPSO)* (T-713/14, ECLI:EU:T:2016:727), citing the previous ECJ judgment "CGT", interpreted Directive 2002/14 as applicable «concerning a user undertaking's obligations to inform and consult temporary agency workers' representatives», from the perspective of both the concept of employee and the concept of undertaking included in the Directive.

The ECJ judgment "AMS" ruled along the same lines as ECJ judgment "CGT". This case also concerned litigation instituted in France between the AMS and CGT, in relation to the creation of a trade union body. The legal provisions subject to interpretation were Directive 2002/14 and Article 27 of the CFREU. This case analysed the exclusion imposed by Article L. 1111-3 of the Labour Code (Code du Travail), which excluded the following from calculation for purposes of creating the body: apprentices, holders of an employment-initiative contract, and holders of a professional training contract.

The Court noted that it had previously ruled on this issue in its earlier and aforementioned judgment of 18 January 2007 *Confédération générale du travail (CGT) and Others*, (C385/05, EU:C:2007:37). As in that case, the Court insisted that while the encouragement of employment is a legitimate aim, it cannot frustrate the implementation of a fundamental principle or provision of EU law. Reference was again made to Article 11 to emphasise that Member States must adopt the necessary provisions to guarantee compliance with Directive 2002/14. Due to all the foregoing, the provision excluding specific employees from the calculation was held to be incompatible with the Directive.

In this regard, the later Directive 2024/1760 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 expressly includes both temporary agency workers and workers in "non-standard" forms of employment as employees and hence as having the right to consultation.

In this case, a second issue was raised that also affected the analysis at hand: specifically, whether Article 3.1 of Directive 2002/14 met the requirements to have direct effect and whether, in that case, it could be invoked against AMS. The first question was answered affirmatively, given that the obligation to take all employees into account is “precise and unconditional”, quoting the judgment of 5 October 2004, *Pfeiffer* (C-397/01, ECLI:EU:C:2004:584), in this respect. However, as the conflict was between private parties, the court could arrive at an interpretation that confirmed national law, but the conflict “cannot serve as the basis for an interpretation of national law *contra legem*”.

The importance lies in the alleged application of Article 27 of CFREU in conjunction with Directive 2002/14, with the judgment holding that the same outcome is reached. The Court argued that this was not a similar situation to the judgment of 19 January 2010, *Küçükdeveci* (C-555/07, EU:C:2010:21), which clarified that the principle of non-discrimination on grounds of age (CFREU Article 21) was “sufficient in itself to confer on individuals an individual right which they make invoke as such”. This was not true in the case at hand, insofar as Article 27 cannot give rise to a legal rule directly applicable to the specific case. Also relevant in relation to this are the judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105), and 26 February 2013, *Melloni* (C-399/11 EU:C:2013:107); as well as the later judgments of 18 January 2022 *Thelen Technopark Berlin GmbH* (C-261/20, EU:C:2022:33), and judgment of 22 January 2019, *Cresco Investigation GmbH* (C-193/17 EU:C:2019:43).

Article 3(2) of Directive 2002/14 establishes that, in conformity with the principles and objectives of the Directive, Member States can approve specific provisions for what have generically been defined as “ideological undertakings”. The relevant provision cites the following specific examples: undertakings (or establishments) that pursue directly and essentially political, professional organisational, religious, charitable, educational, scientific or artistic aims, as well as aims involving information and the expression of opinions. It is noted that the relevant provisions must already exist in national law at the date of entry into force of the Directive.

It is worth noting the broad nature of this definition, which even includes organisations with scientific or artistic aims, *a priori* going beyond the definition of an ideological undertaking. In addition, the purpose of an undertaking (or, as stated, establishment) with information and consultation obligations must be distinguished, since the representatives are subject to a duty of confidentiality as analysed in point 3.3 below. In any event, it is important to emphasise that no absolute exclusion is being introduced with respect to this kind of undertaking; rather, the legislator is given the power to establish a specific law.

Finally, Article 3 also provides that Member States may derogate from the Directive with relation to the crews of vessels plying the high seas. There are other precedents for this express exception (Directive 2001/23/EC, Article 1(3), on transfers of undertakings).

4. Definitions of Concepts

Article 2 of the Directive introduces the definitions of undertaking, employee, establishment, employer, employees' representatives, information and consultation. All of these terms are very broadly defined, as previously noted in relation to judgment "AMS". They allow Member States broad discretion in terms of transposition into their domestic law. This is all consistent with the nature of a minimum-requirement regulatory framework.

First, to define the concepts of employer, employee and employees' representatives, the Directive directly refers to the law of each Member State and does not introduce any further considerations; the case-law cited in the preceding section should be taken into account in this regard.

Further substantive content is included in the other definitions.

(i) **Undertaking.** The concept of undertaking includes public and private entities that are carrying out an economic activity, whether or not they are operating for gain, and which are located within the territory of the Member States. In this respect, it is worth noting the inclusion without distinction of public and private undertakings, both operating for gain and otherwise.

This concept is analysed in the judgment of 6 July 2023, *Ethikos Organismos Pistopoiisis Prosonton & Epangelmatikou Prosanatolismou* ("Eoppep") (C-404/22, EU:C:2023:548). Eoppep is a Greek national body created for the certification of educational and non-formal training resources and results. It is structured as a private-law legal entity within the public sector and it has two types of functions: those falling within the exercise of public powers and those, particularly providing professional guidance services to competent ministerial bodies, vocational training bodies, businesses and employers' or employees' associations, in which there is a market containing undertakings that are in competition with Eoppep. Eoppep can receive income from these activities as can any other operator, even if it is not operating for gain or is operating on a less competitive basis.

The Court provided a systematic answer based on the literal wording of Article 2(a) of Directive 2002/14, noting that as stated, the concept of under-

taking includes all public or private undertakings carrying out an economic activity, whether operating for gain or not.

With regard to the proper interpretation of carrying out an “economic activity”, the judgment referred to ECJ case-law, which has interpreted this concept as encompassing any activity consisting of offering goods or services on a given market. In this respect, it cited judgments of 20 July 2017, *Piscarreta Ricardo* (C-416/1, EU:C:2017:574), and of 11 November 2021, *Manpower Lit* (C-948/19, EU:C:2021:906). As the Court expressly stated, this led to the opposing conclusion that activities falling within the exercise of public powers would be excluded from classification as economic activities.

What is interesting in the case at hand is that the Court analysed what would happen in circumstances involving the provision of services that did not fall within the exercise of public powers, but which were carried out in the public interest and without a profit motive and were in competition with those offered by operators pursuing a profit motive. In such cases, and again citing the judgment of 11 November 2021, *Manpower Lit* (C-948/19, EU:C:2021:906), the Court declared that these services would have to be regarded as economic activities for all the purposes of Directive 2002/14.

Therefore, and bearing in mind the characteristics of Eoppep’s activities, the Court concluded that it must be interpreted as falling within the scope of Directive 2002/14, given that: (i) it provided services that did not *a priori* fall within the exercise of public powers, even if it did so to supplement its certification tasks that did involve such exercise of public powers; and (ii) it had a mixed financing system and also included income from the activities described in the foregoing point (i), which was regarded as consideration for those activities.

As a result of all the foregoing, the Court concluded that “Eoppep carries on, in part, an activity consisting in offering services on a given market, and that it therefore falls within the scope of the concept of ‘undertaking’ within the meaning of Article 2(a) of Directive 2002/14.”

In this case, Eoppep argued that Directive 2002/14 was not applicable on the grounds that the case did not concern an “undertaking carrying out an economic activity” according to Article 2(a) of Directive 2002/14; this was the first of the two questions submitted for a preliminary ruling.

However, there was no reference made to groups of companies, an increasingly prevalent organisational system for productive organisations. This is particularly significant in view of the thresholds established to determine the scope of application and the potential for incentivising a degree of atomisation at these organisations.

Finally, it should be noted that this definition differs significantly from that established in Article 21 of the European Social Charter and its related Annex (SWIATKOWSKI, Andrzej Marian, 2023).

(ii) Establishment. This concept is linked to carrying out an economic activity with human and material resources. The broad definition requires national legislators to provide a more specific definition. Particularly as technological resources are blurring the traditional concept of an establishment, there is an increasing need to review this parameter, which clearly affects rights to information and consultation, among others.

Finally, the definition of the concepts of information and consultation will be analysed in more detail in the following section.

II. DEFINED RIGHTS

1. Content

Article 2 of the Directive defines information as transmission of data so that employees' representatives can acquaint themselves with the relevant subject matter and examine it. Consultation, in turn, is defined as the exchange of views and establishment of dialogue between the employees' representatives and the employer. Information therefore entails a unilateral transfer of data, while consultation implies an exchange and mechanisms for dialogue. Based on the foregoing, Article 4 develops the scope of both rights in three parts:

a. Information on the recent and probable development of the undertaking's or the establishment's activities and economic situation. At this initial point, then, the scope is restricted to economic information, which must be up to date based on the reference to "recent development". However, and as previously commented, the Directive's aim of being preventive as well as reactive stresses the need to provide information regarding expected probable development. Predictions as to future development are always uncertain, but the requirement for the undertaking to provide information on significant future developments of which it is aware cannot be diluted based on this uncertainty.

b. Information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment. Issues affecting employment are included at this point, and the

procedure is elevated from merely providing information to engaging in consultation.

Of particular interest on this point is the judgment of 6 July 2023 *Ethnikos Organismos Pistopoiisis Prosonton & Epangelmatikou Prosanatolismou (Eoppep)* (C404/22, EU:C:2023:548), in relation to the second question submitted for a preliminary ruling regarding how to interpret Article 4(2)(b) of Directive 2002/14, which refers to “*information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment*”.

Eoppep had removed two workers from their posts in the relevant case. This did not entail the end of the employment relationship or the abolition of the occupied posts, but rather the demotion of the workers and the resulting modification of their functions.

Eoppep did not inform or consult the employees’ representatives when making its decision, resulting in the imposition of a fine that Eoppep appealed. It was in the course of those proceedings that the question subject to the preliminary ruling was raised.

The Court ruled that the generic reference to “employment” must be interpreted as not referring to individual employment relationships, and particularly not when the affected posts were not abolished. Recital 8 of Directive 2002/14 was used as a basis to support this position. It outlined the objective of promoting and enhancing “*information and consultation on the situation and likely development of employment within the undertaking and, where the employer’s evaluation suggests that employment may be under threat, the possible anticipatory measures envisaged, in particular in terms of employee training and skill development, with a view to offsetting the negative developments or their consequences and increasing the employability and adaptability of the employees likely to be affected*”. This reference to employment at the undertaking or establishment was hence interpreted as the basis for the obligation of undertakings to inform and consult, with this obligation defined by the collective context within which these rights arise.

In this regard, authors have argued that the Court could have gone further by distinguishing within that collective dimension the issues affecting the situation, structure and probable development of employment from those more serious matters causing a threat to employment. However, this was not the Court’s interpretation. It tied this obligation to the existence of a threat at the undertaking or establishment in order to secure the conservation of employee positions or minimise the harm they might suffer, albeit from a dual perspec-

tive of reacting to a specific situation that has already occurred and preventing a probable development.

Focusing on the specific case, the Court ruled that this was not applicable for the following reasons: there was no threat to employment but rather a mere removal; there was a very small number of affected people (three out of eighty); and no pleadings had been made regarding the potential impact of those changes on the structure or probable development of employment at Eoppep, or any threat at that undertaking.

c. Information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9(1). Along the same lines as in (b) above, in relation to employment and with express reference to the information and consultation mechanisms already established in restructuring process regulations and which the Directive expressly states will not be affected. Member States are required to interpret the reference to “work organisation”, with its potentially broad scope, on a case-by-case basis.

The lack of any express reference to employee training and skill development in the Directive has been highlighted, taking into account not only the preventive purpose of the Directive but the presence of such training and skill development in its Recitals. In this respect and in light of Recitals 7 and 8, one would argue that training is connected to: (a) the need for adaptability of employees and flexibility of work organisation (Recital 7); and (b) preventive measures to offset negative developments for employment, via employee training and skill development (Recital 8). Again, Member State transposition will permit these rights to be exercised on these broader terms.

Without fitting clearly into the material scopes defined by Directive 2002/14, there is a broad reference to information and consultation rights in Directive 2024/1760 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859. Recital 39 and Article 7 of this Directive establish that due diligence policies should be developed in prior consultation with the company’s employees and their representatives. They specify that these policies should include a description of the company’s due diligence approach (including in the long term), a code of conduct, and a description of the measures taken to verify and ensure compliance.

The consultation defined in Directive 2002/14 is not proposed as a binding procedural step; rather, it is a matter of dialogue and exchange. In addition, and as previously noted, no elements of participation as such are included.

2. Procedure

The Directive again distinguishes between information and consultation in terms of the procedure to be followed. The following points are of note in this regard:

a. **Information.** The Directive establishes that information is to be provided with appropriate timing, method of delivery and content. No additional provisions or minimum requirements are specified, but appropriateness is linked to each Member State establishing a fundamental criterion: that the employees' representatives are able to conduct an adequate study and, where necessary, prepare for consultation. Therefore, the *ratio decidendi* for the assessment of effective compliance with the Directive here is analysis of whether representatives can in fact perform their functions and, secondly, whether they can perform them as a necessary precursor to the effective exercise of the right to consultation.

b. **Consultation.** The Directive introduces more detail on this point, establishing five requirements:

- It repeats the requirement established for information in terms of appropriate timing, method and content. In this respect, the judgment of 22 February 2024 *Resorts Mallorca Hotels International* (C-589/22, ECLI:EU:C:2024:155) analyses when the obligation arises in a collective redundancy procedure, albeit citing Directive 98/59/EC of the Council of 20 July 1998 rather than Directive 2002/14.

Level of representation. It is provided that consultation must take place at the relevant level of management and representation, depending on the subject under discussion. This is connected to a highly varied issue in relation to employees' representatives. As they may be operating at the centre of the undertaking but will usually depend on the promotion of elections among the employees, there may be (and often are) unrepresented areas of the undertaking. Moreover, the existence of a dual representative channel may encourage differences at each undertaking and hence introduce additional elements that require assessment. The undertaking cannot be solely responsible for determining the "relevant" level of representation to be chosen. A precise regulatory and case-law framework is required to secure due process and ensure that processes are conducted with legal certainty.

One may refer to the judgment of 16 May 2024, *Konzernbeiratsrat* (C-706/22, EU:C:2024:402), on the right of employees to

participation at a European company, to observe the complexity of this issue at transnational organisations.

- Opinion. The consultation period and the information received will enable representatives to prepare the opinion that they are “entitled to formulate”. No further specifications are provided regarding the content of the opinion, time periods or any other procedural requirements. The transposition of this measure is a matter for national legislation, but more as to the form and time periods than the content, which must fully cover the issues that the Directive establishes as subject to consultation. However, it does not appear to be mandatory for an opinion to be prepared; in the following point of the same article, reference is made to an opinion that “might” be formulated.
- Response to the opinion. According to the Directive, the consultation process must allow for a reasoned response to be obtained from the employer regarding any opinion that might be formulated. This is an interesting provision: it emphasises the bilateral nature of the consultation process and appears to require the employer to provide a response that respects the content of the opinion. It is particularly striking that the response must be “reasoned”. Any reasoning requires an argument and an assessment of the facts under analysis. The consultation mechanism may therefore have a positive impact on rights to information. It is also noteworthy that this response must be offered by means of a meeting, since this necessarily imposes minimum timeframes prior to the implementation of measures.
- Agreement. The Directive states that the consultation must take place with a view to reaching an agreement on the employer’s decisions as described in point III.A(c) above. This cannot be interpreted as causing these decisions to be conditional on an agreement being reached, but such an agreement is the legitimate objective that the consultation process must have. Again, this sets the standard pursued and the criteria for interpreting the Directive.

3. Confidential Information

The Directive regulates potential limits on information and consultation based on the confidentiality of certain information. Article 6 of the Directive defines the regulatory framework in this respect:

a. The national legislator must set the conditions and limits of confidentiality in each case.

b. Expert. The confidentiality obligation extends to experts, who are classified in Article 6(1) as “*any experts who assist*” the employees’ representatives. It should be taken into account that Article 6(1) marks the first reference to these external parties, who are not mentioned in the definitions included in Article 2. However, many issues could have been included in this respect, including their potential participation in the process and the mechanisms to govern it.

c. Persistence of obligation after the representative’s term of office has expired or they have moved elsewhere. Reference is also made to their obligations persisting “*wherever the said representatives or experts are*”, which would appear to include situations in which the term of office persists but the geographical or even jurisdictional area changes.

d. Information must be expressly classified as confidential. In practice, this is a significant element and one to be borne in mind in the methodology followed for the communication of information, always subject to the provisions of national law for this purpose.

e. Exceptions. Member States are empowered to establish limitations on the obligation to transfer information when, “*according to objective criteria, it would seriously harm the functioning of the undertaking or establishment or would be prejudicial to it*”. Recital 25 of the Directive states that undertakings and establishments should be protected “*against disclosure of certain particularly sensitive information*”, while Recital 26 states that employers “*should be allowed not to inform and consult where this would seriously damage the undertaking*”. This power is left to the Member States, who have to balance it against the other objectives and standards set out in the Directive. This means that any regulation that would render ineffective the obligations established under the Directive would be inadequate. However, it is also inadvisable for national legislation to overlook the potential harm that a particular transfer of information could do to undertakings, since this could prejudice the ultimate aim of the Directive.

Finally, Recital 26 describes a situation where the employer “*has to comply immediately with an order issued to him by a regulatory or supervisory body*” as one could give rise to the possibility of not informing or consulting. This reference is not followed up in the main body of the Directive, and it appears to concern an assessment of the possibility of informing or consulting prior to a measure that must be taken due to a court order, rather than amounting to an exception to the obligation to inform and consult.

f. Administrative or judicial procedures. Member States are obliged to provide for administrative or judicial review procedures where the employer requires confidentiality or does not provide information. They are also allowed to establish procedures to safeguard the confidentiality of information.

Three levels of information can therefore be distinguished based on their “degree of accessibility”: a level at which Member States can “exempt” the employer from providing the information; a level at which the scope of disclosure is limited to representatives and experts and the information is classified as confidential; and a level that must be construed as free disclosure, always in accordance with the purpose for which the information was supplied.

III. GUARANTEES

1. Transposition

As a minimum-requirement regulatory framework, Article 11 of Directive 2002/14 states that Member States are to adopt the law, regulations and administrative provisions necessary to comply with the Directive. However, the Directive also establishes management and labour having reached agreements to comply with it as a potential transposition mechanism, with Member States being obliged to guarantee the results imposed by the Directive.

Two ECJ judgments should be taken into account in this regard. The first of these is the judgment of 11 February 2010, *Ingeniørforeningen i Danmark* (C-405/08, EU:C:2010:69). This case analysed the request for a preliminary ruling made in the context of a dismissal procedure involving Mr Holst and the Danish Association of Engineers (“IDA”) and the company Babcock & Wilcox Vølund ApS (“BWV”). Two provisions of national law were analysed in particular in the context of the conflict:

- Law No. 303 on informing and consulting employees, which adjusted Danish law to the Directive; this law applied to all employees not included within the scope of application of a collective agreement intended to transpose the Directive.
- The Cooperation Agreement (Samarbejdsaftalen), a cooperation agreement between two major Danish labour and employer organisations. This was one of the transposition measures in respect of the Directive, establishing different protective measures in response to dismissal.

The ECJ was asked to provide a preliminary ruling on whether Directive 2002/14 must be interpreted as permitting transposition by way of a collective agreement that covered a category of employees even though they were not members of the trade union that entered into the agreement and their field of activity was not represented by that union. Interestingly in this respect, the Court reasoned that the Directive expressly empowers Member States to leave the implementation of this regulatory aim to management and labour. It noted that this is consistent with ECJ case-law confirming that management and labour can implement social-policy objectives. The Court cited the ECJ judgments of 28 October 1999, *Commission v. Greece* (C-187/98, EU:C:1999:535), and 18 December 2008, *Rubén Andersen* (C-306/0, EU:C:2008:743). This is without prejudice to Member States' obligation to safeguard the protection provided for in Directive 2002/14. In view of the presence of a collective agreement in the case at hand, the Court concluded that the practice followed was not contrary to Directive 2002/14.

The ECJ judgment "AMS", which was discussed in section II above, ruled on a second issue. To recap, this judgement analysed a Member State's exclusion of a certain group of workers for the purposes of the rights recognised under the Directive. The Court interpreted this as contrary to Article 3 of the Directive, which meets the necessary conditions to have direct effect in application of the case-law cited.

However, it also noted that "*even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties*". The principle of interpretation in conformity with Community law to be followed by the lower-instance court has certain limits, with the court obliged "to refer" to the Directive, but it could not "*serve as the basis for an interpretation of national law contra legem*."

The significance of the analysis lies in the alleged application of Article 27 of the CFREU in relation to Directive 2002/14, to circumvent the limitations on the direct application of the former. The Court ruled that the Charter established that "workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by European Union law and national laws and practices". However and with the same forcefulness, it clarified that "for [Article 27 of the Charter] to be fully effective, it must be given more specific expression in European Union or national law." Therefore, the prohibition on excluding a certain group of workers from calculation of staff numbers "cannot be inferred as a directly applicable rule of law either from the wording of Article 27 of the Charter or from the explana-

tory notes to that article”, preventing it from being directly invoked as such or being invoked in relation to Directive 2002/14.

As explained, Article 27 of the CFREU must be distinguished from other rights, such as those pertaining to equality and non-discrimination (CFREU Article 21), which have been further developed and which do have specific compliance mechanisms. Relevant ECJ judgments in this regard include the ECJ judgment of 22 May 14, *Glatzel* (C-356/12, EU:C:2014:350), and the previously cited *Küçükdeveci* judgment.

All of the foregoing is without prejudice to the fact that if national law is not in conformity, the prejudiced party will be able to invoke the European law against the State to obtain redress for the harm suffered. This has been stated in ECJ judgments of 9 November 1995, *Francovich* (C-479/93, EU:C:1995:372), and of 24 January 2012, *Domínguez* (C-282/10, EU:C:2012:33).

The Judgment of the General Court in “IPSO” was different insofar as it affected a European Union institution, with the European Central Bank (ECB) ruled to have breached the applicant’s information and consultation rights, violating Article 27 of the CFREU as specified in Directive 2002/14. As a result, the appeal filed was upheld and the General Court annulled the decision of the ECB’s Executive Board limiting to two years the maximum period for which the ECB could use the services of the same temporary agency worker.

2. Compliance

Article 8 of the Directive set outs an obligation for Member States to provide for appropriate measures to ensure compliance with the provisions of Directive 2002/14/EC. This general statement is reinforced by a mandate issued to the Member States to establish adequate administrative or judicial procedures to enable the enforcement of compliance by employers and employees’ representatives. In addition, provision is made for the development of a system of sanctions that respects the principles of effectiveness, proportionality and an approach based on dissuasion.

3. Protection of Employees’ Representatives

As part of these mechanisms to ensure compliance, Article 7 of the Directive provides that Member States are to ensure that employees’ representatives enjoy adequate protection and guarantees in the performance of their duties.

The ECJ has ruled on this issue in its “*Ingeniørforeningen i Danmark*” judgment, cited in the preceding section IV.A. As stated, this case examined potential differences in the protection of an employees’ representative from dismissal, depending on which law was applicable. More specifically, however, the Court was asked whether Article 7 of Directive 2002/14 entitles employees’ representatives to “more extensive protection against dismissal”. The Court ruled that the Directive’s mandate requires employees’ representatives to be able to carry out their work adequately and with sufficient guarantees. However, it concluded that there was “nothing whatsoever in the wording or the spirit of Article 7 of Directive 2002/14 to indicate that employees’ representatives must necessarily be granted more extensive protection against dismissal in order to ensure compliance with the requirements of that article.”

In this case, an assessment of the applicable law led to the conclusion that either of the two provisions whose application was in dispute would guarantee the rights of the employees’ representative whose dismissal was subject to review. This would be the case provided that:

- it could be ascertained in judicial or administrative proceedings that he had not been dismissed on the grounds of his status as a representative; and
- adequate sanctions would apply as established in the event that he had been dismissed on those grounds.

Therefore, there was no requirement for more extensive protection, but the protection provided must make it possible to respect the minimum level of protection under Article 7.

The Judgment of the General Court of 21 June 2023, *UG v Commission* (T-571/17EU:T:2023:351), analysed the European Commission’s termination of a member of so-called contract staff, with a contract of indefinite duration. The contract was terminated on grounds of poor performance and conduct incompatible with the interests of the service, with reference to around 20 detailed circumstances occurring between 2013 and 2016, at which time the termination took place.

The contracted party’s challenge included allegations referring to the breach of Article 7 of Directive 2002/14, on the grounds that she held a trade union position at the time of termination and the Commission had not complied with the minimum requirements established in the aforementioned article. The Court noted that institutions are required to create the conditions necessary to ensure the exercise of the duties of staff representation and that “the fact of performing such duties cannot be prejudicial to an official”. On this

point, it cited the ECJ judgment of 16 December 2010, *Lebedev v. Commission* (T-364/09, EU:T:2010:539).

On this basis, the Court stated that contract staff who had been on trade union secondment for more than a certain percentage of the time for which they had been providing services (which was true in the case at hand) must obtain prior permission to be absent from the service for the performance of their union duties. A hierarchical superior could deny a request by means of a “reasoned decision in writing”. In this case, a further element to be taken into account was the fact that the worker was no longer performing her union duties at the date on which the decision was made. This was interpreted as evidence that the termination was not based on the claimant performing those duties at that time.

The existence of this legal obligation led the Court to conclude that its breach could result in a Commission sanction without breaching the requirements of Article 7 of Directive 2002/14. The succinct and conclusive approach of the Court on this point is somewhat surprising, as it could easily have included two elements that were considered proven in the judgment into its conclusion: the fact that the communication appeared to be broadly and extensively reasoned, and the evidence that the decision to terminate was not based on discriminatory grounds.

On the same topic, the Judgment of the General Court of 21 November 2024, *UG v Commission* (C-546/2023 EU:C:2024:975), that declared that the termination of the so called contract staff on the basis of the non-fulfilment of the obligation to previously inform and obtain authorisation to develop representative duties is valid. The Court understands, as it occurred in the previous case, that the termination decision was not based on the claimant performing those duties, but in the fact that from an organizational point of view, the lack of fulfilment of the statutory obligations to inform with prior notice affects the conditions of the service for which the claimant was contracted.

Directive 2019/1152/EC of 20 June 2019 on transparent and predictable working conditions in the European Union has been added to the foregoing regulation. Article 17 of this Directive regulates the right to protection for workers’ representatives.

4. Relationship between Directive and other National and EU Provisions

As a regulatory framework, Directive 2002/14 expressly establishes that its transposition will not affect the procedures included in Article 2 of Direc-

tive 98/59 on collective redundancies and Article 7 of Directive 2001/23 on transfers of undertakings, or the provisions adopted pursuant to Directives 94/45 and 97/74 on European Works Councils.

Finally, and as a closing guarantee, Article 9 of Directive 2002/14 states that its implementation will in no case provide grounds for any regression in relation to the existing situation in any Member State in terms of the level of protection as to information and consultation. In other words, the Directive harmonises and establishes minimum requirements, but it cannot be used for transpositions and interpretations that have the effect of reducing levels of protection already recognised by Member States.

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CHAPTER 32

**THE EU FRAMEWORK FOR EMPLOYEE REPRESENTATION:
EWCS AND SES**

RAQUEL FLÓREZ ESCOBAR AND SERGIO PONCE RODRÍGUEZ

INDEX: I. Introduction. II. The european works council. III. Employee involvement in european entities (SE and SCE). IV. Cross-border transactions.

I. INTRODUCTION

The right of workers to information and consultation is enshrined in the Charter of Fundamental Rights of the European Union, the EU Treaties and on secondary law. The 2017 European Pillar of Social Rights also affirms that workers or their representatives have the right to be informed and consulted in good time on matters relevant to them. This chapter deals with two fundamental topics that are central to understanding the representation and participation of employees in pan-European entities. The first part of the chapter deals with the European Works Councils, focusing on its inception process and the competences of these bodies. The second part of the chapter sets out employee participation rights in the incorporation process of the European Companies Societies (SEs) and European Cooperatives Societies (SCEs).

II. THE EUROPEAN WORKS COUNCIL

1. Introduction

European Works Councils (EWCs) and information and consultation rights (I&CR) of employees in EU-scale undertakings and groups of undertakings were introduced in 1994, as mechanisms to inform and consult employees on important issues arising in large multinational companies active in various EU countries. Since key decisions are often taken by European (or global) management, domestic information and consultation mechanisms are often deemed insufficient.

Given the limited impact of the Council Directive 94/45/EC, a new directive was adopted in 2009 (the 2009 Directive or the EWC Directive). Despite the improvements introduced by the 2009 Directive, the number of EWCs has not increased substantially. In fact, the number of EWCs being set up is decreasing every year. Most of the existing EWCs have been set up under the national laws of Germany, France, Sweden, the Netherlands, Ireland and Italy (in decreasing order)¹.

At the European Parliament session on 16 December 2021, a resolution on “Democracy at work”² was adopted, calling on the EU and the Member States to adopt a legal framework for employees’ participation rights and to revise the EWC Directive. As a result, on 12 May 2022 the Draft Report by MEP Denis Radtke was published with recommendations to the Commission regarding the revision of the Directive.³ On 24 January 2024 the Commission presented a proposal for a new EWC directive in order to tackle shortcomings in the existing legislation, and in June the Council agreed its position on this new EWC directive.⁴ The European Parliament’s Committee on Employment and Social Affairs voted its report on 3 April 2024, and was expected to vote in December 2024 on a mandate for interinstitutional negotiations. Council adopted a general approach on 20 June 2024⁵. It is unlikely anything meaningful will happen in the short term. So for the time being, we are stuck with the 2009 Directive.

¹ Revision of the European Works Councils Directive. Stronger social dialogue in a multinational context. Briefing – EU Legislation in Progress, European Parliament, 7 November 2024 - [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2024\)760375](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)760375)

² European Parliament resolution of 16 December 2021 on democracy at work: a European framework for workers’ participation rights and revision of the European Works Council Directive (2021/2005(INI)) OJ C 251, 30.6.2022, p. 104/114.

³ Draft report with recommendations to the Commission on the revision of the European Works Council Directive (2019/2183(INL)): PR_INI (europa.eu)

⁴ Press release from the Council of the EU, 541/24 of 20 June 2024. Strengthening representation of EU workers in multinational companies: Council agrees its position on the European works council directive

⁵ Revision of the European Works Councils Directive. Stronger social dialogue in a multinational context. Briefing – EU Legislation in Progress, European Parliament, 7 November 2024 - [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2024\)760375](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)760375)

2. EWC or alternative procedure

According to Article 1 of the 2009 Directive, all Community-scale undertakings and groups of undertakings must establish an EWC or an alternative procedure for informing and consulting employees. The aim of the rule is that a single EWC should be set up, even when a group includes one or more undertakings or groups that, on their own, would also count as “Community-scale”.

Through EWCs, employees receive information and can be consulted on important European-level decisions that could affect their working conditions. The EWC, or alternative information and consultation procedure, must be established by an agreement between the parties. If it is not possible to reach an agreement, or in certain cases specified in the 2009 Directive, the subsidiary requirements set out in the law shall apply.

3. Scope: Community-scale undertakings and Community-scale groups

As mentioned above, the obligation to set up an EWC or alternative procedure applies only to Community-scale undertakings or groups. The 2009 Directive does not apply to undertakings that are purely national in scope, nor to all European undertakings, but only to those that meet the following requirements:

- employ at least 1,000 employees in the Member States (including EEA Member States); and
- employ at least 150 employees in at least two different Member States.

In the case of groups of undertakings, the following requirements must be met:

- employ at least 1,000 employees in the Member States;
- the group comprises at least 2 undertakings located in different Member States; and
- at least one undertaking of the group employs 150 employees or more in one Member State and at least one other undertaking of the group employs 150 employees or more in another Member State.

Once the Community-scale undertaking or group has been defined, it is necessary to identify where its central management is located. This will deter-

mine the law applicable to setting up the EWC or alternative procedure. Furthermore, the central management will be the addressee of most of the corresponding obligations, starting with the methods and conditions for setting up the EWC.

Article 2(e) of the 2009 Directive defines “central management” as the central management of the Community-scale undertaking or the controlling undertaking of the Community-scale group. Whether an undertaking counts as a controlling undertaking will be determined by domestic rules.

If the central management is not located in a Member State, it can designate a representative in a Member State for it to be considered as the central management. In the absence of such a designation, the representative of the establishment or undertaking employing the greatest number of employees in a Member State shall be considered the central management.

4. Procedure for setting up the EWC

4.1 RESPONSIBILITY FOR COMMENCING THE PROCESS AND PROVIDING INFORMATION

According to the 2009 Directive, it would seem that every Community-scale undertaking or Community-scale group is obliged to set up an EWC or alternative procedure. In practice, this depends on whether a request has been made (or whether the undertaking or group decides to take the initiative). There are still many Community-scale undertakings and groups within the EU without an EWC of any kind.

It is up to the parties, the management of the undertaking or group and the employees’ representatives to agree on the nature, composition, competences, operating methods, procedures and resources of the EWC or alternative procedure; it is only if it is not possible to reach an agreement that the subsidiary requirements provided for by the 2009 Directive will apply.

One of the main obstacles that employees initially encountered when starting the process of setting up an EWC, was in obtaining access to information about the workforce of the EU-scale undertaking or group and its distribution. Without this information, it was difficult to start the process of setting up

an EWC. This issue gave rise to three complaints to the Court of Justice of the European Union (ECJ).⁶

The Bofrost case concerned a German dispute between the undertaking Bofrost and its national works council, which arose from the undertaking's refusal to provide information on the number of group employees and the structure of its undertakings, with a view to setting up an EWC.

The undertakings of the Bofrost group had entered into a private agreement that put them all on an equal footing, so that none of them would dominate and there would be no subordinate relationship between them. Thus, the management of the German undertaking considered that no undertaking exercised control within the group. In its judgment, the ECJ recalled that the aim of the rule was to ensure that employees of Community-scale undertakings or groups are duly informed and consulted, and stated that:

— Article 11 of the Original Directive imposes an obligation on a group undertaking to provide information to the employee representative bodies, even if it is not yet clear that the management they are addressing is the controlling one. This was a necessary prerequisite to establish the existence of a Community-scale undertaking or group, which in turn was a prerequisite for creating an EWC.

— In relation to the scope of the information obligation, the ECJ ruled that when data on the structure or organisation of a group of undertakings form part of the information necessary to start negotiations with a view to setting up an EWC, it is for any undertaking in that group to provide the employees' representatives with the data in its possession or which it is able to obtain.

In the Kühne & Nagel case, the problem arose from the fact that the central management was not located in a Member State, nor had a representative been appointed in any Member State. Since the German undertaking had the largest number of employees, the German works council considered that it should assume the role of the central management and asked it for information. The German undertaking argued that it could not comply with this request, as the central management was located in Switzerland. The ECJ held that the responsibility for providing the information laid with the presumed central management (in this case the German one), and that, in order to comply with its obligation, this undertaking was obliged to request the information

⁶ Judgments of 29 March 2001, Bofrost C-62/99, ECLI:EU:C:2001:188; 13 January 2004, Kühne & Nagel C-440/00, ECLI:EU:C:2004:16; and 15 July 2004, ADS Anker C-349/01, ECLI:EU:C:2004:440.

from the other undertakings of the group. The same principle was reiterated in the ADS Anker case.

The 2009 Directive integrated the ECJ's solutions in relation to the preliminary right to receive information. Under Article 4, the central management of the group or any individual undertaking of the group is responsible for obtaining and transmitting to the interested parties the information necessary for commencing negotiations.

4.2 COMMENCEMENT OF NEGOTIATIONS

There are two alternative ways of initiating negotiations:

- The central management does so on its own initiative.
- At least 100 employees (or their representatives) from no less than two establishments or undertakings, in at least two different Member States apply in writing to do so.

There are circumstances in which the central management may refuse to initiate negotiations:

- When the conditions for the existence of a Community-scale undertaking or group are not met.
- When a special negotiating body has already expressly decided not to start negotiations, or to cancel the ones that had already started.
- When an agreement on this matter is already in force.

4.3 SPECIAL NEGOTIATING BODY

The next step is to set up the special negotiating body (SNB) by electing its members.

The members of the SNB are determined according to national law. The 2009 Directive states in Article 5.2.a) that Member States should provide that employees in establishments where there are no employees' representatives for reasons beyond their control, have the right to elect the members of the committee.

The composition of the SNB will be in proportion to the number of employees the Community-scale undertaking or group employs in each Member State. Although the Original Directive established minimum and maximum

limits, these limits were eliminated in the 2009 reform. The 2009 Directive is silent on whether representatives from third countries where there are establishments can be part of the SNB.

The SNB shall inform the central management of its composition, and both shall then inform the local management and the European employees' and employers' organisations of the SNB's composition and of the start of negotiations. The latter was one of the new features introduced by the 2009 Directive to manage relations between the EWC and European employees' organisations.

Once the SNB is set up, the central management is obliged to convene it for a first negotiation meeting.

It is up to the SNB itself to adopt the rules on how the negotiation sessions will be conducted, and it can also adopt internal operating regulations. The SNB can meet before and after each meeting with the central management. It can also request the assistance of experts, who can attend the negotiation meetings.

All expenses arising from the functioning of the SNB must be borne by the central management, including those incurred for the election of its members and for the organisation of meetings (interpretation, accommodation and travel). Member States may lay down budgetary rules for these purposes, including caps on these expenses.

The SNB's tasks end with an agreement: either to establish an EWC or alternative procedure, or, as the case may be, to not start negotiations or to cancel negotiations that had already started.

4.4 THE AGREEMENT

The typical outcome of these negotiations is the establishment of an EWC or an alternative information and consultation procedure. Although the parties have plenty of room to negotiate, the agreement must:

- Identify the parties to the agreement (negotiating committee and central management).
- Establish its scope (i.e. workplaces affected by the agreement).
- Establish the composition of the EWC.
- Establish the competences of the EWC and the information and consultation procedure, as well as the modalities of articulation between the powers of the EWC and those of the national bodies.

- Establish the place, frequency and duration of meetings. In practice, most EWCs hold plenary meetings once a year, and very rarely more than twice a year. It is not unusual to have preparatory meetings beforehand and debriefing or follow-up meetings afterwards.

- Establish the material and financial resources necessary for the proper functioning of the EWC.

- Establish the term, modification procedure, termination procedure and situations in which the agreement must be renegotiated. Once terminated and expired, the agreement will remain in force until a new agreement is reached, or the subsidiary requirements will apply. The renegotiation must be carried out by the EWC itself.

- If it is decided to establish a committee, then the agreement must also regulate its composition, how its members are appointed and how its meetings are organised.

The 2009 Directive establishes a clear preference for EWCs, setting only two requirements if the parties opt for an alternative information and consultation procedure:

- One or more procedures must be established regarding transnational issues that significantly affect employees' interests.

- Provision must be made for the right of employees' representatives to meet and discuss the information communicated to them.

The third option is for the parties to decide to submit to the subsidiary requirements.

4.5 THE SUBSIDIARY REQUIREMENTS

Article 7 of the 2009 Directive specifies when this subsidiary model comes into play:

- By express agreement of the central management and the negotiating body.

- When, for a period of six months, the central management refuses to open negotiations.

- If, after a period of three years, the parties have not been able to reach an agreement.

5. The EWC

5.1 COMPOSITION OF THE EWC

There are two models: (i) the German model, under which the EWC is composed only of employees' representatives, and (ii) the mixed or French model, under which representatives of the central management are also included. In practice, the outcome in both cases is similar: under the German model, EWC meetings are followed by a joint meeting with management, and under the French model it is typical for EWC meetings to be preceded by preparatory meetings among the employees' representatives.

The rules we have seen concerning the composition of the SNB are not applicable here – everything is left to the autonomy of the parties, including eligibility for membership. Under the subsidiary requirements, the composition of the EWC must be proportional to the number of employees in each Member State.

5.2 EWC COMPETENCES

The fundamental objective of this EU legislation was to put in place mechanisms for the provision of information to and consultation of employees at the European level.

The concept of “information” was introduced in the 2009 Directive. It is defined as the transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it. The 2009 Directive further specifies that the information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent body of the Community-scale undertaking or group.

With regard to “consultation”, it is defined as the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as to enable employees' representatives to express an opinion about the proposed measures to which the consultation is related, which may be taken into account within the Community-scale undertaking or group.

Moreover, when defining the competences of the EWC in the absence of an agreement between the parties (subsidiary requirements), Annex I paragraph 1(a) introduces an additional element to the general definition, stating that “consultation shall be conducted in such a way that the employees’ representatives can meet with the central management and obtain a response, and the reasons for that response, to any opinion they might express”.

One of the purposes of the 2009 revision of the Directive was to try to ensure that EWCs are effective, that they are actually informed in a timely manner and that their participation and influence in decision making is encouraged. This is why the references to how and when information should be given and consultation should take place were introduced, although they are still rather vague.

Another purpose of this revision was to harmonise the concepts of information and consultation across the different European standards. Thus, the definitions of these concepts are very similar (although not identical) to those found in Directive 2002/14/EC⁷ and Directive 2001/86/EC⁸, both of which are the subject of other chapters in this work. However, there is a substantial difference: these two directives refer to consultation “for the purpose of reaching agreements” on decisions that may involve substantial changes to the organisation of work, whereas in the EWC context, the purpose is for the EWC to give an opinion “which can be taken into account” in decision making – i.e. only to participate in and seek to influence, if necessary, such decision making.

In any case, it seems right to conclude that the 2009 reform of the Directive sought to change the information and consultation procedures from being mere formalities to being part of the decision-making process, an issue that does not yet seem to have been solved. In this regard, time seems to be one of the fundamental aspects of an undertaking’s effectiveness: the 2009 Directive itself refers to this when it states in its preamble “without compromising the adaptability of the undertaking” or “without delaying the decision-making process within undertakings”.

This is one of the potential conflicting issues: how to strike the balance between an effective information and consultation process for employees’ representatives and an effective decision-making process for the undertaking (i.e. one that does not take too long).

⁷ Directive 2002/14/EC of the European Parliament and of the Council of 11-3-02 establishing a general framework for informing and consulting employees in the European Community (OJ No L 080 of 23/03/2002 p. 0029-0034).

⁸ Council Directive 2001/86/EC of 8-10-01 supplementing the Statute for a European Company with regard to the involvement of employees (OJ No L 294 of 10/11/2001 p. 0022-0032).

And then there is the issue of what a “transnational question” is, a concept that is not included in the definitions in Article 2 of the 2009 Directive. The distinction between local, national and transnational is becoming increasingly blurred. A transnational decision may have national consequences, and thus involve intervention at both levels. On the other hand, decisions that at first sight appear to have only a local impact, often affect the situation in other parts of the undertaking in different countries. The 2009 Directive does provide some clarification of what is meant by transnational decisions, for example by considering that they include decisions affecting employees that are taken in a Member State other than the one in which those employees work. This is one of the issues that will be probably addressed by the revised directive.

It also states that matters are considered to be transnational if they concern the whole undertaking or group or at least two Member States. Such matters include, irrespective of the number of Member States concerned, those that are of importance for European employees in terms of the extent of their possible effects, or those that involve the transfer of activities between Member States.

5.3 PROTECTION OF EMPLOYEES’ REPRESENTATIVES

According to Article 10, the members of the SNB, those of the EWC and the employees’ representatives in the event of an alternative information and consultation procedure, will have, when performing their functions, the same protections and guarantees that national legislation gives to employees’ representatives in the country in which they provide services. In other words, they do not all have the same protections, with this instead depending on the country in which they work.

Article 11 provides that Member States must put appropriate measures in place to deal with non-compliance with the directive, including providing for administrative or judicial proceedings that employees’ representatives can pursue if the central management fails to comply with its obligations.

5.4 CONFIDENTIALITY

The confidentiality of information is regulated by Article 8. This rule was introduced in order to protect the legitimate interest of undertakings, which may be obliged to deal with trade secrets, as well information about the undertakings themselves the disclosure of which could harm their corporate interests.

The 2009 Directive states that local implementing legislation should provide that neither the members of the SNB, nor the members of the EWC, nor the experts assisting them, are authorised to disclose to third parties information that has been expressly communicated to them in confidence. This obligation continues to apply even after the expiry of the mandate and irrespective of their location.

It seems obvious that “third party” refers to any person who is not part of the SNB or EWC or participating in the meetings as an expert, and thus includes the rest of the employees, which, as it has been pointed out, could go against the very purpose of the rule (which is to inform the employees as a whole).

Qualifying what information is communicated “on a confidential basis” is the responsibility of the undertaking. This has been criticised due to the lack of limits imposed, which, moreover, makes any type of control *a posteriori* difficult (and ineffective). The 2022 Draft Report also refers to this point.

In addition, and exceptionally, management can be exempted from passing on information, the disclosure of which “according to objective criteria, would seriously harm the functioning of the undertaking concerned or would be prejudicial to them”.

Although the 2009 Directive provided for the possibility for Member States, when transposing it, to make the waiver regarding secret matters subject to prior control by administrative or judicial authorities, most Member States – with a few exceptions – have not provided for any such control.

What happens therefore if undertakings abuse the exception? For instance, while in France and Spain they can be fined, in four other Member States it is possible to file a complaint against abuse.⁹

6. Collective bargaining within the EWC

The directives do not make any reference to the negotiating role that has, in fact, been assumed by some EWCs in adopting texts or documents with a wide range of names such as “framework agreement”, “overall agreement”, “joint declaration”, “common viewpoint”, “joint understanding”, “joint position”, “plan”, “charter” and “charter of fundamental social rights”.

These are transnational agreements that cannot be subsumed under typical national collective bargaining institutions, but which deal with relatively

⁹ Variations on a theme? The implementation of the EWC Recast Directive, p. 47.

recurrent issues such as restructuring, corporate social responsibility, employee health and safety, training, etc.

What is certain is that, however limited the matters to which they relate, undertakings' management bodies have recognised the bargaining power of these EWCs, sometimes overcoming potential problems concerning the legal standing of the EWC by jointly signing EWCs with European, national or international trade union federations.

Some say that the 2009 Directive's failure to mention this bargaining power was in fact a move by the European institutions in favour of trade unions, which are reluctant to recognise such autonomous bargaining power for EWCs.¹⁰

In any case, it is true that there are EWCs whose competences go beyond information and consultation on transnational issues. Thus, one in ten EWCs have the power to initiate projects, agree on measures or negotiate with central management.

From the existing agreements, it could be concluded that the country where the central management of the EU-scale undertaking or group is located – and thus the headquarters – plays an important role in this respect: EWCs set up by multinationals with headquarters in Germany, France or the Netherlands are more likely to have additional competences compared to those set up in other countries.

Moreover, some EWCs have express competence to enter into negotiations with management, and others, even without such express competence, go so far as to sign transnational agreements with management. There are also cases where the possibility of collective bargaining is expressly excluded in the founding agreement.

7. Consequences of Brexit on EWCs

As a consequence of Brexit, the United Kingdom has become a third state and therefore is no longer the reference state for EWCs, for whom the central management of the EU-scale group or undertaking was located in the United Kingdom, making it necessary to transfer such EWCs to a Member State.

Moreover, in these circumstances, UK employees are not entitled to be represented in the EWC unless the EWC expressly agrees otherwise. And the

¹⁰ A.: "La nuova direttiva sui comitati aziendali europei: un'occasione per ripensare la partecipazione dei lavoratori in Italia?", in *WP C.S.D.L.E. "Massimo D'Antona"*. INt, 69/2009.

question of whether or not they can maintain their participation will depend on the specific EWC agreement.

The future of EWCs that were set up not by agreement between the parties but according to the English subsidiary model, has also been called into question, so if, post-Brexit, the requirements for being deemed Community-scale are still met (without taking UK employees into account), it seems that it would be necessary to start the process again from the beginning.

8. Final considerations

The EWC standard was a pioneer in European social law. When it was adopted in 1996, it followed the informal model that some European multinationals had started to implement from the 1980s onwards. However, almost 30 years after the original rule was adopted, and despite the 2009 reform (which was expected to incentivise the formation of numerous EWCs), it has not been able to realise its full potential, as there are still a good number of undertakings that meet the requirements of the rule, but have neither set up an EWC nor an alternative procedure.

The other interesting aspect worth mentioning, from my point of view, is the tendency of some EWCs to go beyond the purpose for which they were conceived – which is limited to informing and consulting employees – to become true forums for negotiation. We will have to wait and see whether, as on other occasions, this practice initiated by undertakings becomes consolidated as a legal rule or whether, on the contrary, European collective bargaining continues to primarily take place through other avenues.

III. EMPLOYEE INVOLVEMENT IN EUROPEAN ENTITIES (SE AND SCE)

1. The regulation and its lengthy drafting process

1.1 REGULATORY FRAMEWORK

The regulatory framework for SEs and SCEs is divided into two regulations (which govern the legal status of these entities) and two directives (which govern employee involvement in them). Namely:

- European Societies:
 - Regulation EC/2157/2001 on the Statute for a European company (SE) (“SE Regulation”).
 - Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees (“SE Directive”).
- European Cooperative Societies:
 - Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE) (“SCE Regulation”).
 - Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees (“SCE Directive”).

Given that the legal framework for employee involvement is practically identical for both SEs and SCEs, references to SEs will also apply to SCEs.

1.2 THE GENESIS OF THE FRAMEWORK

The regulatory framework took several decades to materialise, from the initial proposals made by the Commission in the early 1970s, to the actual enactment of the regulations and directives mentioned above. In the late 1980s and early 1990s (within the framework of the “Davignon Commission”), the decision was taken to separate the regulatory framework into a regulation (which would regulate the general status of SEs) and a directive (which would lay down the rules applicable to the employee involvement).

The reason for this decision was to acknowledge that, in certain jurisdictions, employees are appointed as members of the management or supervisory bodies of companies (dualist systems). This participation system, which existed in Germany, Austria and the Nordic countries, among others, gave rise to misgivings on the part of those other Member States where no such participation regime existed (monist systems) and which feared that the creation of an SE could lead to a disproportionate extension of the rights of employees’ representatives. By regulating this through a directive, the Member States were allowed a degree of flexibility in these matters.

The tension between the systems is reflected in the new concept of “employee involvement”, which encompasses all the ways that, in one way or another, employees’ representatives can influence company decision making, including both the participation and the information and consultation models.

It is useful at this point to dwell briefly on the definitions contained in the directives, which are an essential element for understanding the subsequent legal framework.

Firstly, and as noted above, “employee involvement” should be understood (Directive 2001/86/EC, Article 2.h) as “information, consultation and participation, and any other mechanism by which employees’ representatives can influence the decisions taken in the company”. In other words, the term “involvement” is the broadest term that includes any mechanism by which employees’ representatives can influence company decision making: the usual methods will be information and consultation on the one hand, and participation on the other.

Specifically, “participation” means (Directive 2001/86/EC, Article 2.k): “the influence of the body representative of the employees and/or the employees’ representatives in the affairs of a company by way of: 1) the right to elect or appoint some of the members of the company’s supervisory or administrative organ, or 2) the right to recommend and/or oppose the appointment of some or all of the members of the company’s supervisory or administrative organ”.

On the basis of these definitions, European and Spanish legislation has constructed a legal system based on two key principles or elements that attempt to combine the necessary flexibility, while guaranteeing the rights of employees and their representatives.

2. The fundamental pillars

2.1 THE “BEFORE AND AFTER” PRINCIPLE

As stated in Recital 3 of the SE Directive, one of the fundamental pillars on which the legislation is built is to the goal of setting special provisions aimed at “ensuring that the establishment of an SE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of SEs”. Therefore, “[e]mployee rights in force before the establishment of SEs should provide the basis for employee rights of involvement in the SE (the ‘before and after’ principle)”. It should be noted at this point, that the preservation of the rights to be guaranteed by this “before and after” principle extends not only to national legislation, but also to rights arising from collective agreements, whether at national, sectoral or company level (Directive 2001/86/EC, Recital 20).

This principle has been confirmed in its full scope of application by the ECJ in its judgment on 18 October 2022 in *C-677/20, IG Metall*, ECLI:EU:C:2022:800. In this decision, it was ruled that the “before and after” principle meant that the number of representatives that could be elected by the employees in the supervisory body, should be the same as before the establishment (in that case by transformation) of the SE, and that the same applied to the procedures for electing those representatives (which in the specific case led to the conclusion that a separate ballot had to be held to elect the representatives proposed by the trade unions). As can be seen, the breadth of the “before and after” principle led to the conclusion that it should also apply to seemingly ancillary aspects, such as the manner of election (through one or two ballots) of the employees’ representatives.

2.2 PRE-EMINENCE OF COLLECTIVE BARGAINING

The second pillar on which the employee-involvement framework is based, is that of the pre-eminence of collective bargaining, as the principal source regulating the rights of information, consultation and participation of employees in the SE. In this sense, it can be affirmed that European legislation fully respects the will of the parties and collective autonomy; the legislation only provides for the subsidiary application of rules on employee involvement if that bargaining fails in its attempt to reach an agreement, or if the parties expressly decide to refer to these subsidiary rules. This pre-eminence of collective bargaining is a logical consequence of the search for flexibility in this area, and the attempt to avoid the imposition of formulas for employee involvement that are not customary, and which may therefore generate undesirable tensions in the SE’s industrial relations.

3. **Involvement of employees in SEs as a prerequisite for the establishment of an SE**

In addition to the two previous pillars, it is necessary to highlight a third specific characteristic of employee involvement in SEs: it is an essential requirement for the very constitution of an SE. In this regard, it is worth recalling that Article 12.2 of the SE Regulation and Article 11.2 of the SCE Regulation establish that “no SE (or SCE) may be registered unless an agreement on employee involvement has been concluded”, negotiated as provided for in the

Directive, or the negotiation period has expired without any agreement having been reached. In other words, the negotiation of mechanisms for employee involvement in a SE is a prerequisite and essential for the very existence of these companies, giving it an axial nature in the creation of these Community-scale companies.

Particularly relevant here is the ECJ's judgment on 16 May 2024 in C706/22, *Konzernbetriebsrat der O SE & Co. KG v Vorstand der O Holding SE*, ECLI:EU:C:2024:402, in which the ECJ declared that there was no obligation under the provisions of Regulation 2157/2001 and Directive 2001/86/EC for an SE holding company, when none of its participating companies or subsidiaries employs employees, and when it had already been established and registered as an SE without negotiations having been carried out beforehand, to subsequently enter into such negotiations on the grounds that it has subsequently acquired control of subsidiaries employing employees in one or more Member States.

First of all, the ECJ recalled that it follows from a reading of Article 12(2) of Decree 2157/2001 in conjunction with Article 3(1) to (3) of Directive 2001/86/EC that the procedure for negotiations between the parties on the arrangements for involvement of employees in the SE in order to enter into an agreement on those arrangements must, as a general rule, take place at the time of incorporation and prior to the registration of the SE. In this context, the ECJ pointed out that these provisions are not applicable to an SE that has already been established, where the participating companies that set up the SE did not, at the time of establishment, employ employees, such that negotiations on the involvement of employees in the SE could not take place prior to the registration of the SE. In this regard, although Directive 2001/86/EC does provide for three cases in which the procedure for negotiating the involvement of employees may be initiated at a later stage, the wording of the directive does not require the subsequent implementation of such a procedure within an SE that has already been set up.

Secondly, the ECJ also emphasised that it is clear from Directive 2001/86/EC that both the guarantee of acquired rights in respect of employee involvement and the negotiations between the parties on the actual procedures for that involvement are linked to the “creation” and “establishment” of the SE. According to the ECJ, this conclusion does not support the view that the negotiation procedure regarding employee involvement must be initiated subsequently in an SE that has already been established. The ECJ also noted that Directive 2001/86/EC does not contain any provision creating an obligation to initiate negotiations on employee involvement in – or extending the guarantee of existing employee participation rights to – situations where structural changes are introduced in an

SE holding company that had already been established by participating companies with no employees or with subsidiaries with no employees.

Thirdly and finally, in ruling on the question of whether the obligation to initiate a subsequent negotiation procedure within an already established SE could be imposed, in accordance with Article 11 Directive 2001/86/EC (misuse of procedures), where an SE is misused for the purpose of depriving employees of their rights of involvement, the ECJ stated that Article 11 leaves the Member States a margin of discretion as regards the choice of appropriate measures to be taken, provided that EU law is complied with and the Member State does not impose, in the case of an SE in a situation such as that at issue in the main proceedings, an obligation to subsequently initiate such a negotiation procedure.

4. Negotiation procedure

4.1 INITIATION OF THE PROCEDURE

Responsibility for initiating the negotiation procedure lies with the competent bodies of the participating companies, which means that the management bodies of the companies requesting the formation of an SE must initiate the negotiation procedure.

The procedure must commence as soon as the project for setting up the SE is established. In order for it to be effective, the competent bodies must provide the employees' representatives with information on the identity of the participating companies and all their establishments and subsidiaries, indicating which of them will be affected by the proposed formation, as well as the number of their respective employees and the location proposed for the registered office. This is the first point to bear in mind if there are participation mechanisms in any of the companies participating in the future SE: the information to be provided must also include the characteristics of those participation systems, the number of employees covered by the systems and the proportion they represent of the total number of employees who will form part of the SE.

4.2 CONSTITUTION OF THE NEGOTIATING COMMITTEE

The constitution of the SNB and election of its members is undoubtedly one of the most complex aspects of the framework, and in many cases generates uncertainty and doubts as to how it should be applied in each specific case.

Despite these doubts, the fact is that the framework is based on the clear and intuitive criterion of proportionality. Specifically, it is established (Directive 2001/86/EC, Article 3.2.a.i) that the members will be elected in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries or establishments (i.e. workplaces), at the rate in each Member State of one seat per 10% – or fraction thereof – of the total number of employees across all Member States.

A first point to note is that proportionality is taken into account on the basis of the employees in each Member State and not on the basis of the employees in each company or establishment. This means that where there are more than two companies or establishments concerned in the same Member State, the employees' representatives of these companies must adopt the necessary coordination mechanisms to jointly elect their representative(s) to the SNB.

However, an exception to this is provided for: in the case of SEs formed by merger, additional members representing each Member State must be added to the SNB to the extent necessary to ensure that it includes at least one member representing each of the participating companies that are registered and employ employees in that Member State and which, according to the draft merger agreement, will cease to exist as a separate legal entity. However, the number of additional members thus elected may not exceed 20% of the number of ordinary members initially elected. Where this number is exceeded, the additional seats shall be allocated to companies from different Member States in descending order of the number of employees they employ.

Given that this correction mechanism can lead to situations of “double representation”, the rules provide that the representatives elected by these exceptional means shall be deducted from the total number of representatives that would normally have been attributed to that Member State, so that, as we have said, there is no over-representation of employees from certain Member States.

4.3 OPERATING REGIME

The general rule for the functioning of the SNB is that decisions are taken under a “double absolute majority” system: absolute majority of the members, representing an absolute majority of the employees (Directive 2001/86/EC, Article 3.4). This double majority is relevant in relation to the possibility of appointing additional representatives without strict proportionality criteria, as doing so will often lead to the existence of blocking minorities which, although they cannot take decisions on their own, can prevent the adoption of agreements.

Without prejudice to the foregoing, there are cases where a qualified majority is required, in order to preserve the “before and after” principle. Specifically, in order to adopt agreements that entail a reduction of employees’ participation rights, the majority required is two thirds of the members of the committee who, in turn, represent two thirds of the employees of at least two Member States. The above rule applies in two cases:

- in the case of a merger where a participation system involving at least 25% of the total number of employees is implemented in one of the participating companies; and
- in the case of the formation of a holding company or a joint subsidiary, where a participation system involving at least 50% of the employees is implemented.

On the other hand, the qualified majority rules do not apply if the SE is formed as a result of a transformation, since in such a case the previously existing shareholding rights must be fully respected. The already mentioned and important ECJ decision in “IG Metall” analysed precisely a case of transformation into an SE and applied this rule strictly. Specifically, the ECJ analysed Article 4.4 of the SE Directive, which regulates this matter, and concluded that “the EU legislature intended to grant special treatment to SEs formed by transformation in order to avoid infringing the rights of involvement enjoyed by the employees of the company to be converted into an SE under national legislation or practice”. On the basis of this, the ECJ concluded that where the applicable national law requires a certain formula for the election of employees’ representatives to the supervisory board (in this case, separate vote for the representatives proposed by the trade unions), this formula must be respected in the same terms in order to comply with the mandate of the SE Directive.

4.4 FUNCTIONS OF THE SPECIAL NEGOTIATING BODY

The parties must negotiate in good faith with a view to reaching an agreement. However, the rule itself provides for the possibility for the parties to decide not to enter into negotiations, and to instead simply submit to the provisions on information and consultation of employees in force in the Member States where the SE has employees. In this case, the decision would need to be taken by a qualified majority of two thirds of the members from at least two different Member States. Of course, this possibility is only applicable in cases where no participation systems exist in any of the companies

participating in the SE – i.e. it is only available in cases where a reference to the rules on information and consultation in force in the Member States is appropriate.

It is important to clarify that in this case, the reference is not made to the subsidiary provisions regulated in the legislation itself (to which we will refer later), but rather to the national rules of each of the Member States.

Naturally, all members participating in the negotiations are bound by the duty of confidentiality and reservation (Directive 2001/86/EC, Article 8). This duty persists even after the expiry of their mandate and may give rise to appropriate liability in accordance with applicable national legislation. Precisely as a consequence of this duty of confidentiality, the general rule is that companies may not withhold information or documents from the members of the SNB on the grounds that such information or documents are secret or confidential. Exceptionally, however, information relating to industrial, financial or commercial secrets the disclosure of which could, according to objective criteria, hinder the functioning of the SE or seriously harm its economic stability, may be withheld. However, this exception may never be used to refuse data on the volume of employment in the undertaking.

4.5 DURATION OF NEGOTIATIONS

Given that we are dealing with an eminently procedural regulation, and that compliance with this procedure is an essential prerequisite for the formation of the SE itself, the duration of this procedure becomes a key element. Therefore, the legislation (Directive 2001/86/EC, Article 5) has established that negotiations must start as soon as the SNB has been set up and may last for up to six months. However, the parties may agree to extend negotiations further, up to a maximum period of one year from the setting up of the SNB.

In addition, and although it will undoubtedly delay the establishment process, the possibility should not be ruled out that – if the representatives refuse to establish the SNB (or even if they consider that it has not been validly established) – the bodies promoting the formation of the SE may go to the courts to determine whether all the formalities for the SNB to be validly established have in fact been complied with. As we have said, this option will undoubtedly extend the timelines for the constitution of the SE itself, but it will also provide greater legal certainty in this respect.

In any case, practical experience seems to indicate that it is precisely this type of uncertainty around the duration of negotiations and thus the length of

time the SE-formation process may take that leads, in many cases, to SE-formation projects being abandoned. Ultimately, not being able to have a completely clear view of how long it will take to complete the incorporation process, leads entrepreneurs to discard this option.

4.6 CONTENT OF THE AGREEMENT

Once the SNB has been set up, the parties must negotiate in good faith with a view to reaching an agreement. Although the parties have a high degree of autonomy to determine the content of the agreement, the law establishes the minimum content that it must necessarily include, which is substantially the same as what is included in section 2.4.4 (regarding the minimum matters to be covered by the EWC agreement).

It should be noted that, in accordance with Article 4.3 of Directive 2001/86/EC, in the case of an agreement, the reference provisions referred to below do not apply subsidiarily, unless the agreement expressly provides for this.

4.7 REFERENCE OR SUBSIDIARY PROVISIONS

4.7.1 *Scope of application of these provisions*

Without prejudice to the almost full autonomy of the parties in shaping employee-involvement rights in the SE, the legislation has sought to establish a safety net for those cases where either the parties are unable to reach an agreement or they decide not to make use of this autonomy. The legislation has therefore established “reference provisions” (according to the terminology of the SE Directive) for the following cases (Directive 2001/86/EC, Article 7):

- When the parties so decide.
- When no agreement has been reached within the maximum duration of negotiations, provided that (i) the Commission has not expressly decided to refer to national rules on information and consultation; and (ii) the competent bodies of the participating companies so decide.

In other words, in the event of a failure in the negotiations, it is possible for the participating companies to desist from continuing the process of registering the SE, although this is unlikely.

This general rule again has some specificities with regard to the rules on participation. Subsidiary provisions on participation only apply where, in addition to the above requirements, the following circumstances also apply:

- In the case of an SE formed by transformation, where an employee-participation system is already in place in the company to be converted.
- In the case of an SE formed by merger, where a participation system affecting any participating company was previously applied in one or more of the participating companies:
 - covering at least 25% of the total number of employees; or
 - covering less than 25% of the total number of employees, but the SNB so decides.
- In the case of an SE formed by the creation of a holding company or a joint subsidiary, where participation systems are applied that affect:
 - at least 50% of the total number of employees; or
 - less than 50% of the total number of employees, but the SNB so decides.

Furthermore, if the participation systems in force in the SE's participating companies differ (e.g. in some cases there is a veto right regarding the appointment of members to the supervisory board and in other cases there is a right to appoint a representative), the SNB must decide which participation system is to be established. If the SNB is unable to reach an agreement in this respect, the system that previously affected the largest number of employees of the participating companies shall apply.

4.7.2 *Special reference to the subsidiary provisions on participation*

Among the subsidiary or reference provisions, those relating to employee participation (Directive 2001/86/EC Annex, Part 3) deserve special mention.

As explained above, the rules will differ depending on the process through which the SE is being created. Thus, in the case of a transformation, and as already stated above with particular reference to the ECJ judgment in "IG Metall", all the previously implemented elements of employee participation will continue to apply (including ancillary or purely procedural elements such as the formula for electing representatives proposed by the trade unions). As there is no material change in the corporate structure in the case of a transformation, all participation rules are transferred completely and unconditionally.

In other cases, it is foreseen that the employees will have the right to elect, appoint, recommend or oppose the appointment of a number of members of the management or supervisory body of the SE equal to the highest of the proportions in place in the participating companies. This is what we could call an “upwards” equalisation – i.e. the participation rights in the SE will be as broad as the participation rights existing in any of the participating companies, which is a translation of the “before and after” principle we have been referring to. This interpretation was ratified by the first relevant judgment in this area, the ECJ’s decision on 20 June 2013 in C-635/11, *European Commission v Kingdom of the Netherlands*, ECLI:EU:C:2013:408. This judgment refers, for the purpose of interpreting cross-border mergers, to Part 3(b) of the Annex to the SE Directive, which contains the provision referred to above. The ECJ concluded that the “text provides in this area for an equivalence with the most protective regime for employees among the regimes existing in the companies concerned”.

The representative body shall decide on the distribution of seats for employees on the management or supervisory body, depending on the proportion of employees employed by the SE in each of them. It shall also decide, where applicable, on the manner in which employees may recommend that someone be appointed to the management or supervisory body.

A correction mechanism is provided for to facilitate the representation of all Member States, as far as possible, in the administrative or supervisory body: if employees from one or more Member States are not to be represented, while those from one or more other Member States are to have more than one representative, the existing seats are to be redistributed by allocating one of those seats to one of the Member States initially not represented. This member shall be deducted from the number allocated to the Member State that has obtained the most representatives or, in the case of several Member States with the same number of representatives, from the number allocated to the Member State with the lowest number of employees.

Finally, it is foreseen that the members of the administrative or supervisory bodies who have been appointed by the employees, will have exactly the same rights and obligations as the other members (including the right to vote), thus becoming full members of the corresponding body.

IV. CROSS-BORDER TRANSACTIONS

In the case of cross-border transactions of limited liability companies, situations similar to those arising from the formation of an SE arise, insofar as

the existing systems of involvement in each of the pre-merger companies must be reconciled with the creation of a new, larger company with a presence in more than one Member State. Therefore, when regulating employee involvement in cross-border merger processes, the EU has decided to refer to the rules on employee involvement in SEs.

Directive 2019/2021 establishes common rules on three types of structural modifications, provided that they entail a change of applicable law (“cross-border operations” in the terminology of the Directive: (i) cross-border conversion (Article 86b (2)). (ii) cross-border merger (Article 118) (iii) and cross-border division (Article 160a(1)). Employee protection is established for each of the situations in Articles 86 *duodecies*, 86 *terdecies*, 126 *quater*, 160 *duodecies*, 160 *terdecies*, and concordant articles.

The company carrying out the cross-border operation must draw up a report to inform its shareholders and employees. The report must explain and justify the legal and economic aspects of the proposed cross-border operation and its consequences for the employees. In particular, the report will have to explain the consequences of the cross-border operation as regards the future activity of the company, including its subsidiaries.

As regards employees, the report should explain the consequences of the proposed cross-border operation for their employment situation. In particular, the report should clarify whether there would be any substantial changes to the working conditions laid down in laws, collective agreements or transnational collective agreements, and to the company’s places of business, such as the location of the registered office. In addition, the report should include information on the management body and, where applicable, on staff, equipment, premises and assets before and after the cross-border operation, on likely changes to the organisation of work, wages and salaries, the location of certain posts and the expected consequences for the employees occupying them, and on social dialogue at the company level, including, where applicable, employee representation on the management body. The report should also explain how these changes would affect the company’s subsidiaries.

Finally, if certain conditions are met, it could be necessary to set up an SNB to define the employees’ participation rights in the company as a result of the cross-border transaction (even if the companies that are involved in the transaction lack employee-participation rights).

CHAPTER 33

SOCIAL DIALOGUE AND COLLECTIVE BARGAINING IN THE EUROPEAN UNION LEGAL ORDER

MANUEL ANTONIO GARCÍA-MUÑOZ ALHAMBRA

INDEX: I. Introduction. II. The historical construction of the European social dialogue. III. The legal framework for social dialogue and collective bargaining in EU law. IV. The impact of European social dialogue and collective bargaining at national level. V. Conclusions. Case Law.

I. INTRODUCTION

1. The concept of social dialogue in the European Union

Social dialogue is both an objective and an instrument of European social policy. In the EU Treaties, social dialogue appears as one of the objectives pursued by the Union in the field of social policy, as established in Article 151 of the Treaty on the Functioning of the European Union (TFEU). This formulation implies a series of obligations and commitments: the Union recognises and promotes the role of the social partners in the social field (TFEU art.152) and is committed to develop and promote social dialogue at EU level. It also means "supporting and supplementing" the actions of the Member States in the field of "representation and collective defence of the interests of workers and employers ..." (TFEU art.153.1 f).

In addition, social dialogue also functions as a regulatory instrument. This is reflected in the Treaties, where Articles 154 and 155 of the TFEU design a system for the participation of the social partners in the regulatory initiatives promoted by the European Union in the social field. This system consists of a double compulsory consultation, which may in turn lead to a proposal for a regulation drawn up by the social partners themselves (opening the door to collective bargaining between representatives of European employers and employees).

However, despite its central position in European social law, it is not easy to determine precisely which practices or mechanisms can be labelled as "European social dialogue", nor is it easy to identify what is "European collective bargaining", or to establish what kind of relationship exists between these two concepts in EU law. These difficulties are related to the breadth of the term 'social dialogue'. Indeed, the European Commission has used it to refer to phenomena that are not only diverse, but structurally and functionally distinct. In the Commission's view, social dialogue includes joint discussions, consultations, negotiations and actions by employers and trade unions, both in the form of bipartite social dialogue and in reference to tripartite social dialogue.

This broad understanding is not shared, however, by the social partners, who in their joint declaration at the Laeken summit in 2001, called for a distinction to be made between "tripartite concertation", which would group together those phenomena more akin to institutional participation, and "social dialogue", a term they prefer to reserve for their own bipartite work, whether or not prompted by the Commission's official consultations under Art. 154 TFEU (Clauwaert, Hoffman, Kirton-Darling and Mermet, 2004). Tripartite concertation would therefore designate the participation of the European social partners in structures such as the Economic and Social Committee or the Standing Committee on Employment, as well as their presence in forums such as the Tripartite Social Summit for Growth and Employment or the Macroeconomic Dialogue. Therefore, in the view of the social partners, the term 'European social dialogue' would be reserved to refer to bilateral dialogue processes between the social partners themselves, both at sectoral and cross-industry level, as well as the tripartite dialogue arising from the consultations under Article 154 of the TFEU.

This later view is reinforced by the fact that bilateral social dialogue processes are independent of consultations, i.e. they may or may not be driven by such consultations, in the latter case being the autonomous initiative of the social partners (see section three of this chapter for more details). Moreover, bilateral European social dialogue, whether or not it originates in a consultation process, can lead, according to the provisions of art. 155 TFEU, to "the establishment of contractual relations, including agreements", although here

we would already be in the field of European collective bargaining, which makes it necessary to consider the definition of collective bargaining and how it relates to social dialogue in EU law.

2. Collective bargaining in the European Union

Collective bargaining in the European Union is a unique construct. Even if we admit that a European collective subject does exist, the legal regulation of collective bargaining in the EU is not the result of the recognition of pre-existing social practices, nor does it entail the codification, at the supranational European level, of autonomous practices of the social partners. Quite on the contrary, it is a normative construction emerging to a certain extent from a top-down approach, so that the doctrine has stated that "in the supranational context (of the EU) promotional legislation has preceded the independent development of collective autonomy (Carusso, 1997)".

This fact can explain some of the defining features of EU level collective bargaining, helping to understand why several key elements, which are central to the collective bargaining systems of most EU Member States, are absent from EU level collective bargaining. After all, the power of the European social partners at EU level to develop its own regulations, as well as the power to ensure compliance with these, regardless of how the law codifies and qualifies these "de facto" practices, seems to be absent. Furthermore, there is no full constitutional recognition of collective autonomy at EU level: both freedom of association and the right to strike, i.e. the role that conflict plays as a constituent element of collective autonomy, are incomplete in EU law (Lo Faro, 2000). Likewise, EU law does not grant the European social partners the power to establish legally binding regulations on their own: as the case law of the Court of Justice has established in EPSU, the Commission can assess at any point the 'appropriateness' of their agreements and refuse to transpose them into European law with binding force. To sum up: EU level collective bargaining is a system deeply embedded in EU law and policy, and therefore cannot be easily compared to national level systems of collective bargaining.

It is true, however, that the right to collective bargaining is recognized at 'constitutional level' in both Article 28 of the Charter of Fundamental Rights of the European Union (CFREU) and Article 12 of the 1989 Community Charter of the Fundamental Social Rights of Workers, as well as in Article 6 of the European Social Charter. Moreover, the European Court of Human Rights' interpretation of Article 1 of the European Convention for the Protection of

Human Rights and Fundamental Freedoms also allows to include collective bargaining as one of the rights protected by the Convention. Nevertheless, this recognition at the "constitutional" level does not compensate the partial and problematic incorporation of collective bargaining into EU law.

Although the CFREU, by virtue of Article 6.1 of the Treaty on European Union (TEU), has the same legal value as the Treaties, it must be interpreted and applied in accordance with certain rules. Firstly, and fundamentally, Article 6.1 of the CFREU itself states that the provisions of the CFREU do not extend the competences of the Union as defined in the Treaties (and therefore cannot overcome the exclusion of competence in Article 153 .5 TFEU), adding that the rights contained in the Charter "shall be interpreted in accordance with the general provisions of Title VII of the Charter, governing its interpretation and application, and with due regard to the explanations referred to in the Charter that set out the sources of those provisions". Thus, by virtue of these provisions, the rights in the Charter are addressed to the institutions of the Union, and to the Member States, "only when they are implementing Union law" (CFREU Art.51.1). This has a strong limiting effect, since in order for the Charter to be applicable, there must be a situation that is relevant to European Union law, which will normally require a transnational element. Secondly, the potential for recognition of the right is also limited by the wording of Art. 28 of the CFREU, which requires collective bargaining to be conducted "in accordance with Community law and national laws and practices". This means accepting not only the limits that may derive from the different national legal systems, but also from the European legal system itself. Considering that the idea of "conformity with Union law" is what has allowed the Court of Justice of the European Union (CJEU) to justify the need to weigh the right to exercise "collective action (...) including strike action" against the economic rights of freedom to provide services or freedom of establishment, the potential limitations of Art. 28 become apparent.¹

For its part, the recognition of collective bargaining in the European Social Charter, the Charter of Fundamental Workers' Rights or the European Convention on Human Rights, which is relevant in the EU legal system as a source of inspiration and interpretation of the contents of the CFREU itself (as stated in its Preamble), has scarcely had any relevance in the orientation of the case law of the CJEU.

The main problem is, therefore, that the aforementioned "constitutional" recognition is not able to overcome the principle of conferral, and the Union lacks competence on freedom of association and strike action (art.153.5 TFEU). This fact results in a fragmentation of the elements that normally allow legal systems

¹ Case C-341/05, 18.12.2007, *Laval un partneri*, ECLI:EU:C:2007:809

to promote and/or recognise the collective autonomy of social partners. Likewise, it complicates the understanding of European collective bargaining as a right derived from collective autonomy thus hindering, at regulatory level, the development of a fully-fledged legal framework enabling a functioning system of collective bargaining at the EU level. Furthermore, the system set out in Articles 154 and 155 TFEU reserves a central role to the Commission, calling into question the content of the idea of collective autonomy of the European social partners.

Thus, in the European Union, European collective bargaining is limited to the possibilities deriving from Articles 154 and 155 TFEU, enabling the European social partners to establish "contractual relations, including agreements", which may occur at interprofessional or sectoral level.

Surely, there are other references to European collective bargaining in EU law: Article 156 of the TFEU refers to the "right of association and collective bargaining between employers and workers" as one of the areas in which it seeks to promote coordination and cooperation between Member States in the fields of social policy; Article 153.3 TFEU states that social directives may be implemented in the Member States by the national social partners. Even beyond primary law, references to collective bargaining can be found in secondary legislation, where negotiation processes are promoted to establish European Works Councils (Dir 1994/45/EC) or agreements for the involvement of employees in European Companies (Directive 2001/86/EC). Similarly, several provisions in the adequate minimum wages Directive (EU/2022/2041) directly or indirectly promote collective bargaining as will probably be the case with the platform work Directive (2021/0414/COD). However, all these provisions have in common that they lead us to the field of purely national collective bargaining.

3. The relationship between social dialogue and collective bargaining in the European Union

Some scholars have argued that there is a continuum between social dialogue and collective bargaining at the European level that would make any attempt to differentiate the two concepts futile. This idea is based either on a broad conception of "social dialogue", which would encompass almost any manifestation of participation by European social partners, thus diluting the notion of collective bargaining, or by considering European collective bargaining exclusively as a consequence of the processes of social dialogue.

These interpretations are certainly supported by EU legislation itself, where continuity seems to be linking articles 154.3 and 154.4 of the TFEU. The

rule in these provisions states that, following the second mandatory consultation by the Commission with the social partners on the content of a regulatory proposal in the social field, the social partners may notify the Commission of their intention to initiate the process provided for in article 155. This, in turn, activates the possibility for the social partners to develop contractual relations (including agreements). Indeed, when social dialogue, following the Commission's consultation, gives way to a collective bargaining process, it could be understood that both are different phases of the same regulatory process.

The problem is that, if this interpretation is accepted, those experiences of social dialogue and collective bargaining taking place outside the Commission's consultation would be left out of the picture. Moreover, it should not be overlooked that the Court of First Instance of the European Union, the General Court and the Court of Justice of the European Union have themselves pointed out that a distinction must be made between the consultation phase and the negotiation phase referred to in the articles of the Treaty (see, in particular, the judgment of the CFI in *UEAPME*, T-135/96). Finally, on a more conceptual level, a differentiation between social dialogue and collective bargaining has been advocated on the basis of the different purpose of these two processes: whereas, on the one hand, bargaining implies a series of binding or normative links in relation to what has been agreed that are absent in social dialogue (without going into the question of the legal effectiveness of the negotiated agreement), on the other hand a certain conflictual nature is predicated of collective bargaining (although very nuanced in the EU case), as opposed to a dialogue where collaboration is the driving force of the process.

In short, there are important legal and conceptual arguments for a differentiation between social dialogue and collective bargaining in the EU legal system, although it must be admitted that, in their practical operation, the two phenomena are strongly interrelated.

II. THE HISTORICAL CONSTRUCTION OF THE EUROPEAN SOCIAL DIALOGUE

1. Beginnings and Val Duchesse

The European Commission has stressed the important role played by the social partners in the establishment and implementation of European policies from the very beginning of the integration project (European Commission, 1996). Indeed, the involvement of the social partners began with their recogni-

tion as participants in the Consultative Committee of the European Coal and Steel Community (ECSC), as well as in various consultative committees within the European Economic Community, the most important of which was the Economic and Social Council. Moreover, at sectoral level, a number of committees were set up from 1960 onwards in various economic sectors. These committees, which in principle had a consultative role, were set up either on the initiative of the Commission or by the social partners themselves.

Despite the importance of these experiences, most scholars see the so-called “Val Duchesse” process as the real origin of European social dialogue. “Val Duchesse” consisted on a series of bilateral meetings between the social partners in a context of important changes in the EU integration project that culminated in the Maastricht Treaty. These meetings set the foundations for the existing European social dialogue and collective bargaining system, at a time when the Commission’s commitment to develop such a system was unequivocal. Indeed, the Commission believed that the development of a European industrial relations area required the existence of strong social actors with the capacity to act, as well as a form of social dialogue that could function as a regulatory instrument, allowing the Union to make progress in the “harmonisation of employment and working conditions” (European Commission, 1999).

There is consensus around the idea that the “Val Duchesse” dialogue represented a turning point from which the consultative logic that had until then dominated social dialogue experiences in Europe was overcome, giving way to a qualitatively different process that advanced towards a bipartite dialogue. However, in hindsight, the importance of the “Val Duchesse” dialogue lies more in the establishment of procedures for regular dialogue and the building of trust between the social partners at European level than in the results achieved in the process itself.

2. Incorporation into the Treaties and first experiences

The Single European Act introduced a new Art. 118B, which incorporated the social dialogue in the EU Treaties for the first time. Subsequently, the Maastricht Treaty would incorporate the Agreement on Social Policy, opening a period of confidence in the social dialogue as a method of regulation in the European Union. The first agreements would follow suit, although this period of success was to be short.

The content of Art. 118B of the Single European Act was rather limited: it urged the Commission to develop the social dialogue at EU level, recognising the possibility for the social partners to establish relations “based on agree-

ment". However, the real codification of European social dialogue and collective bargaining took place with the adoption of the Maastricht Treaty, to which the Agreement on Social Policy was annexed. The Agreement on Social Policy was a document, drawn up by the social partners themselves, that provided for a formula for their participation in the development of European social legislation that was adopted by the EU with almost no changes (and is still in force in the current articles 154 and 155 TFEU).

The role played by the EU Commission in the negotiations leading to the Agreement on Social Policy was decisive. Indeed, it was the Commission's active role which made the social partners feel that it was better for them to negotiate in order to secure a role in the construction of social Europe, since otherwise 'Brussels' would regulate as it pleased. The Commission's activism has proved afterwards to be essential, surely aided at the time by the pressure exerted by the European Parliament, that threatened to block legislation for the development of the internal market if the social dimension was not developed at the same time.

Since the Agreement on Social Policy was incorporated as a Protocol annexed to the Maastricht Treaty, there was an intense doctrinal debate about its legal nature, although in practice, with the adoption of Dir 1994/45/EC on European Works Councils, it became clear that these protocols were to be considered sources of EU law. The problem became ultimately irrelevant when the contents of the Agreement on Social Policy were incorporated into the EU Treaties in the reform known as the Treaty of Amsterdam, which introduced the new Chapter on Social Policy.

The adoption in 1996 of Dir 96/34/EC on parental leave made legally binding under EU law the regulation agreed by the social partners, who became this way the architects of social regulation at EU level. With this first agreement, trade unions and employers demonstrated their capacity to reach compromises and to advance the Commission's regulatory agenda, inaugurating a period characterised by the use of social dialogue and collective bargaining as an instrument of social regulation at European level. Further agreements were soon reached and transformed into Directives: the framework agreement on part-time work (Dir 1997/81/EC) and the framework agreement on fixed-term work (Dir 1999/70/EC). In parallel, the existing social dialogue structures at sectoral level were reformed in 1998: Decision 1998/500/EC (1998/C-2334) would establish the new Sectoral Social Dialogue Committees, constituting the fora, now under revision (European Commission, 2023 b) in which European sectoral social dialogue and collective bargaining now takes place.

3. Turn to autonomy, paralysis and crisis.

The period of confidence in social dialogue was to be short-lived. Very soon the first failures in the negotiations showed the weaknesses of the model. The system was built on a balance that depended to a large extent on the Commission's initiative. Thus, when the Commission adopted a more passive attitude at the turn of the century in a context where there was no strong social agenda, the model suffered. This would ultimately result on a change in the type of agreements negotiated in what was at the time described as a transition towards a more autonomous model.

The context in which the alleged shift towards greater autonomy in the European social dialogue and collective bargaining took place is the new political and institutional environment that began to take shape with the Lisbon Strategy. The beginnings of the change can be traced back to the Laeken Declaration, where the European social partners expressed their desire to work towards the development of a more autonomous social dialogue. A new type of European agreements appeared on the scene, precisely called 'autonomous', which would be implemented "in accordance with the procedures and practices specific to management and labour and the Member States", as stated in article 155.2 of the TFEU. These agreements, therefore, no longer required to be transposed into directives.

This shift towards autonomous agreements should be understood, in my opinion, as a response to the new political and institutional context, rather than as a voluntarist search for greater 'autonomy'. In fact, the scenario in which the the Laeken declaration took place was very different from the one existing at the time when the Agreement on Social Policy was signed. Without being able to elaborate on each of them here, the following developments should be noted as key elements of this change: the planned enlargement of the EU to the eastern countries, the limitations of the project to constitutionalise social rights and, crucially, the emergence of new forms of regulation (notably the "open method of coordination") in the context of a debate on governance that coincides with major changes in the Commission's policy agenda.

The influence of the debate on new governance and new forms of regulation, with the renunciation to legislative harmonisation, is decisive in understanding the new stage. This debate is linked to the emergence of a new political agenda engineered by the Commission that enshrines the centrality of job creation as the main goal in the social sphere. This political agenda, which would be embodied in the Lisbon Strategy, sought formulas to increase employment levels through a programme of reforms focused on boosting the flexibility of social and labour legislation (synthesised in the concept of 'flexicurity'). The paralysis of legislative proposals, together with the emergence of the "open method of

coordination” as a new regulatory technique, greatly affected the functioning of social dialogue. Thus, the shift towards greater autonomy would be an adaptive response to the new scenario: with the disappearance of a credible threat of legally developing the EU's social dimension, and faced with a business community that had less incentives to negotiate, the hypothesis that autonomous agreements appear as the best ‘alternative’ to the possibility of no development at all in social dialogue has great explanatory force (Dukes and Cannon, 2016).

Since 2001, with the exception of the revised framework agreement on parental leave in 2009 (Dir 2010/18/EU), all agreements reached by the social partners at cross-industry level have been autonomous agreements. The same cannot be said, however, of the sectoral level, where it is more difficult to identify a trend towards the conclusion of autonomous agreements, given that even after the Laeken Declaration as much as ten agreements negotiated at sectoral level have requested to be implemented via directives (although not all of them have been so), whereas five have remained as autonomous agreements. These data suggest a different type of dynamics at work at sectoral level.²

4. The Eurozone crisis and its legacies

In this scenario, a major international financial crisis erupted in 2008, which developed into a monetary and fiscal crisis in the Eurozone, impacting the political agenda of the European Union. This inaugurated a period of ‘emergence’ that paved the way for a paradigm of efficiency that eventually became the driving force of integration. The emphasis in this period was on the need to improve the competitiveness of the economy as a formula for overcoming the crisis, competing in the global market and fostering job creation.

This new paradigm (already visible in the Lisbon Strategy prior to the crisis) was the core of a new political agenda of the Commission: the ‘Europe 2020’ strategy. This was also the period of the development and strengthening of economic governance mechanisms, which had a strong negative impact on the social sphere, in particular in some Member States. ‘Europe 2020’ laid the foundations for what is now known as the European Semester: the process, first tested in 2011, by which the EU and the Eurozone countries coordinate their economic and budgetary policies along the lines set out in the Stability and Growth Pact. The European Semester as a method of governance, seeking to coordinate the macroeconomic policies of the Member States, was strongly reinforced at

² European Social Dialogue database. Data at 15/08/2024.

this time, especially by granting the Union the power to penalise the member states in cases of non-compliance. The abandonment of the legislative route to advance the integration of the Union is total; in fact, legislation is seen as a cost and a burden, almost an obstacle to the proper functioning of the economy.

In this context, the Commission launched in 2012 a programme called REFIT (now part of the Better Regulation agenda) aiming at revising the EU's legal corpus in order to 'simplify' and 'streamline' European legislation. The declared objective was to ease the burden on businesses, facilitating the implementation of rules within the theoretical framework of 'smart regulation'. The REFIT initiative, denounced by European trade unionism as an exercise in deregulation that endangered the European *social acquis*, was used at sectoral level by the Barroso Commission to justify its refusal to implement certain sectoral agreements, such as the agreement in the hairdressing sector, as EU directives. The reasoning behind this refusal paved the way for the reading of Article 155.2 that is at the origin of the EPSU case law. Throughout all this difficult period, the European social dialogue at cross-industry level was defined by stagnation and paralysis, especially from 2010 onwards. From that year until 2013, there were no new agreements, documents or initiatives, although the social dialogue at sectoral level showed, however, greater dynamism and resilience.

The prospects for the EU social dialogue in 2014, when the Commission chaired by Jean-Claude Juncker took office, were bleak: alongside the paralysis of the legislative programme, the 'Barroso Commission' had directly attacked the European social dialogue with its refusal to transpose the agreement on health and safety reached by the social partners in the hairdressing sector. Besides, the Commission unilaterally canceled, during the summer of 2014, up to a dozen meetings of the Sectoral Social Dialogue Committees scheduled to take place in July that year. In this context, the Juncker Commission triggered a policy shift and in March 2015, even before the Pillar of Social Rights was announced, a high-level conference was held between trade unions, employers and European institutions with the aim of giving new impetus to the European social dialogue.

The most visible result of the conference was the 2016 joined declaration entitled 'a new start for social dialogue' which identified four main lines of action: strengthening the involvement of the social partners in the functioning of the European Semester; strengthening the capacities of the social partners at national level; strengthening the role of the European social partners in the legislative and policy-making processes; clarifying the relationship between the Europe Agreements and the Better Regulation agenda. At least in theory, since 2015, the social partners are seen again as a priority, regaining a central place in social Europe and regarded as key actors in the implementation of the

principles and rights set out in the European Pillar of social rights, that further reinforced their position in its principle number 8.³ This approach has been continued, as reflected in subsequent documents and declarations such as the Porto Social Commitment of 2021. A proposal to strengthening social dialogue and collective bargaining along the lines agreed in 2016, with a focus on the national level, is currently in the pipeline (European Commission 2023 b).

However, in January 2018 the Commission ‘invited’ the social partners in the hairdressing sector to withdraw their request to transpose the agreement on health and safety as a directive, suggesting that they instead should opt for the autonomous implementation route. Similarly, in the case of the agreement on information and consultation of civil servants and public employees in central administrations, the Commission informed the European Public Service Union (EPSU), in March 2018, of its decision not to transpose the agreement via directive. This decision triggered EPSU to refer the matter to the General Court of the European Union, claiming a violation of article 155 TFEU. Following the General Court's verdict, EPSU appealed to the CJEU, which finally issued a controversial ruling published in September 2021. In the Commission’s view, this case law has been useful to ‘clarify’ the functioning of European level social dialogue and collective bargaining, without paying to much attention to its potential negative implications (European Commission, 2023 a). I will return to some of these developments in the fifth and final part of this chapter.

III. THE LEGAL FRAMEWORK FOR SOCIAL DIALOGUE AND COLLECTIVE BARGAINING IN EU LAW

1. Articles 154 and 155 TFEU

The articles establishing the system of European social dialogue and collective bargaining are located in the Social Policy Chapter of the TFEU. This

³ Principle 8 of the European Pillar of Social Rights: social dialogue and involvement of workers. *The social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices. They shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action. Where appropriate, agreements concluded between the social partners shall be implemented at the level of the Union and its Member States.*

Workers or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of undertakings and on collective redundancies.

Support for increased capacity of social partners to promote social dialogue shall be encouraged.

chapter begins with Article 151 of the TFEU, which sets out the objectives of the Union and the Member States in the field of social policy, including social dialogue. Article 152 establishes the obligation of the Union to promote the role of the social partners, although without defining what this obligation consists of, which greatly weakens the value of the article. For its part, Article 153 lists the Union's areas of competence in the social field: here we find the exclusions of competence that leave out of the Union's regulatory possibilities the rights of freedom of association and strike action and the field of remuneration. Articles 154 and 155, taking up the contents established by the social partners themselves in the Agreement on Social Policy, establish the central elements of the legal regulation of social dialogue and collective bargaining in the European Union.

Article 154 TFEU sets a double compulsory consultation of the social partners in the field of social policy. The first must take place before adopting a proposal in this field: the Commission must consult the social partners on the possible direction of Union action. Secondly, when after the first consultation the Commission decides to go ahead with its proposal, the social partners will be consulted on its content.

It is in the response to this second consultation that a scenario opens up with different possibilities: the social partners may choose to send the Commission an opinion or a recommendation or, alternatively, to open a bilateral negotiation process on the proposal, which in turn may lead to the adoption of an agreement. The latter possibility is foreseen in Article 154(4) establishing the option to open bilateral negotiations, where the Commission temporarily 'loses' control of the legislative process in favour of the initiative of the social partners, which may be considered a peculiar manifestation of collective bargaining. Therefore, the importance of Art. 154 lies in the central role it gives to the European social dialogue, which becomes a pre-regulatory technique that obliges the Commission to comply with new rules.

As we have seen, there is a scholarly debate on the connection between Art. 154 (consultation phase) and Art. 155 (negotiation phase) and, more specifically, the existence of a necessary continuity between the Commission's consultations and the negotiation phase. In this debate, I took a position in favour of the independence of the two phases, arguing that the reference in art. 154 TFEU to the procedure provided for in art. 155 TFEU, does not necessarily entail a relationship of dependence of the latter on the former. Indeed, the existence of a prior phase of consultation by the Commission is not necessary to activate the negotiation provided for in art. 155 TFEU, as nothing in the Treaty seems to indicate this. Thus, the social partners can initiate an autono-

mous process of collective bargaining in which the European institutions remain outside both in its genesis and in its development.

Finally, art.155.2 TFEU establishes two options for the implementation of the possible agreements that might be reached: the implementation of the agreements according to 'the procedures and practices specific to the social partners and the Member States' (which will give rise to 'autonomous' agreements) or, if the agreement falls within the competences listed in art.153 TFEU, by means of an agreement that can become binding by a 'Council decision on a proposal from the Commission', which is invariably a directive. These later are referred to as binding agreements in this chapter.

2. Implementation of the agreements (1): the binding agreements (Council decision)

The binding agreements are those which are transposed by means of a Council decision. Choosing this route of implementation entails a series of limitations which, analysed from the point of view of collective autonomy, can be criticised, even more so after the interpretation of art. 155.2 TFEU proposed by the General Court and the Court of Justice of the EU in their rulings in the *EPSU* case.

When implemented via Council decision, the social partners' agreements are subject to a series of controls by the European Commission. Whereas the controls of legality, representativeness and respect for SMEs can be explained by the Commission's role as guardian of the Treaties (European Commission, 1993), as well as by the nature of the instrument chosen for the transposition of the agreements (a Directive), the control of the 'appropriateness', on the other hand, raises important questions from the perspective of collective autonomy.

The control of the legality of the agreement, as well as the formal verification that the agreement is not harmful to SMEs, does not pose major problems, although the dubious position of the Commission in a role of control of legality, more typical of a court than of an institution that broadly corresponds to the 'executive' power, can be criticised.

More complex is the question of representativeness. This is a difficult issue that has profound implications for the very *raison d'être* of the participation of employers and trade unions in European social regulation: democracy in the European Union and the legitimacy of their actions in the social sphere. The starting point is the absence, in European law, of any rules on the representativeness of the social partners. This void has been justified on grounds of respect for the autonomy of the social partners, as well as the EU's lack of competence on

the right of association under Article 153(5) TFEU. However, as early as 1993, the Commission developed a series of criteria to select the social partners to be consulted in accordance with the provisions of the Agreement on Social Policy. Such criteria stated that the social partners had to be cross-industry or sectoral organisations organised at European level, constituted by organisations recognised in the Member States, with the capacity to negotiate, structures that guarantee their effective participation in the consultation process and, finally, representative of the greatest possible number of EU Member States. To these criteria must be added the express recognition of the representative status of Business-europe, CEEP and the ETUC (European Commission, 1993).

Although designed to select the social partners at the consultation stage, these criteria have also been used to assess the validity of agreements when implemented through a Council decision, in the so-called control of representativeness. And this has been the case despite the fact that the European Commission, the Council and the CJEU maintain (as they state in UEAPME and EPSU) that the negotiation and consultation phases of EU level social dialogue and collective bargaining are distinct and must be distinguished. The main argument underpinning such differentiation is that the Commission does not control the negotiation phase and that no provision confers on a social partner a right to negotiate on the basis of its right to be consulted. It seems, accordingly, that the principle of mutual recognition is only rule for determining who participates in the negotiations of European agreements. However, in practice, participants in negotiations of European collective agreements will have to prove their representative status when they seek to have their agreements implemented by a Council decision. Despite these contradictions, the control of representativeness is logical if one considers that it is a feature connected to the democratic principle, especially since the European Parliament has no role in the elaboration of the agreements reached by the social partners (Casas Baamonde, 1998).

At sectorial level, the application of the criteria described above was insufficient. Consultations had been taking place on an informal basis, and the Commission lacked an overview of who the social partners were in most sectors. This situation prompted the Commission to launch studies on the representativeness of the social partners at sectoral level. These studies are constantly being reworked and updated and are the key tools in deciding who is representative in each of the sectors in which there is European social dialogue. Thus, no criterion has been defined that resolves the problem more or less definitively, and the method used to determine the representativeness of a stakeholder at the European sectoral level is a case-by-case assessment of whether an specific actor is representative according to the studies on social partners' representativeness at sectoral level.

The most problematic of the controls that the Commission can carry out is the control of the (political) ‘appropriateness’ of the agreement. Such a check had not been activated in practice, at least explicitly, until 2018, when the Commission rejected EPSU's request to transpose the agreement on information and consultation of civil servants and other public employees in the central government sector as a Directive. In its rejection, the Commission put forward arguments assessing the agreement from the perspective of its ‘appropriateness’. Such an assessment is obviously contrary to any serious conception of collective autonomy, as well as problematic from the point of view of the democratic principle.

The Commission's power to reject the transposition of a social partners' agreement is grounded on a reading of Article 155(2) TFEU according to which the Commission is not obliged to send the social partners' request to the Council for the activation of the binding transposition procedure of their agreements (via Council decision). This is as well the basis for the control of ‘appropriateness’. Such an interpretation of Article 155(2) has been preceded and prepared by the inclusion of the partners' agreements in the REFIT regulatory assessment programme, and has finally been confirmed by the CJEU in its EPSU judgment. Although it is not possible here to develop even a superficial analysis of the judgments of the General Court and the Court of Justice in EPSU, the consequence of the interpretation of Article 155(2) TFEU proposed by the Commission and endorsed by the Court is clear: the European Commission can refuse, for reasons of (political) appropriateness, to send an agreement of the European social partners to the Council for adoption as a Directive.

The idea of collective autonomy at the European level is, after EPSU, seriously undermined. A very wide discretionary power is given to the Commission, which can prevent the social partners' agreements from becoming legally binding for reasons of expediency. The European social partners, as well as their role as ‘co-legislators’, appear in a subordinated position vis-à-vis the Commission. In practice, the new interpretation of article 155.2 TFEU discourages any truly autonomous (that is, non-influenced or conditioned by the Commission) bargaining process by the European social partners, jeopardising even the already limited space for collective autonomy that existed at EU level. This is because any potential content of the agreements will be limited and conditioned, beyond the limits of competence, legality and the representativeness of the signatories, by the regulatory agenda and the preferences of the Commission.

The idea of democracy and the concept of ‘general interest’ reflected in the Courts' judgments in EPSU in relation to social dialogue and collective bargaining are equally problematic. The starting point of the Courts is the idea that the European social partners do not have the capacity to represent a gen-

eral interest, and certainly not the general interest of the Union. This is in line with the Commission's reasoning on the need to apply REFIT to European social partner agreements, now presented as optional: to be decided on a case by case basis by the Commission (European Commission 2023 a). This has important theoretical implications. It seems that the Commission and the Court of Justice defend the existence of a general interest, of a more or less objective nature, which can be identified by technical means, such as impact analyses or the consideration of broad constellations of interests. At the same time, this capacity or ability to identify the general interest is vested exclusively upon the European Commission. Such a conception departs from those models where decisions are taken through a democratic process leading to an unstable 'consensus' that reflects the balance of power and political support of different, politically organised, social groups. Indeed, the concept underlying the Commission's and the Courts' conception is closer to a model in which the legitimacy to decide the "right" regulation is given to those with the "expert" or "technical" knowledge. From this perspective it is logical to treat collective bargaining and its democratic function with reservations. Beyond the theoretical issues, the impact on the practice of European collective bargaining can be very negative: the social partners know, when they enter into negotiations, that they may be confronted with the Commission's refusal to give their agreements normative legal effectiveness at EU level. Evidently, the parties' expectations and bargaining power are affected by the Commission's refusal to give their agreements legal force at EU level.

It is safe to assume that, from now on, agreements at EU level should only be expected in those areas and on those issues where the Commission encourages partners to negotiate, limited to discussing the terms set out by the Commission itself in its agenda. And even when fitting this agenda, it seems that reaching European agreements, at least at cross-sectoral level, is increasingly difficult, as the case of the failed negotiations to negotiate telework seems to show (EPSU, press release 28 November 2023).

3. Implementation of the agreements (2): the 'autonomous' agreements and the role of the national social partners

So-called autonomous agreements are the second type of agreements covered by Art. 155(2) TFEU. These agreements, according to Art.155.2 TFEU, are to be implemented 'in accordance with the procedures and practices specific to the social partners and the Member States'.

Most scholars understand that the social partners, when using the autonomous route for the implementation of their agreements, avoid all the limitations and controls described in the previous section for the binding agreements implemented via Council decision. However, this is only partially truth, since the total absence of limitations and controls can only be predicated of those autonomous agreements that do not originate in a consultation of the Commission. On the contrary, in the case of those agreements that do originate from a consultation, the Commission reserves the possibility of evaluating the agreement reached *ex ante* and the possibility of exercising its right of initiative when it considers that the agreement in question does not meet the objectives of the Union (European Commission, 2004).

Therefore, only autonomous agreements that do not originate in a consultation of the Commission are free from limitations as to their form and content, and can deal with matters that are outside the competence limits of article 153 of the TFEU. These are therefore a genuine manifestation of transnational collective autonomy. On the other hand, in this scenario, given the absence of rules regarding their application, it is up to the social partners themselves to design a self-regulation for the transposition of these agreements. The obvious risk is that they will then become irrelevant for the European legal system, since there is no any recognition in EU law of a power of self-regulation that is capable of conferring any relevance on the results of what has been negotiated in the European legal system by the social partners.

What, then, is the legal effectiveness of these autonomous agreements, what obligations do they generate for the signatories and what rights for third parties? There is no answer to these questions in European positive law. For some scholars, autonomous agreements have no legal impact, being thus mere recommendations, pure ‘gentlemen's agreements’ from which not even binding relationships between the parties can be derived.

However, for most authors, these agreements have a certain degree of binding force, at least of a contractual nature for their signatories, so it seems logical that, once concluded, they should be implemented. Indeed, the European social partners, in accordance with the provisions of Art. 155 TFEU, choose how to implement the agreements, but, in themselves, the agreements would already be effective. This position is consistent with several Commission communications and documents arguing that there is an obligation for agreements to be implemented and for the signatory parties to influence the social partners at national level to effectively implement them (European Commission, 2010). However, given the existing regulatory vacuum, the limitations faced by the presumed binding force of these instruments must be acknowledged.

In this scenario, for most scholars, the reference in Art. 155.2 TFEU to the “procedures and practices of the social partners and the Member States” for the application of the agreements should be interpreted as a referring the agreements to national collective bargaining: the internalisation of the agreement in the different national systems of the Member States through national level collective bargaining would be necessary. The final effectiveness of the autonomous agreements would depend on the effectiveness of the agreements of the social partners in each Member State. This reasoning places us outside Union law to determine the legal value and nature of European collective agreements. This interpretation seems to be the most consistent with the Commission's own view and with the practical application of autonomous agreements by the social partners. Indeed, in an annex to the 2010 Commission document setting out the different responsibilities of the various actors in relation to the implementation of the autonomous agreements, this thesis seems to be confirmed: the national social partners would be the main responsible for implementing the agreements (along with other obligations of information, development of measures for their correct implementation and dissemination, etc.), while the European social partners would have functions of assistance, coordination, control of implementation, interpretation and monitoring, whereas the Commission would provide assistance, financial as well as being ultimately responsible for evaluating and monitoring the implementation of the agreement (European Commission, 2010).

However, there is no obligation for EU Member States to guarantee the general effectiveness of the agreements, which means that these agreements fragment their effectiveness through their reception via collective bargaining in the different Member States of the Union, with the result that the autonomous agreements do not achieve the same legal effectiveness in the different States. In this sense, some authors consider such agreements as soft law instruments which, by not guaranteeing the same level of regulation in all Member States, fail to achieve the fundamental objective that ideally would be pursued by collective bargaining at the European level: the uniform regulation of a given subject or sector at the EU level.

The description of autonomous agreements as framework agreements that need to be transposed into national law through national collective bargaining does not solve the problem of the legal nature of the obligation for national actors to transpose the agreements. Here, again, the question of representativeness arises: ultimately the obligation to implement the agreements will depend on the representative capacity of the social partners at the European level in relation to the organisations at the national level, i.e. on the associative and legal links established between the two levels of bargaining.

IV. THE IMPACT OF EUROPEAN SOCIAL DIALOGUE AND COLLECTIVE BARGAINING AT NATIONAL LEVEL

1. The results of European social dialogue at cross-industry and sectoral level

To understand the dynamics and role of European social dialogue and collective bargaining, a quantitative and qualitative analysis of the results achieved in these processes, both at interprofessional and sectoral level, is helpful. Such analysis indicates that agreements with a regulatory vocation are a small percentage of the total, which in turn indicates that the function of European social dialogue has more to do with influencing the design of European policies and regulations (lobbying) than with the development of an autonomous regulation of industrial relations in the European Union.

Indeed, over the years, the results produced by the European social dialogue have taken the form of numerous documents of various types: agreements, conventions, declarations and others that are difficult to classify. The classification proposed by the European Commission (see Annex 2 of European Commission's 2004 Communication) groups the results of European social dialogue and collective bargaining into different types of documents, distinguishing between agreements (autonomous and implemented by Council decision), process-oriented texts (frameworks for action, policy orientations, guides and codes of conduct), joint opinions, tools and procedural texts. This is also the classification used in the European Commission's social dialogue database.

The total number of results at cross-industry level in the referred database is 109, of which only 10 are considered agreements, 4 of them reinforced by a Council decision and 6 autonomous. The other outputs are identified as declarations (19), monitoring and evaluation reports on agreements (29), frameworks for action (3), joint opinions (40), policy orientations (5), procedural texts (the Agreement on Social Policy) and tools (2).⁴

As for sectoral agreements, the European social dialogue database contained more than 1140 results, which is a significant number, although there is a debate about their quality and real impact. As is the case at the cross-industry level, these are texts of varied typology, among which agreements are a small percentage: only 17 agreements have been concluded at the sectoral level, which represents less than 1.5% of the total, of which 12 are classified in the database as agreements that have requested transposition by a Council deci-

⁴ European Social Dialogue database. Data at 15/08/2024.

sion (of which only 8 have actually been implemented as directives)⁵ and only 5 are intended to be implemented as autonomous agreements. The vast majority of the outcomes are declarations, joint opinions and tools (more than 81% of the total), so it can be said that most of the outcomes produced by the European social dialogue are soft law documents.⁶ The number and type of outcomes produced varies widely from one sector to another, being far from easy to identify trends or factors explaining these variations, which reflect the particular dynamics of each sector.

Consistent with the type of results produced, most of the results of the European social dialogue are addressed to the European institutions and national governments (aprox 60%), aiming at communicating the social partners views on legislative and policy proposals affecting their interests. This data invites to conclude that the European social dialogue's primary or main function is more about lobbying, information and consultation than anything else.

2. Reception of European agreements at national level

The reception at national level of those European social partners' agreements that have been transposed via Council decision is different from that of the autonomous agreements.

Indeed, the legal nature of the agreements that are incorporated into directives for their implementation is identical to that of any other directive, so their implementation at national level should follow the rules that apply to these instruments under EU law, and so must be their impact the same as the impact of any other directive.

When it comes to the autonomous agreements, the starting point is, as explained above, their dubious legal nature and uneven impact in the different Member States, dependent on collective bargaining systems at national level. Indeed, the impact of the existing autonomous agreements at sectoral level varies greatly: for example, in the case of the autonomous agreement in the railway sector on drivers' licenses, it can be argued that, anticipating the European regulation on the matter, it has had a significant impact, given that Dir 2007/50/EC on the certification of train drivers for locomotives and trains establishes a system of licenses and certificates very similar to that contained in the agreement.

⁵ Directives 1999/63/EC, 2000/79/EC, 2005/47/EC, 2009/13/EC, 2010/32/EU, 2014/112/EU, 2017/159/EU and 2018/131/EU.

⁶ European Social Dialogue database. Data at 15/08/2024.

In the case of the multisectoral agreement on crystalline silica, that included a highly effective system of control and monitoring of the agreement, the available data show that the agreement has had a strong follow-up and a positive impact on the safety and health conditions in the concerned sectors in many Member States, with its contents serving as an inspiration both for national collective bargaining and for national and European legislators. On the other hand, in the case of the agreement on European certificates in the hairdressing sector, only in few Member States (Austria, Denmark and Germany) seem to be some awareness of its contents and, as of 2014, only Austria and Denmark had obtained permission for the distribution of the certificate of professionalism, which would be far from the objectives of the agreement to relaunch the quality and good image of the hairdressing sector throughout the Union.

The content of agreements and the existence of mechanisms for the control and monitoring of their implementation are, in the light of the examples discussed above, fundamental. But there are other elements to be considered. First, the context and the internal dynamics of the SSDCs where the agreements have been negotiated matters, which in turn determines the mechanisms for the implementation of the agreements. Each sectoral agreement is the result of long internal processes of debate and preparation, often with an important role (even in this type of autonomous agreement) for the Commission, which is identified as a key element in the achievement of agreements. A second important aspect is the issue of negotiation since, due to the structural characteristics of European social dialogue and collective bargaining, it is almost impossible to negotiate an agreement if the employer is not interested in doing so, so that the possible subjects for negotiation are limited to those areas where there are common interests between employers and trade unions. Thirdly, the activity of the specific social partners involved in the negotiation of each agreement is decisive.

V. CONCLUSIONS

The Juncker Commission, despite the continuity of institutionalised austerity in the mechanisms of economic governance, expressed its intention to boost the social dimension of the European project in order to recover legitimacy, in a bid to enable the completion of the Economic and Monetary Union ('EMU'). Initiatives such as the European Pillar of Social Rights (EPSR) should be read in this light. The first von der Leyen Commission, with its action plan for the implementation of the EPSR, continued this policy line. How-

ever, the judgments of the General Court (T-310/18) and the Court of Justice (C-928/19 P) in the EPSU case are a setback and a call for caution regarding the role of European social dialogue and collective bargaining in the expansion of this social dimension.

The conference on the new start for social dialogue in March 2015 affirmed that social dialogue has a fundamental role in the 'European social model', while recognising, however, that further steps had to be taken to strengthen it and encourage its further development. The joint declaration resulting from this conference delineated the way forward: improving the involvement of the social partners in the European Semester process, both at European and national level; enhancing the capacities and involvement of the social partners at national level, as well as the national social dialogue and collective bargaining processes themselves; strengthening trade unions and employers' associations' involvement in the legislative process and policy-making in the European Union; and clarifying the relationship between the 'Better regulation' agenda and social dialogue agreements.

There is undoubtedly a link between the relaunching of the social dialogue and the attempt to deepen the EMU, given that in order to complete the EMU it is in turn necessary to deepen the development of the social dimension of the Union in order to try to reverse the deterioration in the acceptance of the European project, reinforcing its legitimacy and weaving new alliances. Thus, as Lo Faro pointed out long ago, it seems plausible to think that European social dialogue is mobilised once again in an attempt to add legitimacy to the Union's social policies, thus easing the acceptance of market integration (Lo Faro, 2000). This seems to be reinforced by the adoption of the EPSR and its action plan, that has translated so far in the adoption of some Directives and Recommendation with social content. However, despite all the rhetoric about the centrality of social dialogue, the situation of European social dialogue and collective bargaining at EU level is far from ideal, and a mixed picture seems to be emerging.

The scarcity of agreements is partly explained by the shortcomings of the legal set-up of European collective bargaining, which makes it difficult to negotiate agreements, as well as to implement them uniformly in the different Member States. The threat of legislation by the Commission has long been considered by many scholars as a functional substitute for the typical pressure measures that trade unions have in national systems of collective bargaining. In this sense, the way forward to achieve the objectives proposed in the declaration 'a new start for social dialogue', especially in relation to the greater participation of the social partners in the legislative process of the Union,

would be to design an ambitious and credible regulatory agenda in the social sphere. The EPSR and its development seem to be such an agenda, but there are doubts about the role of the social partners. Indeed, the Commission's decision not to transpose the agreement on information and consultation of civil servants and public employees in central administrations, which is at the root of the EPSU case, represents an interpretation of Article 155.2 TFEU, now endorsed by the case law of the Court of Justice of the European Union, which greatly weakens the potential of collective bargaining.

However, the proclamation of the EPSR, with its promise to 'instrumentalise' social concerns in a scenario of a deepening EMU, may be a catalyst for change in other aspects, particularly through the incorporation of the Pillar and its principles into the European Semester process through the establishment of standards that would contribute to making it more social. This last option would be complementary to the idea of improving the involvement of the social partners in the European Semester process. Indeed, in this front it seems that some progress has been made, and social dialogue seems to have become more important, particularly at national level, in the European Semester, with increased funding and Country Specific Recommendations on social dialogue and the strengthening of social dialogue and collective bargaining (Council Decision EU 2022/2296).

But moving seriously towards strengthening both the actors and the processes of national collective bargaining and social dialogue probably requires reversing some of the reforms made in the last decade or so on national collective bargaining, frequently following the recommendations issued by the EU in Country Specific Recommendations of the European Semester. As it is well known, some of these recommendations urged some Member States, such as Spain, to undertake reforms that had a major impact on their national collective bargaining systems, weakening to some extent the role of trade unions and collective bargaining for the sake of greater 'flexibility'. Reversing this process entails promoting reforms that go in the opposite direction to those described above, enabling the strengthening of the social partners, and therefore of social dialogue and collective bargaining, in those Member States where they remain underdeveloped or have been weakened as a result of the referred reforms. In this way, within the framework of the European Semester and with reference to the EPSR and the central role of the social partners in its principle 8, future Country Specific Recommendations could become an instrument for developing social regulation along these lines. In this sense, the proposal for a Council Recommendation on strengthening social dialogue in the European Union (European Commission, 2023 b) is a step in the right direction. In par-

ticular, the idea of developing indicators specifically aimed at monitoring progress in the reforms seeking to strengthen social dialogue and collective bargaining is promising. The idea is that strengthening national social dialogue and collective bargaining processes in the various Member States of the Union would in turn undoubtedly strengthen European social dialogue and collective bargaining, promoting their development and their central role in the European social model.

In this later sense, reforms at national level may be further incentivised by provisions urging Member States to implement or set in motion such reforms in EU secondary law. Such is clearly the case in those provisions of the adequate minimum wage Directive stating the need to strengthen collective bargaining. It may be also the case in the future Directive on working conditions of platform workers. All these are positive developments in the right direction, setting an example for future developments of the EPSR. It seems, therefore, that although the prospects for social dialogue and collective bargaining at EU level are rather bleak, due mainly to the problems arising from an incomplete and dysfunctional legal framework, such as the lack of relevant outcomes, clearly visible at cross-industry level, on the contrary the perspectives for social dialogue and collective bargaining at national level are more positive. The role of EU law on this later scenario seems to be that of promoting and incentivising legal reform at national level that could result, in the long term, in the strengthening of EU level social dialogue and collective bargaining, if national reforms succeed in enhancing the power and capacities of social partners in the Member States.

CASE LAW

Case T-135/96, 17.6.1998, *UEAPME v Council*, ECLI:EU:T:1998:128

Case C-341/05, 18.12.2007, *Laval un partneri*, ECLI:EU:C:2007:809

Case T-310/18, 24.10.2019, *EPSU and Goudriaan v Commission*, ECLI:EU:T:2019:757

Case C-928/19 P, 2.9.2021, *EPSU v Commission*, ECLI:EU:C:2021:656

CHAPTER 34

COLLECTIVE BARGAINING RIGHTS AND FREE COMPETITION

JOSÉ MARÍA GOERLICH PESET

INDEX: I. Competition rules: general aspects. II. The immunity of collective bargaining agreements and their scope: the Albany saga. 1. The Albany case. 2. The limits of interpretation. III. Collective bargaining and self-employment. 1. The doctrine of the Court of Justice. 2. Guidelines on the application of Union competition law to collective bargaining agreements concerning the working conditions of self-employed persons without employees.

I. COMPETITION RULES: GENERAL ASPECTS

According to the Treaty on European Union, one of the aims of the EU is the establishment of an “internal market” in which a “highly competitive social market economy” functions (TEU Art. 3.3). To this end, Article 3.1.b) of the Treaty on the Functioning of the European Union gives the Union exclusive competence for “the establishing of the competition rules necessary for the functioning of the internal market”, although in this latter area the Member States have shared competences that enable them to contribute to action at European level (TFEU Article 4.2.a). In order to achieve this internal market, articles 101 f. of the TFEU establish the rules on competition that decisively condition those established in the Member States as well as national practices.

Article 101.1 TFEU considers anti-competitive conduct to be “incompatible with the internal market”. In this sense, it prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- b) limit or control production, markets, technical development or investment;
- c) share markets or sources of supply;
- d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts”.

Apparently, the addressees of these rules are companies. As we have just seen, Article 101.1 TFEU, when defining the prohibited consultations, expressly refers to “agreements between undertakings, decisions of associations of undertakings and concerted practices”. However, according to Community case law, the notion of undertaking is to be understood in a broad sense. “In the context of competition law”, this notion includes “every entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed” and economic being understood as “any activity consisting in offering goods or services on a given market” (Judgement of the Court of First Instance of 13 December 2006, *FNCBV and Others v Commission*, T-217/03 and T-245/03, EU:T:2006:391, citing earlier cases; more recently, Judgment of the General Court of 26 October 2010, *CNOP and CCG v Commission*, T-23/09, EU:T:2010:452).

II. THE IMMUNITY OF COLLECTIVE BARGAINING AGREEMENTS AND ITS SCOPE: THE ALBANY SAGA.

1. The Albany case

Of course, the broad definition of anti-competitive business conduct, as well as the very broad notion of company used in this area of the law, means

that collective bargaining and collective agreements may fall within the scope of application of antitrust rules. After all, collective agreements are nothing more than agreements involving a plurality of employers or other subjects that can be equated to them. On the other hand, depending on their binding force, they produce distortions in the powers of action of the former in the market. In a formal approach, they are therefore collusive agreements. Not even the negotiation in the corporate sphere, in which only one entrepreneur participates, is excluded from such consideration, since the social counterpart may well be considered a company, in the sense that this notion has in competition law.

The possibility that a collective agreement could be considered as a collusive agreement contrary to Art. 101 TFEU was first analyzed by the Court of Justice in three identically argued judgments of 21 September 1999 (*Albany*, C-67/96, EU:C:1999:430; *Brentjens*, C-115/97 to C-117/97, EU:C:1999:434, and *Drijvende Bokken*, C-219/97, EU:C:1999:437). All three resolved similar issues, concerning the Dutch pension system and the involvement of collective agreements in determining the pension funds to be considered mandatory for all companies in a given sector. Specifically, the question raised was whether the “decision taken in the context of a collective agreement by the organisations representing employers and workers in a given sector, in the context of a collective agreement, to set up in that sector a single pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make affiliation to that fund compulsory for all workers in that sector is contrary to Article 85 of the Treaty” (now Article 101(1) TFEU) (paragraph 52). Subsequently, related, although not identical, questions have been addressed in the judgments of the Court of 12 September 2000 (*Pavlov and others*, C-180/98 to C-184/98, EU:C:2000:428) and 21 September 2000 (*Van der Woude*, C-222/98, EU:C:2000:475), up to the most recent one of 3 March 2011 (*AG2R Prévoyance*, C-437/09, EU:C:2011:112). The first concerns a case in which compulsory membership was established for certain liberal professionals by their representative organizations; the second discusses whether the *Albany* doctrine is applicable to provisions relating to health insurance; the third, finally, raises a case very similar to the latter.

The doctrine established in the *Albany* case and subsequently reiterated revolves around two ideas. First, it is openly recognized that collective bargaining agreements can have a negative effect on inter-company competition. In this regard, it is stated that “certain restrictions of competition are inherent in collective agreements between organizations representing employers and workers” (paragraph 59). However, in view of the legitimate aim they pursue, they cannot be subject to antitrust law since “the social policy objectives pur-

sued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment". In this sense, the Albany doctrine echoed the rules then included in the Treaties in relation to the commission's mission to "promote close cooperation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers" (paragraph 55) as well as to seek the development of social dialogue at European level (paragraph 56). At present it would be possible to refer to Art. 151 f. TFEU, to the documents referred to therein - the European Social Charter of 1961 and the Community Charter of the Fundamental Rights of Workers, paragraph 11 - as well as to Art. 28 of the EU Charter of Fundamental Rights, which expressly recognizes the "right to negotiate and conclude collective agreements".

Therefore, the conclusion reached is that "agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty" (now Article 101(1) of the FEU Treaty) (paragraph 60). In short, therefore, the assessment of the adequacy of the agreement to the antitrust rules requires, on the one hand, that the agreement between undertakings has been "concluded in the form of a collective agreement and is the outcome of collective negotiations between organizations representing employers and workers" (paragraph 62); and, on the other hand, that its object "contributes directly to improving one of their working conditions" (paragraph 63).

2. The limits of interpretation

At first sight, the Albany doctrine seems to preserve collective bargaining from any attacks coming from the market discipline: it would imply the consecration of a sort of immunity of the collective bargaining agreement from it. However, this is not the case. From the outset, and although this is developed elsewhere in this volume ("Freedom of establishment and the freedom to provide services and social rights"), it only acts in the field of competition law: issues arising from fundamental economic freedoms, which always seem to prevail, are left aside. This has been the understanding of Community case law since the middle of the previous decade. The idea was forcefully affirmed in the famous Viking judgment of 11 December 2007 (*The International Transport Workers' Federation and The Finnish Seamen's Union*, C-438/05,

EU:C:2007:772). Faced with the allegation of the Albany doctrine as a possible basis for trade union action deemed to be contrary to freedom of establishment, the Court of Justice stated that “the fact that an agreement or an activity are excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions are to be applied in different circumstances”. Subsequently, the judgment of 15 July 2010 (*Commission v. Germany*, C-271/08, EU:C:2010:426), which, by the way, resolves a case that is somewhat related to that of the Albany judgment, insists on this approach.

On the other hand, in relation to the antitrust rules understood in the strict sense, the integrity of the agreement is preserved only if the conditions set out in the judgment itself are met, which refer not only to the possibility of recognizing in the agreement in question the characteristics of the collective agreement, but also to the fact that the agreement must act within its proper function of improving the working conditions of the workers. Immunity only arises when the agreement moves towards the common pursuit of measures aimed at improving employment and working conditions: only if they act for the achievement of such objectives, collective agreements are not to be considered as falling, by reason of their nature and object” within the scope of application of the antitrust rules. On the contrary, if an agreement stipulation does not move along such lines, it could be prosecuted from an antitrust perspective. Thus, the immunity of agreements from the application of antitrust law is only relative.

Some member states’ legal systems expressly include this limited nature of the immunity of collective bargaining agreements from competition rules. In Portugal, for example, art. 478 *Código do Trabalho* prohibits collective bargaining agreements from “regulating economic activities, in particular the periods of operation, the tax regime, the formation of prices and the exercise of the activity of temporary employment agencies, including the contract of use”. For its part, since 2018, the French *Code du travail* imposes that, at the time of assessing the extension of the personal effectiveness of a collective agreement, the competent labour authority analyzes the possible conflicts between its clauses and competition law and admits that the latter be denied “for being excessively detrimental to free competition” (art. 2261-25).

In other Member States there are no specific rules on this matter, but there are also cases of friction between collective bargaining agreements and the imperatives of the defense of competition. In the case of Spain, for example, the national competition authority has taken action in relation to con-

tractual clauses that impose certain pricing policies on companies, condition their decisions on the supply of their services over time or extend their application beyond the natural scope deriving from the representation held by the negotiators. Likewise, certain subrogation clauses in collective bargaining agreements, the limitations they sometimes impose on the use of outsourcing and the criteria they may establish in relation to the provision of services for the companies or workers concerned have also been called into question.

Although these conflicts are not very frequent, it should be noted that they are not always resolved harmoniously by the various competent public bodies, the national competition authorities and the judicial bodies responsible for monitoring the development of collective bargaining. This is most likely due to the brief formulation of the Albany doctrine, which also contrasts with the extensive considerations developed by Advocate General Jacobs in his previous opinion of 28 January 1999 (EU:C:1999:28). As we have seen, judgement Albany accepts the restrictive effects of collective agreements on competition as long as they have as their purpose the common pursuit of measures to improve employment and working conditions. Thus, if, instead of dealing with aspects related to remuneration and organization of work, they affect the supply of goods or services that the company offers to the market or the position it occupies in it, collective agreements would exceed their institutional function and, therefore, could be subject to control from the perspective of the defense of competition. However, the separation between the two facets is not simple, since matters that clearly fall within the former have a bearing on the latter, as they indirectly affect the company's position in the market. In this context, the question of the limits to collective bargaining may appear in certain cases to be highly conflictive, since the perspective from which the operator approaches the issue may be decisive when making the assessment.

For the time being, however, we do not have any help other than that derived from the Albany judgment and the subsequent pronouncements that have already been commented on. The *acquis* could have been increased with the resolution of the preliminary ruling requested by the Spanish National Commission of Markets and Competition in relation to the legal support that Royal Decree-Law 9/2019 gave to the conventional imposition of the subrogation in the field of port stevedoring. However, the judgement of 16 September 2020 (*Anesco and others*, C-462/19, EU:C:2020:715) left the question undecided on the grounds that the Commission did not have the status of “court or tribunal of a Member State” within the meaning of Article 267 TFEU.

III. COLLECTIVE BARGAINING AND SELF-EMPLOYED WORKERS

1. The doctrine of the Court of Justice

On another note, the Albany doctrine only applies to subordinate workers. In other words, the tendential exemption from the application of the anti-trust rules to collective bargaining derived from the Albany ruling does not apply to the collective determination of working conditions, when this affects self-employed workers. The aforementioned judgement of 12 September 2000 (*Pavlov and others*, C-180/98 to C-184/98, EU:C:2000:428), had already shown that the exemption established in that judgment could not be extended to include an agreement signed by a representative organization to guarantee a certain level of pensions to all members of a profession exercised independently. None of the provisions that had been used in Albany could justify “the members of the liberal professions to conclude collective agreements with a view to improving their terms of employment and working conditions and providing that, at the request of members of the professions, such agreements be made compulsory by the public authorities, for all the members of the profession in question” (paragraph 69). In view of this, the general antitrust rules apply since the professionals in question - medical specialists - “provide, in their capacity as self-employed economic operators, services on a market, namely the market in specialist medical services. They are paid by their patients for the services they provide and assume the financial risks attached to the pursuit of their activity” (paragraph 76).

The idea that the collective determination of working conditions by self-employed service providers is subject to antitrust law was subsequently reiterated by the Judgement of the Court of First Instance of 13 December 2006 (*FNCBV and Others v Commission*, T-217/03 and T-245/03, EU:T:2006:391) and, above all, by the judgment of 4 December 2014, *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411. In the case decided by the latter, the possibility of a collective agreement, in addition to the salaries of subordinate workers, to fix the salaries corresponding to self-employed workers who, under certain conditions, perform services similar to those of subordinate workers, was questioned. The European Court delimits the Albany doctrine from the subjective perspective, limiting it strictly to the clauses of the agreements referring to subordinate workers and employees. It therefore considers that the competition rules are fully applicable in this case. Although the self-employed “perform the same activities as employees”, they are considered as undertakings within the meaning of Art. 101.1 TFEU “for they offer

their services for remuneration on a given market... and perform their activities as independent economic operators in relation to their principal” (paragraph 27). Consequently, “in so far as an organisation representing workers carries out negotiations acting in the name, and on behalf, of those self-employed persons who are its members, it does not act as a trade union association and therefore as a social partner, but, in reality, acts as an association of undertakings” (paragraph 28). There is therefore no reason to exclude the outcome of this negotiation from the application of antitrust law.

In any case, this conclusion is not automatic. On the contrary, the Court leaves an escape route in the event that the addressees of the agreement are not genuine self-employed workers. Indeed, the above statement does not undermine the possibility that a collective agreement provision such as the one described may be considered to be “the result of dialogue between management and labour if the service providers, in the name and on behalf of whom the trade union negotiated, are in fact ‘false self-employed’, that is to say, service providers in a situation comparable to that of employees” (paragraph 31). The judgment thus incorporates into the problem at hand previous approaches in Community case law, both in terms of competition (“a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter’s activity and operates as an auxiliary within the principal’s undertaking”; paragraph 33; cf. judgement of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio*, C-217/05, EU:C:2006:784) as well as in the social field: the qualification of self-employed provider under national law does not exclude that the same person should be qualified as an employee for the purposes of European Union law if his independence is only fictitious (paragraph 34). Further developments of this idea can be found elsewhere in this volume (see Chapter 7: “The concept of worker”).

2. The Guidelines on the application of Union competition law to collective agreements concerning the terms and conditions of employment of self-employed persons without employees

The importance of self-employment, as well as the similarities it often has with subordinate employment, certainly calls for a revision of the traditional conclusions on this subject. This task has been undertaken by the EU

Commission Communication approving the Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 374/02), published in the Official Journal of the European Union of 30 September 22. Its objective is to set out “the principles for assessing under Article 101 of the Treaty on the Functioning of the European Union (‘TFEU’) agreements between undertakings, decisions by associations of undertakings and concerted practices (collectively referred to as ‘agreements’) concluded as a result of collective negotiations between solo self-employed persons and one or several undertakings (‘the counterparty/-ies’), concerning the working conditions of solo self-employed persons.”.

This cannot be done on the basis of recourse to the figure of the false self-employed persons: although in the case of a person with such status the Albany doctrine applies, the fact is that “until a false self-employed person has been found by a court or by an administrative authority to be a worker, that person does not have the legal certainty that the Albany exception will apply” (paragraph 7). It is therefore necessary to accept that there are genuine self-employed persons whose performance is not fully integrated into the principal’s activity as is the case with subordinates, but who “may not be entirely independent” of him or “may lack sufficient bargaining power”. For them, collective bargaining is “an important means to improve the working conditions” (paragraph 8). The Guidelines therefore clarify: “(a) that collective agreements concluded by solo self-employed persons who are in a situation comparable to that of workers fall outside the scope of Article 101 TFEU; and (b) that the Commission will not intervene against collective agreements of solo self-employed persons who experience an imbalance in bargaining power vis-à-vis their counterparty/-ies” (paragraph 9).

To this end, the extensive guidelines first delimit the typology of the agreements that are covered by them. A broad notion is used, both from the formal perspective and from the point of view of content. In the first sense, it refers to “all forms of collective negotiations conducted in accordance with national law and practice, ranging from bargaining through social partners or other associations to direct negotiations by a group of solo self-employed persons or their representatives with their counterparty/-ies or associations of those counterparties”. The guidelines also cover individual or group accessions to an existing agreement or arrangement, regardless of whether it relates to subordinate or autonomous benefits (paragraph 14). As for the latter, matters that may be subject to negotiation include “remuneration, rewards and bonuses, working time and working patterns, holiday, leave, physical spaces where

work takes place, health and safety, insurance and social security, and conditions under which solo self-employed persons are entitled to cease providing their services or under which the counterparty is entitled to cease using their services” (paragraph 15).

As regards, secondly, the persons covered by the Guidelines, as is clear from their title, they refer to “solo self-employed persons”. The idea is of personal services, although it is admitted that “certain goods or assets are used to provide their services” provided that they constitute “an ancillary means of providing the final service”. Not included, however, are activities consisting of “merely in the sharing or exploitation of goods or assets, or the resale of goods/services” (paragraph 18). In any case, the situation of self-employed persons who have recourse to collective fixing of working conditions must be “comparable to that of workers” (paragraph 20). Specifically, this requirement is met in three cases: “economically dependent solo self-employed persons” (paragraph 23 ff.), “solo self-employed persons working ‘side-by-side’ with workers” (paragraph 26 ff.) and “solo self-employed persons working through digital labour platforms” (paragraph 28 ff.). It is also admitted that those “who are not in a situation comparable to that of employees may nevertheless have difficulties in influencing their working conditions because they are in a weak negotiating position vis-à-vis their counterparty/-ies” (paragraph 32) may have recourse to collective determination of working conditions. It lists the open-ended conditions under which this weak position is understood to exist, depending on the party’s level of “economic strength” (paragraphs 33 ff.); and opens up the possibility for national or Union legislation to provide for further exceptions (paragraphs 36 ff.).

Finally, it should be noted that the criteria set out by the Guidelines are by no means absolute. This is in a twofold sense. On the one hand, the fact that certain types or categories of agreements are expressly contemplated in the Guidelines does not shield them from antitrust scrutiny. To cite a couple of examples: although, as we have seen, a wide range of agreements and a broad content for them is possible, it is excluded that they may go “beyond the regulation of working conditions”, that they determine “the conditions (in particular, the prices) under services are offered by solo self-employed persons or the counterparty/-ies to consumers” or that they limit “the freedom of undertakings to hire the labour providers that they need” (paragraph 17); Member States (or the Union) are also allowed to establish new exceptions, but only “where such national legislation pursues social objectives” will the agreements be exempted from action by the competition authorities (paragraph 36). On the other hand, and in the opposite sense, the fact that a certain agreement or cat-

egory of self-employed providers has not been covered does not automatically mean that we are dealing with an anti-competitive agreement: “ collective agreements negotiated and concluded by self-employed persons that do not fall within the scope of these Guidelines do not necessarily infringe Article 101 TFEU, but require a case-by-case assessment like any other type of agreement between undertakings” (paragraph 12).

CHAPTER 35

RIGHT TO STRIKE AND COLLECTIVE ACTION

ANTONIO BAYLOS GRAU

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I. THE REGULATION OF THE RIGHT TO STRIKE IN EUROPEAN UNION LAW

The right to strike is part of the set of collective and trade union rights that characterize the European social model. Incorporated into the national constitutions of the respective member states either as an essential content of trade union action or as an autonomous right, strike action is recognized as a right at the national-state level of the different EU member states, without prejudice to the different models to which its ownership and exercise can be redirected. In general terms, a division can be made between strike models closely linked to the bilateral nature of the employment relationship, and therefore fundamentally connected with collective bargaining processes, and those in which the strike is

related to the general interests of the workers to be defended through the powers of self-tutelage and which therefore transcend the scope of the collective contract, projecting the field of action also into the socio-political sphere. Therefore, it can be concluded that the strike is a fundamental right recognized by the "constitutional traditions" of the European member states and that it offers its own regulation in each national legal system.

1. The right to strike in European Charters of Rights

At the level of supranational declarations of rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) recognized in its Art. 11 that "everyone has the right to freedom of peaceful assembly and to freedom of association, including the right to form and to join trade unions for the protection of his interests". In this recognition of freedom of association was implicit the recognition of the freedom of collective action and therefore the recourse to the right to strike, as was also the case in parallel with the recognition of freedom of association in ILO Convention 87 and the recognition by the Committee on Freedom of Association (CFA) of the right to strike.

However, in later texts this perspective of integrating the right to strike into the content of trade union action was abandoned. The right to strike is recognized in the European charters of rights with its own substantivity. Articles 6.2 and 6.4 of the European Social Charter establish a direct link between the right to collective bargaining and the right to strike. The Member States undertake to "promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organizations and workers' organizations, with a view to to the regulation of terms and conditions of employment by means of collective agreements", and, in this sense, they recognize "the right of workers and employers to collective action in cases of conflicts of interests, including the right to strike, subject to obligations that might arise out of agreements previously entered into".

The formula of the European Social Charter on the recognition of the right to strike was to be used, however, in the declaration contained the Nice Charter of 2000, to be later embodied in the Charter of Fundamental Rights of the European Union, which will receive full normative value by establishing in art. 6 of the TEU that "the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg on 12 December 2007, which shall

have the same legal value as the Treaties". Thus, art. 28 of the CFREU recognizes workers or their respective organizations "the right (...) in cases of conflicts of interests, to take collective action to defend their interests, including strike action", a recognition which is again made in connection with the right to collective bargaining "at the appropriate levels".

The strike model thus recognized contrasts with the predominant model in countries with a constitutional culture of guarantees and egalitarianism, with differentiated trade union centers, each aspiring to represent workers as a whole, and each with a strong ideological and historical burden. Art.51 of the CFREU states that "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers", then adding in paragraph 2 that "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties". This means that if there is no European legislation that concretely bases the right recognized in the CFREU because the Union does not have competence over a matter or, even if it has competence, has not developed it, this precept cannot be invoked or satisfied in the European area delimited by the law of the Union. It is therefore decisive to determine the margins of action of these rights between their recognition at the national-state level and the field of action reserved for the EU.

2. Substantial exclusions from the scope of EU competence: the right to strike

Both art. 2.6 of the Agreement on Social Policy and art. 153 TFEU reiterate a substantial exclusion of certain matters from the competences of the European Union in social matters. Indeed, according to art.153.5 TFEU, "the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs".

The European Union has no competence to establish a European regulation of the right to strike, it cannot "support and complete" the action of the Member States in this matter, nor can it harmonize national legislation in this respect. There could not therefore be a "homogeneous" regulation of the right to strike at the supranational level of general scope, but rather it is broken down into the various national regimes, into the various regulations that the

respective state and national systems make of the right to strike on the basis of the constitutional framework and the implementing rules in force in each country. Thus, although the right to strike is recognized in the CFREU as a fundamental right of European citizens, it is actually projected at the national-state level, reserving its regulation to that internal level, within the framework of the "balances" that are made in this respect in each national system of labour relations, outside the "radius of action" of the EU (Orlandini, 1999).

This is a conclusion widely supported by doctrinal and judicial experts in European law, who ultimately agree on the impossibility for the Union to draft binding legal acts in the supranational area that corresponds to it on the regulation of the right to strike exercised therein.

II. THE RIGHT TO STRIKE AND TRANSNATIONAL ACTIONS IN THE EUROPEAN CONTEXT

It should be borne in mind that, apart from the consecration of the European Union as a unified mercantile and monetary space, this reality is overlapped by the development of mercantile and social relations on a global scale, where strike action is a means of pressure which obliges the adoption of rules disciplining labour relations at this level. The strike in the globalization space allows the creation of rules that arise as a form of termination or avoidance of the measure of pressure, and directly favors not only the self-protection of workers not bound to any order of protection in their working conditions, but also the emergence of a standard of protection under contractual forms of collective agreement or collective bargaining agreement. The most relevant case is in the maritime transport sector. The strike is the way to impose minimum and standardized working conditions on the crews of flag of convenience ships. In these cases the strike action does not rely on the seamen or the crew of the ship, but on the solidarity of the dock workers or other seafarers to prevent the unloading of goods or passengers at the port and the refueling of the ship. The flag of convenience ship can only sail if the shipowner agrees to sign a standard collective agreement that guarantees reasonable and convenient standards of wages and working conditions of the seafarers enrolled, which entails liability for non-compliance and its justiciability. We will refer to this practice later on.

In other cases, strikes also function as a means of guaranteeing the rights recognized in collective agreements signed in a given country and ignored by companies that post workers from that country despite being bound by the obligations of the agreement. The strike is therefore used as a trade union and

collective instrument against social *dumping*. This form of collective action has a specific application within the perimeter marked by the internal borders of the European Union, the so-called internal market, in which the wage differential between the various countries that compose it often gives rise to lacerating disparities in the protection of working conditions and downward competition on pay and employment conditions which, as will be seen below, occur in the context of the transnational posting of workers (Orlandini, 2017) or in the exercise of the economic freedoms to provide services and freedom of establishment.

Sometimes, the exercise of a collective action indirectly affects the determination of other notions of European transport law. This has been the case with the possibility that the calling of a strike may be considered an "extraordinary circumstance" entitling the carrier not to compensate passengers whose flight was cancelled as a result of the strike. In Krüsemann and others (ECJ of 12 April 2018, C-195/17 and others), a case of conflict in the face of an airline restructuring measure expressed by the spontaneous "wave of affections" consisting of absences due to illness of technical navigation staff and cabin crew members is contemplated, without therefore being called by a trade union as a collective action measure, which in German law would be classified as a "wildcat strike" (irregular), which cannot be protected under the protection of freedom of association. For the ECJ, however, this qualification cannot be subsumed under the notion of "extraordinary circumstances", because an unforeseen event can be inherent to the normal exercise of business activity, especially if, as in the case under consideration, the conflict takes place in the context of the restructuring measures announced by the carrier, decisions that are part of the normal management of the company. In this collective dynamic, the risks arising from the social consequences of the conflict must be considered inherent to the normal activity of the companies.¹

The strike used against wage dumping can be configured as an obstacle to the freedom of movement of goods and persons, to the freedom of establishment, to the freedom to provide services. And this on the basis of a certain "unequal balance" (Baylos, 2008, p. 128) between two levels - national and supranational - which pose blocks of constitutionality with different and large-

¹ "The spontaneous absence, due to unauthorised work stoppage under employment law or collective agreements (a "wildcat strike"), of a significant part of an operating air carrier's staff for flight operation is an "extraordinary circumstance" under Article 5(3) of Regulation No 261/2004. However, the exemption appearing in Article 5(3) applies only in respect of extraordinary circumstances which could not have been avoided, even if all reasonable measures had been taken by the air carrier concerned. This is a question for the referring court to decide, as is the issue of how high the rate of absenteeism must be for an extraordinary circumstance to have occurred in the context of a wildcat strike."

ly confronting material references. From the political parameters prior to the "modernizing" impulses of labour law in Europe, a certain implicit clause was understood to be applicable that solved this conflict by referring to the coexistence of respect for the constitutional traditions of the member states and ultimately to what was defined as the European social model, according to which the interpretation of the fundamental freedoms of the European Union should respect the fundamental rights of a social nature and in particular trade union and collective action for the protection of workers' rights.

1. Freedom of movement and the right to strike

The first fundamental economic freedom which constitutes the foundation of the European Union itself, as opposed to the right to strike, is the freedom of movement of persons and goods, a central element in the configuration of the legal and political system of the European Union. When the strike takes place in certain key sectors, such as transport, the continuity of which makes possible the free movement of goods, the question arises as to whether it can be restricted or prevented precisely in order to preserve this principle of free movement, on the understanding that the European rule would not directly regulate the right to strike, but would be protecting the right of persons and goods to move freely, regardless of whether the origin of such disturbances came from the exercise of a fundamental right recognized in the national legal systems at the highest level as a fundamental right.

This is the purpose of Council Regulation 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States², which, with the precedent of the French farmers' case and the ECJ ruling in *Commission of the European Communities v. French Republic* of 9 December 1997³, provides for the adoption of measures against actions that seriously disturb or hinder the free movement of goods, where the term "omission" shall extend to cases "where the competent authorities of a Member State, faced with an obstacle caused by actions of

² Official Journal L 337 of 12-12-98. See also Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 7 December 1998 on the free movement of goods, Official Journal L 337, 12-12-98.

³ ECJ 9-12-97, *Commission of the European Communities v. French Republic* C-265/95, which analyzes the operability of Article 28 of the EC Treaty in the achievement of the objective of full integration of the internal market, extending its scope to the acts of individuals and specifying the "liability for failure to act" of the State before them. The importance of this judgment, both in itself and in the adoption of Regulation 2679/98, of December 7, 1998, is studied in detail by Orlandini (1999), p. 627 ff.

private individuals, fail to take all necessary and proportionate measures within their competence to remove the obstacle and ensure the free movement of goods within their territory" (Art.1 Regulation), providing for a specific procedure for the formal complaint by the Commission to the State about the disturbance or hindrance to free movement occurring in the territory of that State.

The regulation expressly excludes from the notion of actions that disturb the freedom of movement of goods, which the Member States are obliged to prevent, the restrictions that this freedom may suffer as a consequence of the exercise of the right to strike. Article 2 of Regulation 2679/98 stipulates that it may not be interpreted "as affecting in any way the exercise of fundamental rights as recognized in Member States, including the right or freedom to strike", and goes on to specify that "these rights may also include the right or freedom to take other actions provided for by the specific industrial relations systems in Member States"⁴. This means, therefore, that there is no normative response at the European level on the limits to the exercise of the right to strike in a sector that disturbs or hinders the free movement of goods, but that, depending on the strict application of the principle of subsidiarity, this is resolved in the disparity of legal solutions on the notion of strike that each national system provides in this respect.

The interpretation of the freedom of movement of persons and goods in such a way that it does not interfere with the exercise of fundamental rights of collective action is deduced from the case law of the ECJ from its *Albany* judgment⁵, which reflected on the relationship between collective bargaining and community economic freedoms. Adapting this doctrine to the regulations on freedom of movement, it cannot be applied to the collective actions of workers and their unions, protected as a fundamental right by the Community legal order itself, although it refers to the nature that the strike in question may have depending on its objectives and development in order to be classified as legal or illegal or abusive in the national legal system in question as a conditioning factor for this conclusion.

This means that collective rights produce a sort of "singular derogation" from the supranational economic constitution (Castelli, 2012), which in fact creates a "space of immunity" for the right to strike in relation to the "dynamics of market integration" that unequivocally express the fundamental freedoms of the European Union and in particular the freedom of movement (Sciarra, 2007, p. 35).

⁴ Member States undertake to do everything in their power, taking into account the protection of fundamental rights, including the right or freedom to strike, to protect the free movement of goods and to deal promptly with actions which seriously disrupt the free movement of goods, as defined in Regulation (EC) No 2679/98".

⁵ CJJUE 21-9-99, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* C-67/96.

2. **Freedom of establishment and freedom to provide services. The Viking and Laval doctrine**

The decidedly neoliberal turn that occurred with the Barroso Commission generated a certain exaltation of the freedom to provide services of the (current) art. 56 of the TFEU as the prescriptive and explanatory axis of the dynamics of labour market integration (Lo faro, 2008, p. 73). This is directly related to the posting of workers regulated in Directive 96/71 and the weakening of the guarantees of this regulation with respect to the freedom to provide services by companies, and workers as an integral part of the service provided. This led to the debate in those years on the proposal for a directive on the liberalization of services (Bolkestein Directive), which raised the problem of which labour regulations were applicable to posted personnel according to the freedom to provide services between European states, choosing the rules of the state of origin instead of those of the country of destination.

Although this legislation did not succeed, two cases were subsequently raised in which trade unions opposed the unilateral relocation of companies that degraded the working conditions of the workers concerned or prevented clear signs of social dumping. This gave rise to two judgments handed down by the Grand Chamber of the ECJ in December 2007, the Viking and Laval cases, which were to give rise to an intense doctrinal debate at European level.

The factual assumption on which Viking relies is as follows: In 2003, the Finnish shipping company Viking decided to gain a competitive advantage by re-registering its transport ferry Rosella, which plied the Helsinki-Tallin route in the Baltic Sea, under the Estonian flag, replacing the Finnish crew with lower paid Estonian seafarers. The Finnish union called a strike to have a collective bargaining agreement with working conditions similar to those of Finnish seamen applied to this crew, forcing the company to sign an agreement to that effect. But a year later, Viking filed a lawsuit in England against the Finnish union and the International Transport Workers' Federation (ITF), which is based in London, seeking a declaration contrary to the freedom of establishment recognized in Art. 43 of the EC Treaty - today Art. 49 of the TFEU - and to the freedom of establishment recognized in Art. 43 of the TFEU, and to the freedom of establishment recognized in Art. 49 of the TFEU. TFEU - and to the freedom to provide maritime transport services of Regulation 4055/86, that in the future the Finnish union could call a strike to protect the working conditions of its members, forcing the company to negotiate a collective agreement, thus preventing the possibility of the company to find competitive advantages in this wage difference between the countries of origin, as well as the Interna-

tional Federation to call actions of solidarity with the measure of pressure decided by the said union of Finland, for the same reasons. The question posed by the British court directly affects a well-established trade union practice in the ITF of using direct strike action and solidarity as a measure of pressure to obtain the downgrading of collective treatment of workers of the sea and, in the specific case, intended to confront an action of self-protection against the relocation of the company that involves the flagging of the ship, with the freedom of establishment (now Article 49 of the TFEU) and freedom to provide services (now Article 56 of the TFEU).

For its part, *Laval* presents a case of trade union reaction to social dumping caused by the displacement of workers as a result of the free provision of services in the unified European market. Swedish trade unions took collective action against Laval, a Latvian construction company, over the working conditions of Latvian workers who were working in Sweden, repairing a school in the town of Vaxholm, and were paid under a collective agreement of the country of origin, without being covered by the Swedish sector collective agreement. The unions picketed and blocked access to the work, and a solidarity strike by the electricians' union prevented the work from continuing. In the end, the company had to abandon the work because it was impossible to comply with its obligations under the tender specifications. The basic issue raised was the use of the wage and working conditions differential between different European regulatory frameworks to obtain competitive advantages for companies operating in this supranational area, together with a specific interpretation of Directive 96/71 on the posting of workers and its scope in a system of fully voluntary collective bargaining. The crucial issue however was the incompatibility between the right to strike and the principle of freedom to provide services, since the strike undertaken by the Swedish trade unions hindered or prevented the Latvian company's freedom to provide services in another EU country.

In both cases⁶, therefore, the collective action seeks to re-establish a principle of territoriality in the application of labour protection on working conditions that has been ignored by the transnational provision of services, and therefore involves the use of strikes as a trade union instrument against social *dumping*. The answer of the Court of Justice will be negative as it understands in this case that trade union action is directly confronted with market freedoms, which must condition the exercise of the right to strike.

The outline according to which we proceed to resolve the core of the problem raised follows the following steps. First of all, it is recalled that this is a

⁶ ECJ 11-12-07, Viking C-438/05 and ECJ 18-12-07, Laval C-341/05.

matter, the right to strike, excluded from EU competences by the current art. 153 TFEU), which means that it is up to the legal system of each member state to establish the regulatory framework to which the development of this right must conform. In any case, this normative regulation must respect the general principles set out in art. 28 of the CFREU, art. 6 of the EESC and ILO Convention 87. At the European level, this recognition is embodied in the fact that the right to strike expresses a legitimate interest which in principle "may justify a restriction of the obligations imposed by Community law". However, this possible restriction must in turn be reconciled with the requirements of respect for fundamental economic freedoms in accordance with the principle of proportionality, since "the fundamental nature attributed to the right to take collective action" does not prevent them from being excluded from this contradiction and they will therefore only be lawful if they pass the "reconciliation" test with the obligations deriving from European law guaranteeing the freedom to provide services and the freedom of establishment. Or, conversely, strike action may restrict the freedom of establishment or the freedom to provide services when it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of general interest, although, in this case, "it must be appropriate to ensure the achievement of the objective pursued and must not go beyond what is necessary to achieve it". Thus, it is concluded that in the cases under examination, the strikes called by the trade unions are not lawful as they do not pass this value judgment and therefore unduly harm the obligations deriving from European law in order to protect the economic freedoms that constitute it.

With respect to the first case, *Viking*, the Court recognizes the horizontal effectiveness of art. 43 TEU (49 of the current TFEU) on the actions of private parties - in this case trade unions - seeking to obtain from a private company the conclusion of a collective agreement "the content of which is liable to dissuade it from exercising its freedom of establishment", which is a restriction on this fundamental freedom of the European Union, although this restriction may be justified "by the protection of an overriding reason in the general interest, such as the protection of the interests of workers", but only on condition that "it is established that these measures are appropriate to ensure the attainment of the legitimate objective pursued and that they do not go beyond what is necessary to achieve that objective". In the *Laval* judgment, in a more unfortunate way, in attacking the Swedish voluntary collective bargaining system, it is stated that art. 49 of the ECT (now 56 of the TCE) states that "Article 49 of the TUE (now 56 of the TFEU) is not applicable in Sweden. 49 TEC (now 56 TFEU) must be interpreted as meaning that this provision precludes a trade union organization from attempting, by means of a collective dispute measure,

to force a service provider established in another Member State to enter into negotiations with it on the amount of wages to be paid to posted workers and to adhere to a collective agreement whose clauses provide for more favorable conditions than those laid down by law or relate to matters not covered by Directive 96/71 on the posting of workers. In this way, in a more nuanced way in the first case, and in a more absolute way in the second, the Court validates the "opportunistic behavior" of economic operators who want to operate in a wider and more integrated market but without bearing the "social restrictions" that in the form of higher standards of working conditions are in force in these other national realities.

Some observations should be made on both decisions. Firstly, it is worth highlighting the ease with which these rulings consider that the actions of private subjects such as trade unions are susceptible to restricting the fundamental freedoms of establishment and provision of services in the so-called "horizontal effect" of the precepts that regulate them, as opposed to the classic doctrine that it is the State or other public law persons endowed with regulatory power who are in a position to hinder the enjoyment of the freedoms of establishment, movement and provision of services. Although the arguments to reach this conclusion are not very well founded (Lo faro, 2008, p. 78), it seems that this conclusion is reached mainly on the basis of the power of trade union organizations to make collective agreements and in view of their ability to influence, through the use of conflict measures, the fundamental freedoms of the market. However, this confusion between rules and collective actions in terms of their effectiveness is not in harmony with the downgrading of the instrument of collective bargaining, which in the *Laval* case appears as a recurring element in the judges' arguments. Indeed, the autonomous function of delimitation of working conditions entrusted to collective bargaining is devalued by understanding that the "general application" of Directive 96/71 requires a state or public regulatory system, so that systems such as the Swedish one, which are based on voluntary collective autonomy, are excluded from it. Furthermore, *Laval* dissociates the function of improving working conditions carried out by voluntary collective bargaining, which is the basis of the Swedish system, from the minimum or mandatory state standards, so that the higher-than-legal working standards set by voluntary collective agreements are not binding on the employer organizing the services in that territory. Nor do the powers of collective autonomy territorially delimit the working conditions of those who perform their labour activity in a given country. It is considered incompatible with fundamental economic freedoms that by means of a strike a collective agreement of the territory and sector where the work is provided is

imposed on those who come from another national system and where they presumably have another conventional regime that they "carry in their rucksack" to the country of destination. In short, another of the negative elements of this line of interpretation is the bias it contains, which leads to the conclusion that the collective agreements of countries with higher labour standards are an obstacle to the exercise of the freedom to move workers and provide services, which has been rightly criticized (Orlandini, 2008, p. 590 ff.).

The right to strike is recognized as a fundamental right as determined by national normative standards and recognized in Art. 28 of the CFREU. But it is not placed in a sphere of immunity or non-interference with respect to the fundamental economic freedoms of establishment or provision of services. The two judgments of the Court of Justice start from the premise that this recognition of the right to strike does not prevent it from being understood that its exercise in the European area distorts these basic freedoms under certain conditions and even hinders them. In this way, the right to strike is conditioned by two value judgments made by the European judge: the judgment of the appropriateness of the measure (timeliness), whether the decision to call a strike was necessary, and the judgment of proportionality, with respect to the effectiveness of the strike. This shifts the fundamental right to strike to a subordinate position with respect to economic freedoms that serve as "a means of circumventing labour regulations", thus favoring forms of social dumping.

The right to strike exercised *for anti-dumping* purposes will only be justified if the jobs or working conditions of the workers in whose protection the strike is exercised "are seriously threatened", and if the measure is "adequate" to the objective of protection and "proportional" to it, i.e., if it does not go beyond what is necessary to achieve the objective pursued.

In other subsequent rulings the ECJ has insisted on this very restrictive approach, without attempting to open a wider space to the exercise of the right to strike on the basis of considering feasible the limitation of the freedom to provide services if the strike aims to ensure standards of protection of workers compatible with the balances on which the internal market is founded, which are those set out in the Posting of Workers Directive 96/71 (Orlandini, 2019, p.175). On the contrary, in *Fonnship* (ECJ 8 July 2014, C-83/13), faced with a case in which Swedish trade unions called a strike to impose minimum wages on a flag of convenience vessel owned by a Norwegian company, the Court merely recalls, on the basis of Regulation 4055/86 on the liberalization of maritime transport, that any restriction without objective justification that may have prohibited, hindered or detracted from the freedom to provide services must be declared incompatible with Union law, with an express quotation from

Laval "on the compatibility of collective dispute measures with the freedom to provide services" (Orlandini, 2019, pp 178 ff).

However, the restriction of the union's powers of action with respect to the use of conflict as a way of establishing a system of rules based on collective autonomy in the space of labour relations determined by globalization, paradoxically highlights the importance of the strike as a fundamental right of workers in an unequal society that aims to exclude the labour force from the laws of the market, systematically derogating the rules of the market and economic freedoms with a view to leveling existing economic and social inequalities. The orientations derived from this jurisprudence were therefore in tune with a liberal vision of Europe that places the trade union in a subordinate position by punishing its collective strength, and its great notoriety produced important reactions in this respect. The most striking ones are analyzed in the following section.

3. Some consequences of the Viking and Laval doctrine

The debate triggered by these judgments - together with other contemporary judgments, *Ruffert* and *Commission vs. Luxembourg*⁷ that insisted on the reduction of the protection of the wage and working conditions of posted workers in the framework of a transnational provision of services - led to a major questioning of the validity of collective trade union rights at the European transnational level on the basis of an overprotection of a single market of services that was to be affirmed at the expense of the imbalances and wage and labour differentials between the member countries, preventing collective and trade union action as an element of equalization of the same. Naturally, initiatives were launched to change legislation that contradicted this line of interpretation of European regulations, which also had some repercussions in the national systems directly affected by the rulings in question. But the debate also moved to other institutions entrusted with the guarantee of fundamental individual and collective rights derived from work in other European Charters of rights, especially the European Court of Human Rights and the European Committee of Social Rights. These bodies were also to intervene in defining the complex relationship between the trade union and collective rights recognized in Europe and the free market economic system. Explicitly, as will be

⁷ ECJ 3-4-08, *Dirk Rüffert v. Land Niedersachsen*, C-346/06; and ECJ 19-6-08, *Commission of the European Communities v. Grand Duchy of Luxembourg*, C-319/06; they are known as the *Laval Quartet*.

discussed below, the European Committee of Social Rights, in the *Laval* case, (Décision sur le bien-fondé 3 juillet 2013 Confédération générale du travail de Suède (LO) et Confédération générale des cadres, fonctionnaires et employés (TCO) c. Suède Réclamation n° 85/2012) contested the supremacy of economic freedoms over the right to strike, on the basis that the law of the Social Charter and the law of the European Union are two different legal systems, so that "the principles, rules and obligations that form the latter do not necessarily coincide with "the system of values, principles and rights" enshrined by the former (Chatzilaou, 2016, p. 394).

The European Trade Union Confederation (ETUC) expressed its concern about the effects of this case law on collective action in the European dimension, in addition to the very negative repercussions of this doctrine for Swedish and Finnish trade unions. On the basis of recovering the "social momentum" that should characterize the Europe that emerged from the Lisbon Treaty, the ETUC proposed as early as 2008, the adoption of a "clause for social progress" - then called "social progress protocol" - that should be incorporated into the Union Treaty and in secondary legislation in which it should be established that the Treaty and the fundamental freedoms it recognizes must be interpreted with respect for fundamental rights and especially the collective action of trade unions (Castelli, 2012, p. 155). The clause would also expressly add a recognition of the right of workers and their representatives to take collective action with the aim of raising living and working conditions above the minimum standards of any Member State, in parallel with the amendment of Directive 96/71 to ensure that the host State could establish more favorable working and employment conditions than those established as fundamental in the aforementioned directive.

For their part, the domestic developments of the *Laval* case in Sweden are also highly indicative of the impact of this judgment on the Swedish domestic legal system. Indeed, the Swedish courts sentenced the unions involved in the strike against the Latvian company to heavy punitive damages, court costs and interest, which was essentially problematic for these organizations, given that their actions were deemed to be in accordance with Swedish legislation on collective disputes. In fact, the Swedish judiciary should have held the Swedish state liable for failing to bring its legislation into line with EU law as was apparent from *Laval*, but instead held the Swedish trade unions liable, as they had called the strike in compliance with national law, with no intention of violating European law⁸. This decision was appealed in complaint to the

⁸ The Swedish courts thus set up a true case of "abuse of European law" (Sciarra, 2013, p. 88).

ILO, whose Committee on Freedom of Association found that the imposition of these sanctions on the unions for having organized a legitimate strike under Swedish law and the interpretation of a Swedish court judgment prior to the preliminary ruling constituted a serious violation of freedom of association, recommending that negotiations take place between the government and the social partners to study "possible compensation" for the condemned unions. Most importantly, however, it was necessary to change the law under which the unions had taken the actions deemed unlawful by *Laval* as contrary to European law, and the new regulation was enacted on March 25, 2010, despite opposition from the unions who felt that the passage of the law accepted that the country's collective and union practices could not be applied to transnational contexts. The new regulation, known as *Lex Laval*, limited the exercise of collective actions to negotiate a collective agreement only to Swedish companies, since from the law arose the reasonable fear that if it was done with European companies from other countries, these could bring an action for liability for damages on the understanding that they could apply the working conditions in force in the country of origin, even if were lower than those set as minimums in Swedish collective agreements.

This is not the end of the story. In June 2012, the two major Swedish confederations decided to file a complaint with the European Committee of Social Rights (ECSR) on the grounds that the Swedish law violated the European Social Charter and, in particular, its protection of the right to strike and collective bargaining, a claim that was accepted by the ECSR in its important substantive decision of July 3, 2013, finding that the Swedish law did indeed violate Articles 6.2 and 4 of the European Social Charter. It was contrary to the right to collective bargaining because the legal rule "considerably restricted the power of Swedish trade unions to have recourse to collective conflict measures with the aim of concluding collective agreements in matters other than those provided for by law or with pay levels higher than the minimum levels specified", and did not favor, with respect to posted workers, "the establishment of appropriate procedures for voluntary negotiation between employers' and trade union organizations with a view to regulating working conditions by means of collective agreements". And it violated the right to strike because the rule "prevented *a priori* the exercise of the right to carry out collective actions or authorized them only when they were called for the purpose of observing minimum standards" and this fact infringes the fundamental right of workers and their unions to resort to strike with the aim of protecting the economic and social interests of workers. Following the political change in the country in 2015, with the formation of a government of Social Democrats and

Greens, a commission for the reform of the law was promoted, which finally took place in April 2017, repealing the *Lex Laval* and replacing it with new rules that have allowed union bargaining with respect to posted workers and ensuring the minimum wages and working conditions enjoyed by other workers in Sweden.

The pronouncement of the ECSR made it possible to open a new process of reform of Swedish legislation in this area but fundamentally reveals the collision of the doctrine of the ECJ on the fundamental right to strike and the shaping of corporate powers and faculties deriving from the single market for services with respect to the interpretation focused on the predominance of these fundamental rights with respect to economic freedoms. The issue is complicated by the fact that the case law of the ECtHR is indirectly involved in the interpretation of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and in particular Article 11 thereof on freedom of association and the contractual and conflict powers deriving therefrom.

Demir and Baykara vs. Turkey (ECHR 12-11-08, file 34503/1997) and *Energy Yapi-Yol Sen vs. Turkey* (ECHR 21-4-09 file 68959/2001) that directly include in the content of freedom of association both the right to collective bargaining and the right to strike, considering the prescriptions of Turkish law to be incompatible with the standards of protection of fundamental rights established in art. 11 of the ECHR. This decidedly more open interpretative line of the ECtHR, which places the restrictions on the right to strike - understood therefore as the content subject to protection through freedom of association - in the limits established in a democratic society that derive from national security and public safety, the defense of order and the prevention of crime and the protection of the rights and freedoms of others, and which naturally clash with a political order such as the Turkish one that imposes much more severe limitations than those permitted, is considered as an important element in the consolidation of the fundamental character of the right to strike not only in the scope of the ECHR and the member states of the Council of Europe, but also in the European order. This is because the CFREU itself refers directly to the ECHR to establish the meaning and scope of the rights recognized in that text, and therefore there is no room for a restrictive or harmful interpretation of their content depending on how it has been specified in the ECHR. For its part, the ECSR, in its decision on the merits of the *Lex Laval*, rightly invokes the relationship between Art. 11 of the ECHR and the content of Art. 6 of the CES, and takes over the latest pronouncements of the ECtHR on this matter.

In turn, relevant is the ECHR *Norwegian Confederation of Trade Unions (Lo) and Norwegian Transport Workers' Union (Ntf) V. Norway* (ECHR

10-9-21, no. 45487/17). *Norway* (ECHR 10-9-21, no. 45487/17) The case concerns the alleged violation of Article 11 of the Convention in relation to a decision of the Norwegian Supreme Court to declare illegal a boycott announced by a trade union that had been planned to pressure a Norwegian subsidiary of a Danish company to sign a Norwegian collective agreement applicable to dock workers, and where the Court understands that the fundamental rights of trade union organization and action take precedence over economic freedoms, because it must be ensured that restrictions imposed on Article 11 rights do not affect the essential elements of freedom of association, without which that freedom would lose substance.

The above is undoubtedly a concrete manifestation of the multilevel protection of fundamental rights through their recognition in different Charters of rights, so it is worth asking consequently whether there is a dialogue between the different judicial bodies that this multilevel protection establishes and specifically whether this dialogue can reorient in a convergent sense the different positions that have been established with respect to the vicissitudes of the exercise of the right to strike in a supranational space.

However, it seems that the different sensitivity between these decisions remains. In contrast to the cited ECHR ruling, although it is prior to it, the aforementioned Judgment of the ECJ 8-7-14, *Fonnship C-83/13*, a case of strike against a ship flying a flag of convenience, registered in Panama. In it, the ECJ reiterated that the strike infringes the freedom to provide maritime transport services regardless of whether the vessel is not registered in the European Union. The Court understands that the fact that the vessel carrying out the transport and on which the workers in favor of whom the conflict measures are carried out are employed flies a flag of a third country or that the workers are nationals of third countries does not prevent the application of the Regulation determining the freedom to provide services in Maritime Transport, for which it is sufficient that the provider of the transport service is a national of a State party to the EEA Agreement, established in a State party to that Agreement other than the State to which that service is addressed. Although in the Advocate General's submissions for this case, a faint line of "abuse of European law" can be traced on cases of explicit attempt to achieve "social dumping" suggested as an exception to the general rule, the extensive interpretation given to the companies protected by the freedom of establishment and freedom to provide services does not seem to add a sufficient element to modify or qualify, in the maritime transport sector, the interpretation maintained in *Viking* and *Laval*.

4. A failed attempt at regulation: the Monti II regulatory proposal

At the onset of the economic crisis in Europe, the Barroso Commission decided to commission Mario Monti, the former European Commissioner responsible for markets and competition between 1995 and 2004, to prepare a report to give new dynamism to the process of European integration, in which the mobility of companies and workers within the European single market could give rise to serious imbalances in the solidarity and collective bargaining regimes, especially with regard to wage policies. Specifically, the Report points out the need for "an intervention aimed at better coordinating the interaction between social rights and economic freedoms in the European Union system", and this purpose should be carried out on the model of the already mentioned Regulation 2679/98, introducing a provision ensuring that the transnational provision of services "does not affect the right to take trade union action and the right to strike", protected by the CFREU (Castelli, 2012, p. 158).

The proposals contained in the Report took the form of a proposal for a Regulation, as well as a new Parliament and Council Directive, the aim of which was to establish an appropriate regulatory framework for reconciling collective and trade union rights of action and fundamental economic freedoms. The aim was therefore to establish a regulation that would not only ensure "the right to take collective action in the context of freedom of establishment and freedom to provide services", but also guarantee effective compliance with Directive 96/71 on the posting of workers and prevent and sanction abuses and circumvention of this legislation, as stated in Article 1 of the proposed Regulation.

It is clear that these proposals were directly related to the above-mentioned case law of the ECJ, against which the European legislative intervention seemed to be intended to introduce a correction of the route. However, the general principles underlying the proposed regulation imply, on the contrary, the continuity of the *Viking and Laval* doctrine. Indeed, Article 2 of the proposed Regulation establishes that "the exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike and, conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms". The formula of Regulation 2679/1998, which configures the strike as a "singular derogation" from the freedom of movement of goods, preserving the fundamental rights of free-

dom of association and collective action from their contradiction with respect to the economic freedoms, is therefore not adopted, but rather a rule of necessary composition of these rights is articulated, configured as limits that must be justified as to their objectives and as to their scope in relation to the fundamental economic freedoms of establishment and the provision of services.

It is also relevant that this provision of the Regulation would become a mandatory rule of direct effectiveness on national systems, incorporating a new rule to the different systems or legal models of strike action that would be in many cases completely dysfunctional to them, as would happen in the Spanish case. The proposed Regulation contained an important discordance between the national models of freedom of association and collective action and the European dimension, since at the internal level, there can be no contradiction of these rights with the conditions derived from the European economic freedoms, while these are applicable in strikes that have a European transnational dimension, without taking into account that these conflicts are always concluded in accordance with the rules that discipline the strike in a national system (Castelli, 2012, p. 166).

Trade union hostility to the proposal and social mobilization in the context of the protests against the crisis in some countries and in others on the basis of some trade union pressure, prompted many national parliaments to activate the procedure known as the "yellow card", which allows European legislative initiatives to be questioned when they are thought to harm the principle of subsidiarity and consequently the basic principle of national sovereignty. The Commission then, in September 2012, understanding that there was not enough consensus for its proposal, withdrew it, without bringing this attempt at regulation to fruition.

Although the non-adoption of the Monti II Regulation does not modify the interpretative framework that remains the core of the regulation of the right to strike in the transnational provision of services, the current weight of the debate has shifted to the regulation of the matter on which collective action measures converge as a priority, i.e. the equalization of pay and working conditions between workers posted in the framework of a transnational provision of services and workers in the country where the service is provided. In this respect, the discussions on the reform of Directive 96/71 bring together many of the concerns about social dumping, which is at the root of the labour protection sought through strikes in a unified services market (see Chapter on Freedom of establishment, freedom to provide services and social rights in the "Trilogy" of the ECJ: critical points of Viking, Laval and Rüffert).

CHAPTER 36

PENSION OBLIGATIONS

IVÁN LÓPEZ GARCÍA DE LA RIVA

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I. INTRODUCTION

European social protection systems are structured on the basis of three pillars or levels. The first is the public social security system, which provides most of the benefits. It is characterized by the fact that the contribution to its financing is generally obligatory for workers and employers and that it is based on the principles of solidarity and universality. The second level is made up of

complementary collective pension systems, especially those linked to companies or employment systems. There are voluntary participation systems and mandatory participation systems¹. The third pillar is made up of individual supplementary pension systems that articulate individual or individualized savings decisions.

Here we will analyze the way in which EU law intervenes in relation to supplementary collective pension systems (especially pension plans, which are the basic and most common instrument through which collective pension commitments assumed by companies are articulated).

We will not deal with corporate insolvency in relation to supplementary pension schemes, as this issue is dealt with elsewhere in this book.

1. The heterogeneity of supplementary pension systems

A first observation is the disparate configuration and importance of supplementary collective pension systems in each country. There are substantial differences in terms of the obligation to establish occupational pension plans and in the levels of contributions to them, in terms of the instruments used to create these plans and in their subjective and functional scope. There are also differences in the imposition or non-imposition of access or permanence periods and in the tax regime for contributions and benefits².

This heterogeneity is a prerequisite for EU legislative activity. Thus, for Directive 2016/2341/EU, the different way in which institutions for occupational retirement provision are organized and regulated prevents the adoption of a “one-size-fits-all” EU approach³; moreover, the diversity of the risks covered and of the methods and practices of supervision between Member States means that they must be able to make calculations on provisions in accordance with rules additional to the Directive itself⁴ and that they enjoy a certain discretion when supervising the investments of pension funds.

¹ For its purposes, Directive 1998/49/EC (On safeguarding the supplementary pension rights of employed and self-employed persons moving within the EU) defines them as “any occupational pension scheme established in conformity with national legislation and practice such as a group insurance contract or pay-as-you-go scheme agreed by one or more branches or sectors, funded scheme or pension promise backed by book reserves, or any collective or other comparable arrangement intended to provide a supplementary pension for employed or self-employed persons” (Art.3.b).

² Of interest for containing comparative catalogs are the Commission Reports of 7-7-10, SEC (2010) 830 final and the Commission Report of 26-1-06, COM (2006) 22 final, on the implementation of Directive 98/49/EC.

³ Recital 5.

⁴ Recital 41.

For its part, on similar reasoning, Directive 2014/50/EU states that “the Union must confine itself to determining objectives to be achieved in general terms; therefore, a directive is the appropriate legal instrument”⁵. Such an assertion was already contained also in the previous Directive 1998/49/EC, which the aforementioned Directive complements. Therefore, the freedom of the social partners in the design and implementation of supplementary pension schemes is not restricted beyond compliance with the objectives set out in the Directive. In short, the existence of substantial differences between the legal systems of supplementary pension schemes in the Member States and the fact that many of these systems do not originate from legislation but from private initiative, obliges the Union to respect important margins of discretion in the configuration of these schemes; in other words, it prevents a true harmonization of legislation, limiting the Union to adopting the necessary measures in this area for the establishment of the free movement of workers, under the terms provided for in Article 46 of the TFEU. The Member States will therefore retain the right to regulate their own pension schemes, without being obliged to legislate on the creation of supplementary schemes.

2. The complementary nature of the second pillar of social protection

The second starting point is the configuration of second-tier systems as complementary to public legal social security systems.

With all the nuances to which reference will be made regarding the material scope of this idea, EU social law accepts this assumption.

The Union’s institutions underline the cardinal nature of public social protection mechanisms and the transcendental role of these public systems in improving citizens’ standard of living; they also insist on the promotion of intergenerational solidarity. For this reason, it has been emphasized that supplementary systems are instruments for supporting and improving pensioners’ income, provided that the Member States bear the responsibility for the payments to be made within the framework of the first pillar of social security.⁶

The scope of this complementary nature is being questioned in a scenario with tensions regarding the reforms to which the public pension systems of the first pillar must be subjected. This is a consequence of the economic and financial crises that have affected Europe, public deficit control policies and demographic aging.

⁵ Recital 26.

⁶ European Parliament Resolution 3-12-98, DOC 398, 21-12-1998.

There are positions that accept the reduction of the protection offered by public pension systems, calling for their replacement by complementary capitalization systems. But there are also those who defend the substantial and non-renounceable sufficiency that public systems must offer, in terms of social protection, to citizens.

In the first line, the European Commission itself⁷ has been oriented towards restricting the scope of protection offered by public systems. Thus, it has advocated establishing stricter conditions of accessibility to public pensions and lower levels of coverage in their amount. Based on these premises, the aim has been to promote complementary pension systems. Although they do not intend to replace public systems, they aim at filling the gaps left by the contraction in the levels of protection they offer.

When the EU legislator makes progress in the regulation of these complementary systems, it considers the growing importance they are acquiring and the difficulties detected, especially from the perspective of the free movement of workers. European social law had focused on regulating different aspects of the first level social protection systems⁸. With less ambition, steps are being taken to regulate complementary social protection systems.

II. SUPPLEMENTARY PENSION RIGHTS AND FREEDOM OF MOVEMENT OF WORKERS

The heterogeneous regulation of complementary social protection systems determines the existence of relevant obstacles to the full exercise of the right to free movement of workers enshrined in Articles 45 to 48 of the TFEU and 15.1 and 2 of the Charter of Fundamental Rights of the European Union. Basically, the problems derive from:

— The requirement in some cases of periods of affiliation with employers, of affiliation to the scheme or of age for access to pension plans or for the acquisition of pension rights.

— The permanence of the displaced worker as a member of the complementary pension system.

⁷ Green Paper Towards adequate, sustainable and safe European pension systems, of 7-7-2010, COM (2010) 365, final; White Paper: An agenda for adequate, safe and sustainable pensions, of 16-2-2012, COM (2012) 55, final.

⁸ For example, by establishing coordination rules in the important Order EC/883/2004 (and its predecessor, Order EEC/1408/1971), which, in principle, does not apply, as we shall see, to supplementary pension systems we are dealing with.

- The maintenance and portability of the vested rights of those who leave the employer and change their State of residence.
- Difficulties in informing participants and beneficiaries exercising their right of free movement about their supplementary pension rights.
- The mechanics and consequences of cross-border payments; although this connects to the free movement of capital, it also constitutes an obstacle to the free movement of workers.
- The different tax treatment given by Member States to contributions to supplementary pension systems and their benefits.

1. Limits on the establishment of waiting and vesting periods, or age requirements, for the acquisition of supplementary pension rights

Given the inapplicability, in principle, of the coordination mechanisms of the social security systems established by Regulations EEC/1408/71 and EC/883/2004 to the supplementary pension systems we are dealing with^{9 10} for the reasons already explained, it was decided to establish objectives using the Directive as the most appropriate tool.

First, progress was made with Directive 1998/49/EC. However, given the existing reluctance, the standard did not address the obstacles to which we now refer. Therefore, the Economic and Social Committee insisted on the need to make progress in removing the obstacle posed by the long waiting and acquisition periods that were required in some States¹¹. It has been Directive 2014/50/EU that has addressed the issue mainly in relation to supplementary retirement pensions¹².

⁹ By reason of the provisions of art.1.j) and 4.1 of Regulation EEC/1408/71 and art.1.1) and 3.1 of Regulation EC/883/2004. This is also underlined in Directive 1998/49/EC (Recital 3, 4 and 5) and Directive 2014/50/EU (Recital 3 and art.2.1). Also, Judgment of 16 January 1992, *Commission of the European Communities v French Republic*, C-57/90, EU:C:1992:10, paragraph 17 to 20; Judgment of 24 September 1998, *Commission of the European Communities v French Republic*, C-35/97, EU:C:1998:43, paragraph 34 and 35. Judgment 26 of October 2016, *Rijksdienst voor Pensioenen v Willem Hoogstad*, C-269/15, not published, EU:C:2016:802 qualifies the conclusion in relation to the imposition of levies on pension rights serving the financing of the supplementary scheme.

¹⁰ The insurance mechanisms referred to as “legislation” in Art. 1 letter l of said regulation are subject to Regulation EC/883/2004.

¹¹ Opinion of the Economic and Social Committee on the Communication from the Commission: Towards a single market for supplementary pensions: Results of the consultation on the Green Paper on Supplementary Pension Schemes in the Single Market’, ap.4.2.7 (1999/C368/18 of 21-10-1999).

¹² The European Commission has highlighted the reluctance of Member States to materialize the process of transposition of the Directive. (Report on the implementation of Directive 2014/50/EU; 6 -7-2020, COM (2020) 291 at the end).

The requirement of long waiting periods during which the active worker cannot access the supplementary pension scheme clearly constitutes an obstacle to the free movement of workers; they discourage it and treat the worker who exercises this freedom pejoratively compared to the one who, by not doing so, can access the supplementary system. The same can be concluded with respect to the requirement of long vesting periods that imply a long affiliation of the worker to the system (vesting periods); this implies unequal treatment between those who go to work in another Member State and those who, by not doing so, can remain in the same supplementary pension system. And finally, the requirement of relatively advanced minimum ages to be able to consolidate accumulated supplementary pension rights constitutes an obstacle to the exercise of freedom of movement, especially for young workers.¹³

The Court of Justice of the EU has addressed these problems, for example, in a case¹⁴ involving a worker who worked for the same company in several Member States under a global employment contract which provided that he would be affiliated to the supplementary pension scheme applicable in each country. He worked in Belgium, Germany and then France. The problem arose because the Company refused to grant him a pension for the period of service in Germany on the basis of two arguments:

- The conventional supplementary regime required a vesting period for pension rights of 10 years, or a waiting period of 10 years and a vesting period of 3 years. The employee did not meet these periods unless previous periods of work for the company in other Member States were considered. Consequently, he could only recover his own contributions, without interest.
- It also established, for workers hired before 1978, that if the termination of the employment contract occurred due to resignation of the worker before completing five years of service, they would only be entitled to the benefits insured with their own contributions. The company understood that the employee's voluntary acceptance of the transfer from Germany was equivalent to resignation.

The ECJ first of all considers that it is contrary to the freedom of movement of workers not to take into account, for the acquisition of supplementary

¹³ On the issue, "Green Paper on supplementary pensions in the single market" of 10-6-1997, pp. 25 and 28, COM (97) 283, final; "Proposal for a Directive on the implementation of the EU Lisbon program: on improving the portability of supplementary pension rights", COM (2005)507, final.

¹⁴ Judgment of 10 March 2011, *Maurice Casteels v British Airways, plc*, C-379/09, not published, EU:C:2011:131.

pension rights, the years in which, under an overall employment contract, services were performed in another Member State for the same employer. The employee would be treated less favourably than his colleagues who, before working at the same workplace in Germany, had worked at other workplaces in the same Member State. For them, the time worked at these other workplaces in Germany was taken into account for this purpose. The plaintiff, on the other hand, was not considered to have worked at workplaces of the same employer in another Member State.

Secondly, it concludes that accepting a transfer to a workplace of the same employer in another Member State cannot be equated to a resignation in the regulation of the supplementary pension scheme, when such an interpretation is not made with respect to employees who accept transfers within the same Member State.

Both provisions of the collective agreement lead, in the case of an employee who has exercised freedom of movement, to economic losses connected with such exercise. The Court does not admit as a justifying cause the interest in preventing the worker from being affiliated to several regimes simultaneously, since unjust enrichment on his part is not to be expected, but rather the loss of rights. Nor is the objective of staff loyalty accepted as justification, since the employee who moves to another employer does so within the same company.

In order to reduce the obstacles arising from this type of circumstances for mobile workers, Directive 2014/50/EU decides to require that certain guarantees be established with respect to this type of requirements for the acquisition of supplementary pension rights. Thus, it establishes:¹⁵

- Where either an acquisition period or a waiting period, or both, apply, the total combined period shall not exceed three years for workers who terminate their employment relationship for a reason other than the pensionable event and move between Member States (outgoing workers).¹⁶
- A minimum age higher than 21 years may not be required as a condition for the consolidation of pension rights by the same outgoing workers. However, the Directive does not regulate the possible requirement of a minimum age for affiliation to the supplementary

¹⁵ Article 4.

¹⁶ Directive 2014/50/EU (art. 3.g) defines an outgoing worker as: “an active member whose current employment relationship ends for a reason other than the fact that he/she is eligible for a supplementary pension and who moves between member states.”

scheme, on the understanding that this requirement is not an obstacle to freedom of movement.¹⁷

2. Cross-border affiliation

The impossibility for some supplementary schemes to keep workers affiliated to them when they were posted by their employer to provide services in another Member State clearly constituted an obstacle to the free movement of workers. This situation would be detrimental to the worker's contribution career. Their pension rights would be potentially significantly impaired. For example, if there is no supplementary scheme applicable in the country of employment, or if the scheme imposes waiting or vesting periods longer than the period of posting. Also, when the pension commitments are quantitatively or qualitatively lower than those of the supplementary scheme to which the worker was affiliated in the Member State of origin.

This was addressed by Directive 1998/49/EC¹⁸ by obliging Member States to ensure that during the period in which a worker who is a member of a supplementary pension scheme is posted to another Member State¹⁹, the worker himself or the employer may continue to make contributions to that scheme. To prevent this possibility from imposing a disproportionate burden where there is an obligation to join a supplementary pension scheme in the Member State of posting, the Directive exempts the employer and the posted worker from this obligation if contributions continue to be made to the supplementary scheme in the State of origin.²⁰

Most Member States stated that they did not need to adopt legislative measures transposing Article 6(1).²¹

As for the exemption from the contribution obligation referred to in Art. 6.2, it has required transposition in some Member States where there were

¹⁷ Recital 17.

¹⁸ Article 6.1.

¹⁹ By "posted worker", Directive 1998/49/EC (art.3.e) means a worker who is posted to work in another Member State and who, according to the provisions of Title II of Regulation EEC/1408/71, continues to be subject to the legislation of the Member State of origin. However, at present, the reference of the aforementioned Directive to Regulation EEC/1408/71 must be understood as being made to Title II of Regulation EC/883/2004, as provided for in Article 90.2 of the latter.

²⁰ Article 6.2.

²¹ Report from the Commission on "Protection of supplementary pension rights for employed and self-employed persons moving within the Community" of 26 January 2006, COM (2006) 22, final. Paragraph III.3.

complementary compulsory affiliation schemes (usually sectoral) to expressly recognize this exemption.

On the other hand, progress has been made regarding cross-border membership, primarily through Directive 2003/41/EC of June 3. This directive required Member States to allow companies established on their territory to promote employment funds authorized in other Member States. It also allowed employment funds authorized in their territory to accept promotion by companies established in other Member States. By establishing a system of mutual recognition between Member States of the supervision of pension funds managing funded schemes, the way was opened for cross-border membership. This allows an employee to remain in the same scheme when moving between Member States to work. Among others, Directive 2016/2341/EU of December 14 has acted on these matters, consolidating the advances indicated and deepening other parallel aspects, such as cross-border transfers of technical provisions, obligations and rights or assets of a pension plan from an occupational pension fund to another authorized in another Member State.²²

3. Preservation and portability of vested rights of workers who leave the company and change their State of residence

The problems on this point derive, on the one hand, from the impossibility for the employee affiliated to the supplementary system to transfer his acquired rights from the Member State in which he is contributing to another Member State; on the other hand, from the limitation of expectations resulting from the abandonment of the supplementary system due to the exercise of freedom of movement as opposed to those who can remain in it (e.g. a sectoral professional supplementary system) despite changing employment within the same Member State.

Directive 1998/49/EC, in Article 4, already imposed on Member States the obligation to ensure that members of supplementary schemes who cease to contribute to these schemes because they move to another Member State preserve their acquired pension rights at a level comparable to that members who cease to contribute and do not exercise the right of free movement. The same guarantee applies to the recipient of social security benefits. The aim is to guarantee a min-

²² This Directive (art. 65) repealed Directive 2003/41/EC with effect from 13 January 2019, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application dates of the Directives set out in Annex I, Part B. According to the precept, references to Directive 2003/41/EC shall be construed as references to the repealing Directive itself in accordance with the correlation table set out in Annex II thereto.

imum level of equality of treatment at national and cross-border level as regards the maintenance of acquired rights.²³ Thus, a worker who ceases to be a member of a supplementary scheme because he moves to another Member State to work does not lose his acquired rights if, if he were to change employer within the same Member State, this would not be the case. The provisions of the Directive in this respect did not lead to material changes, since the Member States had already established non-discrimination in this area before its publication.

Subsequently, Directive 2014/50/EU advances to remove obstacles to free movement, considering the possibility that acquisition periods may be established. Thus:

A. In relation to affiliated workers who have not acquired vested rights:²⁴

— When the investment risk related to the contributions is borne by the Company or by the supplementary scheme, if the outgoing employee of such scheme has not yet acquired vested retirement pension rights upon termination of his employment relationship, the supplementary scheme must reimburse him for the contributions to such contingency that he has made or that have been made on his behalf (art.4.1.c).

— When the investment risk is borne by the member (normally defined contribution systems), under the same circumstances of disengagement, the worker is guaranteed to receive the value of the same contributions or the value of the investments derived from his contributions (art.4.1.c).

B. In relation to affiliated workers who have acquired vested rights, Article 5 of Directive 2014/50/EU establishes, basically:

— Member States shall ensure that the vested rights of the outgoing worker can be maintained in the same supplementary regime, with their initial value being calculated at the time of termination of employment.

— They shall also ensure that the dormant benefit entitlements of the outgoing worker or his survivors are treated equitably, meaning, in an open-ended list, that:

— The value of these rights is treated in the same way as the value of the rights of the affiliates.

²³ Commission Report on “Protection of the supplementary pension rights of employed and self-employed persons moving within the Community” of 26-1-2006, COM (2006) 22, final. Paragraph III.1.

²⁴ Although these are conditions for the acquisition of rights, I consider it preferable to deal with these cases here, given their connection with the economic rights of the contributions made.

- The value of the dormant rights is treated in the same way as the evolution of the pension benefits currently paid.
- When the right to a nominal amount has been acquired as a supplementary pension right, the nominal value of the dormant rights is safeguarded.
- When the value of vested rights changes over time, the value is adjusted according to an interest rate established in the supplementary regime or according to the return on investments derived from contributions to the supplementary regime.
- When the value of vested rights is adjusted according to the inflation rate or salary levels, the dormant rights are adjusted according to proportional limits set by law or by the social partners.

The Directive also understands that an adequate level of protection for dormant rights would be provided if, in defined contribution schemes, the possibility of mobilizing vested rights or their value to another supplementary pension scheme that meets the requirements of the Directive is guaranteed; however, it is careful to stress that it is not imposing an obligation to ensure the mobility of vested rights, although it marks the improvement of transfer possibilities “as far as possible” as an objective for Member States.²⁵

- However, in cases where the value of the vested rights is low, the supplementary regime may not maintain the vested rights as dormant rights. It allows, under certain conditions, an amount equivalent to their value to be paid to the outgoing worker.

4. Information on their supplementary pension rights to participants and beneficiaries exercising the right of free movement

Directive 1998/49/EC considers that it is important to regulate the information that these workers must have. The aim is to ensure that they are aware, before exercising their right to freedom of movement, of the effective repercussions that this exercise will have on their supplementary pension rights. It thus imposes on Member States the obligation to ensure that employers or the administrators of supplementary schemes inform members of their pension rights and the possibilities open to them (e.g. the possibilities of remaining a member, the conditions for maintaining vested rights or their portability, etc.) when they move to another Member State; it

²⁵ Recitals 20 and 24.

also requires that this information be comparable to that received by a member worker who ceases to contribute to the scheme but remains in the same State.²⁶

For its part, in addition to the information rights provided for in the regulation on occupational retirement provision²⁷, Directive 2014/50/EU recognizes certain information rights that must be guaranteed regarding the conditions for acquiring pension rights, the consequences of termination of employment, the amount of acquired rights and the treatment they will be subject to.²⁸

From a formal and procedural point of view, the Directive requires that the information to be provided be clear and that it be provided within a reasonable period of time from the request. It also states that the Member State may provide that it need not be provided more than once a year.

5. Cross-border payments of supplementary pensions

It should be noted that it is recognized that the freedom of movement of capital and payments requires a guarantee that supplementary pension schemes can pay the benefits deriving from the vested rights of their members in another Member State. If this is not the case, there will be a disincentive to transfer.

Therefore, Directive 1998/49/EC²⁹ imposed an obligation on Member States to ensure that supplementary schemes can pay full benefits to their members and beneficiaries in another Member State, net of transaction costs and taxes.

6. Diversity of tax treatment of pension contributions and supplementary pension benefits and its relevance in cross-border pension situations

Regarding occupational pensions, it is noted that the Member States have different tax systems. Some do not tax contributions or the investment income of pension funds, but tax benefits. Others tax benefits and investment income, but not contributions. Still others tax contributions, but not investment income or benefits.³⁰

²⁶ Article 7.

²⁷ For the most part the main reporting obligations contained in Directive 2016/2341/EU of 14 December 2016 must be executed automatically by the pension fund institutions, unlike, as we will see, those provided for in Directive 2014/50/EU, which require prior request by the interested party.

²⁸ Article 6.

²⁹ Article 5.

³⁰ For an analysis of the situation in the then Member States, see the Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee on “The elimination of tax obstacles to the cross-border provision of occupational pensions”, 19-4-2001, COM (2001) 214, final.

In this scenario, the exercise of the right of free movement of workers may be discouraged. For example, if a person who has paid contributions in a Member State that taxes contributions receives benefits in another Member State that taxes contributions, this would subject the worker to double taxation.

A second obstacle to freedom of movement was that there were Member States that did not apply the tax relief that their legislation provided for contributions to national pension institutions to other contributions paid to pension institutions established in other Member States.

The Court of Justice has ruled on these issues on several occasions in relation to second-tier regimes:

— It has declared³¹ contrary to the free movement of workers a taxation system that recognizes tax relief and exemptions for contributions made to a supplementary scheme whose sponsor is established in one Member State and does not recognize the same exemptions when the contributions are made to schemes whose sponsors are established in another Member State. In addition, it rejects that reasons of tax control and capital flight³² and coherence of the tax system³³ constitute justification for national provisions restricting the freedom of movement of workers.

— It concluded that a rule which makes the deduction of premiums paid by the employer and the tax reduction of premiums paid by the employee for supplementary old-age and death insurance subject to the condition that such premiums are paid to an insurance company or provident institution established in the Member State concerned is contrary to the freedom of movement for workers. This is because denying such deductions and reductions when the contributions are made to companies or institutions established in another Member State has the effect of granting “a tax advantage which varies depending on the place in which those contributions and premiums are collect-

³¹ Judgment (Grand Chamber) of 30 January 2007, *Commission of the European Communities v Kingdom of Denmark*, C-150/04, not published, EU:C:2007:69.

³² The rejection is argued on the basis of the existence of verification mechanisms available to the national authorities. These mechanisms make it possible to verify the contributions made to a promoter established in another Member State. Also relevant was the inadmissibility of building a general presumption of tax evasion on the mere circumstance of making contributions to a promoter established abroad.

³³ The coherence of the tax system - understood as a direct link between a tax advantage and a correlative disadvantage - cannot be called into question simply because of the country of establishment of the pension plan sponsor. The risk of a transfer of residence of the beneficiary before receiving the benefits generated by exempt or tax-deductible contributions can materialize whether the sponsor is a national or established in another Member State. Conversely, there is nothing to prevent the State of residence from taxing the benefits received by the beneficiary as a result of contributions made to a promoter established in another Member State and in respect of which exemptions or reliefs have been granted.

ed and is accordingly likely to dissuade employed and selfemployed persons from exercising their right to move freely in another Member State”³⁴.

— An obstacle to the freedom of movement of workers is a regulation that establishes that when the payment or attribution of redemption or savings securities is made to a beneficiary who has transferred his residence or the seat of his assets to another Member State, it must be understood to have been made on the day before the effective date of such transfer, for the purposes of taxation.³⁵

— Workers are discouraged from exercising their freedom of movement between Member States by legislation that taxes transfers of capital or surrender values made by the pension fund or insurance institution with which they have been set up in the interest of the beneficiary or his or her beneficiaries to another pension fund or insurance institution established in another Member State, when the same transactions are not taxed if the pension fund or institution is established in the same Member State.³⁶

Among many other objectives, Directive 2003/41/EC of 3 June 2003 addressed these problems by guaranteeing the possibility of contributions to cross-border pension funds. In doing so, it helped to bring about the establishment of national rules³⁷ recognizing the same tax advantages for such contributions as for those made to occupational pension funds authorized in the Member State’s own territory, provided that the contributions are made to pension funds that meet the requirements of the aforementioned Directive.³⁸

³⁴ Judgment of 5 July 2007, *Commission of European Communities v Kingdom of Belgium*, C-522/04, EU:C:2007:405, paragraph 66.

³⁵ Judgment of 5 July 2007, *Commission of European Communities v Kingdom of Belgium*, C-522/04, EU:C:2007:405, paragraph 68 to 71.

³⁶ Judgment of 5 July 2007, *Commission of European Communities v Kingdom of Belgium*, C-522/04, EU:C:2007:405, paragraph 73 and 74; Judgment of 16 November 2023, *European Commission v Kingdom of the Netherlands*, C-360/22, EU:C:2023:875, paragraphs 30 to 39.

³⁷ The regulations that allow cross-border contributions to second pillar pension funds to be deductible for personal taxation under the same conditions and circumstances as if they were made to institutions domiciled in a specific Member State have been based not only on the regime established by Directive 2003/41/EC, but also on the doctrine of the Court of Justice. Thus, that established, among others, by the ECJ 3-10-02, *Rolf Dieter Danner v. Government of Finland* C-136/00) in the sense that it must be interpreted that a tax rule of a Member State which limits or excludes the right to deduct, for income tax purposes, contributions to voluntary retirement insurance, is contrary to a tax rule of a Member State which limits or excludes the right to deduct, for income tax purposes, contributions to voluntary pension insurance paid to pension insurance institutions established in other Member States while at the same time granting the right to deduct such contributions when they are paid to institutions established in the first Member State, if it does not also exclude the taxable nature of pensions paid by such institutions (in the same sense, Judgment of 28 January 1992, *Hans-Martin Bachmann v Kingdom of Belgium*, C-204/90, not published, EU:C:1992:35; more recently, among others, along similar lines, Judgment of 23 January 2014, *European Commission v Kingdom of Belgium*, C-296/12, not published, EU:C:2014:24).

³⁸ Directive 2003/41/EC of June 3 was repealed, with a view to recasting successive amendments to it in one text, by Directive 2016/2341/EU of December 14.

III. SUPPLEMENTARY PENSION SYSTEMS AND GENDER DISCRIMINATION

1. Introduction

Here we will see how EU law has made progress in the application of the principle of equal treatment between men and women in occupational social security schemes. It has dealt, among others, with aspects such as the establishment of prohibitions of discrimination in terms of access to these schemes, in terms of contributions for the acquisition of pension rights, the maintenance of acquired rights and affiliation to the scheme, the calculation and system of benefits or the conditions for leaving the supplementary system. Regulatory actions and judicial decisions have gradually established the various limits to the application of the principle of equal treatment within the framework of supplementary social security.

However, it is necessary to recall some data that bring us closer to the dimension of one of the fundamental aspects of the issue: at the Union level, the wage gap in pensions has been 26% in 2022³⁹, while the strictly wage gap, although very significant, has been 12.7% for the same year⁴⁰; moreover, the gap is much smaller in the pension systems of the first pillar than in those of the other two levels. It is obvious that the treatment that gender discrimination still receives in relation to pensions translates into a perpetuation of its pernicious effects once working life is over. It is clear that during active life:

— Actuarial criteria based on the longer life expectancy of women have been used to calculate the rates that determine the contributions to a supplementary regime or that determine the benefits. This ends up leading to lower benefits for women.

— Part-time employment is a major obstacle to achieving contribution careers that lead to decent pensions. In relation to part-time work, a gap of 20.2% is observed in 2022.⁴¹

— The possibilities of achieving a decent pension derived from occupational schemes are also blurred for workers with a discontinuous working life, which brings us back to the gender issue.

These are just some of the aspects that lead to the conclusion that the current content of EU social law does not yet constitute a definitive guarantee

³⁹ Eurostat data 2022. https://ec.europa.eu/eurostat/databrowser/view/ilc_pnp13/default/table?lang=en

⁴⁰ Eurostat data 2022. <https://ec.europa.eu/eurostat/databrowser/view/tesem180/default/table?lang=en>

⁴¹ Eurostat data 2022. https://ec.europa.eu/eurostat/databrowser/view/tepsr_lm210/default/table?lang=en

of the application of the principle of equal treatment in this area, despite the progress that has been made.

2. The applicability of the principle of equal pay for men and women to occupational pension schemes

Before there was specific legislation on equal treatment of men and women in supplementary pension schemes, the Court of Justice had already declared, on the one hand, the direct applicability of the principle of equal pay for men and women, enshrined in Article 119 of the Treaty of Rome⁴², as opposed to the programmatic nature of Articles 117 and 118.

It also included in the scope of application of art. 119 of the Treaty of Rome the occupational pension schemes. This was provided that their source was not found in law, but a collective agreement and that they were financed by the employer. The basic criteria applied by the ECJ to determine whether we are dealing with a pension scheme subject to Art. 119 of the Treaty of Rome or to the Directives on pensions. 119 of the Treaty of Rome or to the implementing Directives that we will see in relation to occupational schemes have been the intervention of the Law in the definition of the scheme, the agreement between the employer and the workers' representatives, the complementary nature of the bonuses granted in relation to social security benefits, the methods of financing the pension scheme, its applicability to general groups of workers and, finally, the relationship between the benefit and the worker's employment.⁴³

Analyzing several of these aspects, the Court applied art. 119 of the Treaty of Rome to a civil service pension scheme that essentially takes as its basis the job held by the person concerned, since the pension is determined by the remuneration⁴⁴; this application was reflected in art. 7.2 of Directive 2006/54/EC. The essential cri-

⁴² Judgment of 8 April 1976, *Gabrielle Defrenne v Sabena*, C-43/75, EU:C:1976:56, paragraph 38 to 40; Judgment of 15 June 1978, *Gabrielle Defrenne v Sabena*, C-149/77, EU:C:1978:130, paragraph 19 and 23; Judgment of 31 March 1981, *J.P. Jenkins v Kingsgate (Clothing Productions LTD)*, C-96/80, EU:C:1981:80, paragraph 16 to 18. Judgment of 3 June 2021, *K and Others v Tesco Stores, Ltd*, C-624/19, EU:C:2021:429, paragraph 21 and 22.

⁴³ Judgment of 28 September 1994, *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G.A. Beune*, C-7/93, EU:C:1994:350, paragraph 23.

⁴⁴ Three criteria were used: the scheme affects a particular category of public employees, the pension is linked to the years of service and the amount of the benefit is linked to the value of the remuneration. Judgment of 28 September 1994, *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G.A. Beune*, C-7/93, C-7/93, *Beune*, C-7/93, not published, EU:C:1994:350; Judgment of 29 November 2001, *Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie*, C-366/99, not published, EU:C:2001:648; Judgment of 12 September 2002, *Pirkko Niemi*, C-351/00, not published, EU:C:2002:480.

terion is that the pension is paid to the worker on the basis of the employment relationship linking him to his former employer, i.e. the criterion of employment⁴⁵.

On the other hand, excluded from the scope of application of the principle⁴⁶ are the individual contracts of self-employed workers, single-member self-employed workers' schemes, in relation to employees, insurance contracts in which the employer does not participate, optional provisions of occupational schemes offering the participant certain benefits on an individual basis and schemes in which the benefits are financed from voluntary contributions by the employee.

From the delimitation of the scope of application of Art.119 TCEE, the Court of Justice included in the concept of "remuneration" provided for in that provision ("the normal basic or minimum wage or salary and any other gratuities paid, directly or indirectly, in cash or in kind, by the employer to the employee by reason of the employment relationship") the benefits granted to employees by a supplementary pension scheme^{47 48}.

Under these assumptions, the Court of Justice has declared that even survivor's pensions from occupational schemes are included in this concept of remuneration; although they are paid to the survivor, they arise from the employment relationship that the deceased maintained with the promoter of

⁴⁵ Judgment of 28 September 1994, *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G.A. Beune*, C-7/93, EU:C:1994:350, paragraph 43; Judgment of 25 May 2000, *Jean Marie Podesta v CRICA and others*, C-50/99, EU:C:2000:288, paragraph 26; Judgment of 12 September 2002, *Pirkko Niemi*, C-351/00, EU:C:2002:480, paragraph 44 and 45.

⁴⁶ Currently by art.8 of Directive 2006/54/EC.

⁴⁷ Judgment of 13 May 1986, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, C-170/84, not published, EU:C:1986:204. Already on 17-5-1990, but in relation to a situation arising in 1980, the Court, *Douglas Harvey Barber v Guardia Royal Exchange Assurance Group*, C-262/88, upheld the direct applicability of Art. 119 and the inclusion of occupational schemes in the concept of "remuneration" established by that provision. However, it limited the effects of this applicability, for reasons of legal certainty and the economic impact of its decision, to periods of employment after 17-5-1990, unless the workers or their successors in title had claimed prior to that date; the Judgment of 22 December 1993, *David Neath v Hugh Steeper Ltd*, C-152/91, not published, EU:C:1993:949, applied the time limits correlatively to the mobilization value of vested rights; the Judgment of 28 September 1994, *Coloroll Pension Trustees Ltd v James Richard Russell and others*, C-200/91, EU:C:1994:348, paragraph 53 and 54, applied them to survivors' pensions; the Judgment of 24 October 1996, *Francina Johanna Maria Dietz v Stichting Thuiszorg Rotterdam*, C-435/93, EU:C:1996:395, paragraph 28, declares the temporal limitations to the right of access to a Company Pension Plan, nor to the right to receive a pension by someone who was excluded from the Plan, to be inapplicable.

⁴⁸ The Maastricht Treaty of 7-2-1992 brought the issue to Protocol No. 2 on Art. 119 of the Treaty of Rome. Subsequently, Article 2 of Directive 96/97 clarified the scope of this restriction in relation to the date of effect for the new Member States -the date of their incorporation, as this was the date of application of Article 119 of the TCEE-, for States that became part of the EEA Agreement -1-1-1994- and in relation to the general retroactive application for those who had claimed before 17-5-1990, it set a maximum limit of 8-4-1976, unless the State had acquired the status of member after that date. In such a case, the date of incorporation of the State would be considered and required that the application be extended to all benefits deriving from periods of employment since that date. Directive 2006/54/EC of 5 July 2006 replaced the date of 17-5-1990 with the date of application of the Treaty to new Member States that joined after that date.

the pension scheme.⁴⁹ On the other hand, it has been pointed out that the principle of equal pay affects all pensions under a company pension plan, whether contributory or non-contributory; the imputability of the contributions to the employer or to the workers has no bearing on the concept of pay, except in the case of voluntary contributions by the worker for supplementary voluntary benefits.⁵⁰

On July 24, 1986, Directive 86/378/EEC on the application of the principle of equal treatment for men and women in occupational social security schemes was published as the first regulation specifically dealing with the subject.⁵¹

The rule established a specific period for the Member States to adopt the necessary measures to ensure that the provisions of occupational schemes contrary to the principle of equal treatment between men and women were reviewed⁵². This led to a questioning of the relationship between the Directive and Art. 119 of the Treaty of Rome. The question was raised as to the extent to which the incompatibility of the regulation of supplementary schemes with Art. 119 of the aforesaid Treaty could not be maintained if the aforementioned time limit had not been exhausted. The question was resolved by insisting on the direct applicability of art. 119 of the Treaty, without the need for new EU or national measures, and stressing that “the provisions of the Directive “*cannot, in any case, restrict the scope*” of said article⁵³.

In any case, Directive 86/378/EC⁵⁴ established a ban on any discrimination “on the basis of sex, either directly or indirectly, by reference in particular to marital or family status “⁵⁵. Then, with regard to various aspects of supple-

⁴⁹ Judgment of 6 October 1993, *Gerardus Cornelis Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf*, C-109/91, EU:C:1993:833, paragraph 12 and 13; Judgment of 28 September 1994, *Coloroll Pension Trustees Ltd v James Richard Russell and others*, C-200/91, EU:C:1994:348, paragraph 19; Judgment of 9 October 2001, *Pensionskasse für die Angestellten der Barmer Ersatzkasse VVaG v Hans Menauer*, C-379/99, EU:C:2001:527, paragraph 17 to 19.

⁵⁰ Judgment of 28 September 1994, *Coloroll Pension Trustees Ltd v James Richard Russell and others*, C-200/91, EU:C:1994:348, paragraph 88.

⁵¹ Previously, Directive 79/7/EEC included statutory social security schemes in its scope of application and referred to a subsequent provision for the regulation in this field applicable to occupational schemes (art. 3).

⁵² Article 8.

⁵³ Judgment of 14 December 1993, *Michael Moroni v Collo GmbH*, C-110/91, EU:C:1993:926 paragraph 23 and 24.

⁵⁴ It defines occupational schemes as “schemes not covered by Directive 79/7/EEC, the purpose of which is to provide workers, whether employees or self-employed, in the framework of an undertaking or group of undertakings, a branch of industry or an occupational or interprofessional sector, with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional”. This concept is maintained in Directive 2006/54/EC of July 5, 2006, to which we will refer.

⁵⁵ Article 5.

mentary schemes (scope, conditions of access, obligation to contribute and calculation of contributions and benefits, and withdrawal from the scheme), it introduced an open catalog of provisions considered to be discriminatory⁵⁶. The imposition on the Member States of the obligation to adopt measures determining or permitting the declaration of nullity or requiring the amendment of provisions contrary to the principle of equality represented a qualitative leap in the effectiveness of the principle of equal pay in the matter in question.

It should be emphasized that not only the employers promoting an occupational pension scheme are obliged to apply the principle of equal treatment, but also the trustees or administrators of the scheme. The latter are also obliged to ensure, as far as they are competent to do so, compliance with the aforementioned precept. Therefore, members or their successors in title can take action against them, as executors of the employer's commitments, if they have suffered discrimination on the grounds of sex.⁵⁷

3. Scope of the prohibition of discrimination

Directive 2006/54/EC of July 5, 2006, currently in force, after establishing⁵⁸ the main aspects of the impact of this prohibition, undertakes, in an open catalog, a description of provisions that, if based directly or indirectly on sex, are qualified as discriminatory:⁵⁹

- Access to occupational schemes (definition of persons admitted; establishment of the mandatory or optional nature of membership; establishment of differentiated ages for access to the scheme).

In this regard, the Court of Justice has ruled that the right to participate in a company pension plan is part of the scope of application of the principle of equal treatment in terms of pay⁶⁰, even

⁵⁶ Article 6.

⁵⁷ Judgment of 28 September 1994, *Coloroll Pension Trustees Ltd v James Richard Russell and others*, C-200/91, EU:C:1994:348, paragraph 22 and 23; Judgment of 28 September 1994, *Geertruida Catharina Fisscher v Voorhuis Hengelo BV, and others*, C-128/93, EU:C:1994:353, paragraph 31, 33 and 34; Judgment of 9 October 2001, *Pensionskasse für die Angestellten der Barmer Ersatzkasse VVaG v Hans Menauer*, C-379/99, EU:C:2001:527, paragraph 20 to 23 and 29 and 30.

⁵⁸ Article 5.

⁵⁹ Article 9.

⁶⁰ Judgment of 28 September 1994, *Anna Adriaantje Vroege v NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV*, C-57/93, EU:C:1994:352, paragraph 15; Judgment of 28 September 1994, *Geertruida Catharina Fisscher v Voorhuis Hengelo BV, and others*, C-128/93, EU:C:1994:353, paragraph 12; Judgment 13 January 2004, *Debra Allonby v Accrington & Rossendale College*, C-256/01, EU:C:2004:18, paragraph 53.

when it is a mandatory company pension plan⁶¹. Thus, examples of such discriminatory provisions are those that deny access to the supplementary pension scheme to part-time workers, when it is found that the percentage of women part-time workers is considerably higher than that of men⁶². Or provisions denying access to a company pension plan to married women.⁶³

- Contributions (establish different levels for workers' contributions; establish different levels for employers' contributions, unless the intention is to equalize or bring the two sexes closer together in the amount of the defined contribution committed or, in defined benefit schemes financed by capitalization, to supplement the financial allocation required to cover the costs of such contribution benefits).
- Conditions for maintaining or redeeming rights (interrupting the preservation or acquisition of pension rights during periods of suspension of the employment contract, paid and legally or conventionally provided for, due to maternity or for legally or conventionally prescribed family reasons; establishing differentiated rules for the reimbursement of contributions when leaving the scheme without having acquired the right to deferred benefits; establishing differentiated rules for the maintenance of deferred pension rights when the member leaves the scheme).
- Conditions of access to benefits (requiring different minimum periods of employment or affiliation for the acquisition of rights; establishing different conditions for recognition; setting different retirement ages; interrupting the acquisition of pension rights during periods of suspension of the employment contract, paid and legally or conventionally provided for, due to maternity or for legally or conventionally prescribed family reasons).

The Court of Justice considered a case in which an occupational scheme allowed a man to access a deferred pension at the normal retirement age, while a woman could access an immediate pension because of different age requirements. It held that the provision was

⁶¹ Judgment of 24 October 1996, *Francina Johanna Maria Dietz v Stichting Thuiszorg Rotterdam*, C-435/93, EU:C:1996:395, paragraph 17.

⁶² Judgment of 13 May 1986, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, C-170/84, not published, EU:C:1986:204; Judgment of 10 February 2000, *Deutsche Telekom AG v Lilli Schröder*, C-50/96, EU:C:2000:72, paragraph 27 to 29.

⁶³ Judgment of 28 September 1994, *Anna Adriaantje Vroege v NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV*, C-57/93, EU:C:1994:352, paragraph 17.

contrary to the principle of equal treatment, even though the different ages required for access to the benefit corresponded to those provided for by the national legal system. Thus, a national provision cannot have the effect of excluding the application of the supplementary scheme from the scope of application of the principle of equal pay for men and women.⁶⁴ The same solution is offered when the age difference is transferred to the beneficiaries of survivors' benefits under a supplementary scheme.⁶⁵

Furthermore, the Court has pointed out that the correction of discrimination contrary to the principle of equal pay for men and women in this area cannot be achieved by retroactively eliminating the advantages enjoyed in a pension plan by persons in the privileged category⁶⁶, not even in the case where pension rights are revocable under national law.⁶⁷

- Calculation and content of contributions and benefits (establish different levels for benefits, except to the extent that the use of actuarial criteria is necessary in defined contribution schemes; as for funded defined benefit schemes, the use of actuarial criteria according to sex is allowed at the time of implementation of the funding of the scheme).

In this respect, the ECJ declared that the use of actuarial factors based on the higher life expectancy of women for the calculation of company contributions to a defined benefit company pension plan did not fall within the scope of application of Art. 119 of the Treaty of Rome. To this end, it argued that a distinction should first be made between the treatment of employee contributions, which should be the same for all employees of the company, and which are intended to complete the financial basis of the committed defined benefit. From this it deduced that, “unlike the periodic payment of pensions, inequality of employers' contributions paid under funded defined-benefit pension schemes, which is due to the

⁶⁴ Judgment of 17 May 1990, *Douglas Harvey Barber v Guardia Royal Exchange Assurance Group*, C-262/88, EU:C:1990:209, paragraph 32; Judgment of 14 December 1993, *Michael Moroni v Collo GmbH*, C-110/91, EU:C:1993:926, paragraph 18 and 19.

⁶⁵ Judgment of 25 May 2000, *Jean Marie Podesta v CRICA and others*, C-50/99, EU:C:2000:288, paragraph 46.

⁶⁶ Judgment of 28 September 1994, *Constance Christina Ellen Smith and others v Avdel Systems Ltd.*, C-408/92, EU:C:1994:349, paragraph 5, 13, 14, 17 and 18.

⁶⁷ Judgment of 7 October 2019, *Safeway Ltd. v Andrew Richard Newton and Safeway Pension Trustees Ltd*, C-171/18, EU:C:2019:839, paragraph 34, 35 and 41.

use of actuarial factors differing according to sex, is not struck at by Article.119”⁶⁸. This is the criterion adopted by Directive 2006/54/EC in Article 9.1 h).

On the other hand, it has been considered contrary to the principle of equal pay to provide for a system that treated married and unmarried women equally in the calculation of the pension but did not do the same for married and unmarried men. Thus, the pension paid to an unmarried civil servant was systematically lower than that paid to a married civil servant, whereas, according to the principle interpreted, both should receive the same treatment.⁶⁹

The Court of Justice has analyzed the provisions of a civil service scheme subject to Article 119 of the Treaty of Rome which recognized the right to early retirement for members who had interrupted their work under certain conditions to care for children or because of their birth or adoption; in addition, it granted certain bonuses on the periods of actual service required for access to retirement. Overcoming their apparent neutrality, the provisions analyzed may constitute discriminatory treatment on the basis of sex. This is because suspensions for parental leave, childcare leave or leave of absence for the same reason are optional, as opposed to the mandatory nature of maternity leave, involve a loss of pay for the father, which is not the case with maternity leave, and, in the last two cases mentioned, imply a failure to acquire the right to promotion, which is not the case with maternity leave either. Men are treated pejoratively by the terms of access to the early pension also due to the fact that access requires the effective suspension of the provision of services, which leads to a higher percentage of women benefiting from access to this benefit⁷⁰

The Court of Justice has ruled, albeit conditionally, on the exclusion of a transsexual, the partner of the member, as a beneficiary of the occupational pension scheme. Since the supplementary scheme required marriage in order to recognize the pension, it

⁶⁸ Judgment of 22 December 1993, *David Neath v Hugh Steeper Ltd.*, C-152/91, EU:C:1993:949, paragraph 31 and 32.

⁶⁹ Judgment of 28 September 1994, *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G.A. Beune*, C-7/93, not published, EU:C:1994:350.

⁷⁰ Judgment of 29 November 2001, *Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie*, C-366/99, not published, EU:C:2001:648; Judgment of 17 July 2014, *Maurice Leone and others v Garde des Sceaux*, C-173/13, not published, EU:C:2014:2090.

considers that its refusal is contrary to the principle of equal pay, since the national legislation prevented the marriage of a transsexual with someone of the same sex as that person before the sex change operation.⁷¹

⁷¹ Judgment of 7 January 2004, *K.B. v National Health Service Pensions Agency and others*, C-117/01, not published, EU:C:2004:7.

CHAPTER 37

PROTECTION OF EMPLOYEE PERSONAL DATA. ARTIFICIAL INTELLIGENCE

JESÚS R. MERCADER UGUINA AND MARIO BARROS GARCÍA

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I. THE PROTECTION OF EMPLOYEE PERSONAL DATA

1. Regulatory framework for data protection

The protection of personal data is probably one of the individual guarantees that has undergone the greatest regulatory development at an EU level in recent years. Article 8 of the EU Charter on Fundamental Rights Union (“CFREU”) states that *“everyone has the right to the protection of personal data concerning him or her”*. It adds that, *“such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified”*. It concludes that *“compliance with these rules shall be subject to control by an independent authority”*. Article 16(1) of the Treaty on the Functioning of the European Union (“TFEU”) states that *“everyone has the right to the protection of personal data concerning them”*, as a result of which the European Parliament and the Council adopted a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data under Article 39 of the Treaty on European Union.

As the Court of Justice of the European Union (“ECJ”) pointed out in its judgment of 1 August 2022. *Vyriausioji tarnybinės etikos komisija* (C-184/20, EU:C:2022:601), *“it should indeed be borne in mind that the fundamental rights to respect for private life and to the protection of personal data, guaranteed in Articles 7 and 8 of the Charter, are not absolute rights, but must be considered in relation to their function in society and be weighed against other fundamental rights. Limitations may therefore be imposed, so long as, in accordance with Article 52(1) of the Charter, they are provided for by law, respect the essence of the fundamental rights and observe the principle of proportionality. Under the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others”*.

EU data protection legislation forms a comprehensive and complex legal system with provisions of varying scope. These include Regulation (EU) No 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) No 2018/1724 (Data Governance Act), which defines data as: *“any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording”*. Also,

Regulation (EU) No 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, and the one with the greatest impact on employment matters, Regulation (EU) No 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

The importance of protecting personal data in the workplace is underlined by Principle 10 of the European Pillar of Social Rights, which was enshrined in Gothenburg on 17 November 2017 and states that “*Workers have the right to the protection of their personal data in the employment context.*”

2. **Broad concept of personal data and data processing in the GDPR:** **Pankki**

Article 4(1) of the General Data Protection Regulation (“GDPR”) defines personal data as: “*any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person*”.

If data are completely anonymised, they will not be considered personal data, and therefore the GDPR will not be applicable. If anonymised correctly, it is not possible to identify an individual with data or information from various sources, taking into account all the means that can reasonably be used to identify them. On the other hand, personal data are data relating to identified or identifiable living beings. Therefore, in WP29, Opinion 4/2007 on the concept of personal data, information relating to deceased persons should not be considered personal data, since deceased persons cease to be natural persons for civil law purposes.

The ECJ has construed the concept of “personal data” broadly in pursuit of the stated objective of the GDPR to ensure a uniform and high level of protection of natural persons within the Union and to strengthen and specify the rights of data subjects. In its judgment of 22 June 2023, *Pankki* (C-579/21,

EU:C:2023:501), the ECJ pointed out that *“The use of the expression ‘any information’ in the definition of the concept of ‘personal data’ in that provision reflects the aim of the EU legislature to assign a wide scope to that concept, which potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it ‘relates’ to the data subject”*.

Regarding the “identifiable” nature of a person, Recital 26 GDPR states that *“account should be taken of all the means, such as singling out, which may reasonably be used by the controller or any other person to identify the natural person directly or indirectly”*. In paragraph 45 of the *Pankki* judgment, the ECJ states that *“It follows that the broad definition of the concept of ‘personal data’ covers not only data collected and stored by the controller, but also includes all information resulting from the processing of personal data relating to an identified or identifiable person”*.

But the mere presence of personal data is not enough for personal data protection regulations to be applicable; the personal data must be processed as that is when a risk is posed.

Article 4(2) GDPR considers “processing” as *“any operation or set of operations which is performed upon personal data or sets of personal data, whether or not by automatic means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction”*.

The ECJ has also interpreted the concept of “data processing” in line with the GDPR’s objective. In *Pankki*, the ECJ stated that *“as regards the concept of ‘processing’, as defined in Article 4(2) of the GDPR, it should be noted that, by using the expression ‘any operation’, the EU legislature intended to give that concept a broad scope by using a non-exhaustive list of operations applied to personal data or sets of personal data, which cover, among others, collection, recording, storage or also consultation”*.

3. Particularities of the processing of employment data: Hauptpersonalrat der Lehrerinnen

Article 88(1) GDPR contains a specific rule on processing in the context of employment: *“Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees’ personal data in the employment”*

context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective agreements, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, protection of employer's or customer's property and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship”.

Article 88(2) GDPR adds that *“Those rules shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the workplace”.* And Article 88(3) concludes that, *“Each Member State shall notify to the Commission those provisions of its law which it adopts pursuant to paragraph 1, by 25 May 2018 and, without delay, any subsequent amendment affecting them”.*

The ECJ's judgment of 30 March 2023, *Hauptpersonalrat der Lehrerinnen und Lehrer beim Hessischen Kultusministerium* (C-34/21, EU:C:2023:270), is one of the key judgments on the scope of data protection rights in the employment field and the consequences of non-compliance.

The ECJ issued its judgment in *Hauptpersonalrat der Lehrerinnen* in response to a request for a preliminary ruling from the Wiesbaden Administrative Court in proceedings between the Main Committee of Teaching Staff of the Ministry of Education and Culture of the Federal State of Hesse and the Minister of Education and Culture of the Federal State of Hesse. In particular, it is precisely the question of whether § 26.1 of the Federal Data Protection Act (“BDSG”) —which substantially coincides with § 23.1 of the Hessian Data Protection and Freedom of Information Act (“HDSIG”)—, which provide that *“Personal data of employees may be processed for the purposes of an employment relationship where this is necessary for the decision on the establishment of an employment relationship or, after the establishment of the employment relationship, for the implementation or termination of that relationship, and for the exercise or discharge of the rights and obligations arising, respectively, from the representation of employees' interests and laid down by a law or a collective labour regulation instrument or a works or service agreement (collective agreement)”* and article 86(4) of the Data Protection and Freedom of Information Act of the Land of Hesse (“HBG”), which provides that *“The employer may collect personal data on applicants, civil servants and former*

civil servants only if this is necessary for the establishment, implementation, termination or administration of the employment relationship or for the implementation of organisational, social and personnel measures, in particular for the purposes of human resources planning and deployment, or if it is permitted by a legal provision or a service agreement. ... “are compatible with the requirements laid down in Article 88(2) of the GDPR.

This petition was filed in litigation proceedings on the legality of setting up a live broadcasting system to give online classes to pupils of schools in Hesse during the COVID 19 pandemic without having sought the teachers’ prior consent.

The ECJ first determined whether the processing referred to in the contested provisions fell within the material scope of the GDPR. It concluded that the processing of the teachers’ personal data in the context of the live broadcasting of the classes they taught fell within the material scope of the GDPR. Secondly, the judgment held that the processing of that personal data was covered by Article 88(1) GDPR, even though it refers to “employees” and “employment” because the provision includes employees in the private and public sectors. Once again, the ECJ interpreted the concept of worker broadly.

Having clarified these points, the ECJ went on to answer the first question referred for a preliminary ruling: whether Article 88 GDPR must be construed as meaning that, in order to be classified as a “*more specific rule*” for the purposes of paragraph 1 of that article, a legal rule must satisfy the conditions imposed by paragraph 2 of that same article.

The judgment begins by stating that “*the Member States have the option, and not the obligation, to adopt such rules, which may be provided for by law or by means of collective agreements*”; adding that “*those rules cannot be limited to reiterating the provisions of that regulation and must seek to protect employees’ rights and freedoms in respect of the processing of their personal data in the employment context and include suitable and specific measures to protect the data subjects’ human dignity, legitimate interests and fundamental rights*”. This is because any processing of personal data must comply, on the one hand, with the principles relating to data processing set out in Article 5 GDPR and, on the other hand, with one of the principles relating to the lawfulness of the processing referred to in Article 6 GDPR.

Consequently, “*in order to be classified as a ‘more specific rule’ within the meaning of Article 88(1) of the GDPR, a rule of law must satisfy the conditions laid down in paragraph 2 of that article. Apart from having a normative content specific to the area regulated, which is distinct from the general rules of that regulation, those more specific rules must seek to protect employ-*

ees' rights and freedoms in respect of the processing of their personal data in the employment context and include suitable and specific measures to protect the data subjects' human dignity, legitimate interests and fundamental rights. Particular regard must be had to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity, and monitoring systems at the work place". Therefore, "Article 88 of the GDPR must be interpreted as meaning that national legislation cannot constitute a 'more specific rule', within the meaning of paragraph 1 of that article, where it does not satisfy the conditions laid down in paragraph 2 of that article".

This judgment is hugely important because it imposes on both Member States and social partners (when they are involved in negotiating collective agreements that set more specific rules) the need to reinforce protection in those cases in which, for example, a new lawful basis is created for processing personal data. Merely passing a statutory provision establishing a basis for processing is insufficient for the purposes of Article 88(1) GDPR when it is not accompanied by the protections set out in Article 88(2). The German provision in question (*"Employees' personal data may be processed for the purposes of the employment relationship if necessary (...)"*) fell foul of this requirement, which meant the ECJ's response to the referring court's second question about the consequences of a statutory provision being found not meet the requirements of Article 88(2) GDPR was also very important. First, it looked at Article 6 GDPR to find a basis for processing. In the case of public-sector employees, once it is clear that there is no "legal obligation for processing the data", there may be grounds for arguing the basis for processing was to perform a task that is in the "public interest" (Articles 6(1)(e) and 3 GDPR). In the case of private-sector employees, consent (Article 6(1)(a) GDPR) or, more restrictively, "legitimate interest" (Article 6(1)(f) GDPR), would come into play as possible bases.

In the judgment of 19 December 2024, *MK v K GmbH*, (C 65/23), ECLI:EU:C:2024:1051), a similar direction was taken in relation to collective agreements. The appellant in the main proceedings was an employee of the respondent, a German company, and chairman of the works council constituted in that company. The company concluded a collective agreement with the representatives in relation to the workday program. In this agreement, it was prohibited, in particular, for this program to be used for human resources management purposes, such as the evaluation of a worker, during the trial period. According to the agreement, the only categories of data that could be transferred to feed the workday program were the personnel number assigned to the

worker within group D, their surname, first name, phone number, the date they started working for the company, the date they started working for group D, their workplace, the name of the company in question, and the employee's professional phone number and email address. In this context, the appellant in the main proceedings filed a lawsuit before the competent courts seeking access to certain information, the deletion of data concerning him, and the award of compensation. The appellant alleged, in particular, that the respondent in the main proceedings had transferred to the parent company's server data relating to his person, some of which were not mentioned in the company's agreement, which establishes a tolerance, in particular, his private contact details, details of his contract and remuneration, his social security and tax identification numbers, his nationality, and his marital status.

The referring court is primarily concerned with whether a national rule regulating the processing of personal data for employment relationship purposes—which essentially establishes that such processing carried out on the basis of collective agreements is lawful as long as Article 88(2) of the GDPR is respected—is compatible with said the GDPR, or if, for this purpose, the data processing must also comply with the other provisions of the GDPR. The referring court leans towards the view that, when the processing of employees' personal data is governed by a "collective agreement" within the meaning of article 88 of the GDPR, such processing cannot depart from the requirements arising not only from article 88 but also from articles 5, 6(1), and 9(1) and (2) of the Regulation, particularly with regard to the necessity criterion for processing provided for in the latter three articles.

Article 88 of the GDPR, on the processing of personal data in the context of employment, determines the conditions under which Member States may provide for 'more specific rules', by law or by collective agreements, to ensure the protection of the rights and freedoms of employees concerned by such processing. Recital 155 of that regulation states that the concept of 'collective agreement', within the meaning of that article 88, includes 'works agreements', such as that at issue in the main proceedings.

The Court concludes that "any processing of personal data must observe the principles governing the processing of such data and the rights of the data subject set out, respectively, in Chapters II and III of the GDPR. In particular, it must comply with the principles relating to the processing of those data provided for in Article 5 of that regulation and satisfy the conditions for lawful processing listed in Article 6 thereof. As regards, specifically, the relationship between Article 88 of the GDPR and other provisions of that regulation, the Court has stated, in particular in the light of recital 8 thereof, that, notwithstanding the possible

existence of ‘more specific rules’ adopted by the Member States on the basis of Article 88(1) of that regulation, all processing of personal data must comply with the obligations arising from the provisions of Chapters II and III of that regulation and, in particular, from Articles 5 and 6 thereof”.

Similarly, the obligations resulting from Article 9 of the GDPR must be complied with when any processing of personal data covered by that regulation is carried out, including where there are ‘more specific rules’ adopted pursuant to Article 88(1) thereof. That Article 9, which governs the processing of special categories of personal data listed therein, appears in Chapter II of that regulation, as is the case with Articles 5 and 6 thereof, the requirements of which can, moreover, be applied concurrently with those arising from that Article 9. Furthermore, that interpretation is consistent with the purpose of that Article 9, namely to ensure enhanced protection against processing which, because of the particular sensitivity of the data processed, is liable to constitute a particularly serious interference with the fundamental rights of data subjects.

Thus, where the law of a Member State contains ‘more specific rules’, within the meaning of Article 88(1) of the GDPR, the processing of personal data covered by those rules must comply not only with the conditions laid down in paragraphs 1 and 2 of that article, but also with those laid down in Articles 5, 6 and 9 of that regulation, as interpreted by the case-law of the Court.

In the light of the foregoing, the answer to the first question is that Article 88(1) and (2) of the GDPR must be interpreted as meaning that a provision of national law which concerns the processing of personal data for the purposes of employment relationships and has been adopted pursuant to Article 88(1) of that regulation must have the effect of requiring its addressees to comply not only with the requirements arising from Article 88(2) of that regulation, but also with those arising from Article 5, Article 6(1) and Article 9(1) and (2) thereof.

4. Principles relating to the processing of personal data

The principles are set out in Article 5 GDPR:

— Principle of “transparency of processing”. Article 5(1)(a) GDPR requires that data be processed “*lawfully, fairly and in a transparent manner in relation to the data subject*”.

Data processing is lawful when one of the legal grounds listed in Article 6 GDPR exists (“*lawfulness of processing*”). The legal grounds must also com-

ply with Article 52(1) CFREU, which the ECJ has analysed in various cases, such in judgment of 9 November 2010, *Volker*, (C-92/09, EU:C:2010:662).

Article 8(2) CFREU and Article 5(1)(a) GDPR also stipulate that data must be processed fairly, i.e. respecting the requirements, rights and guarantees established by law for this purpose. The data controller must therefore provide the data subject with the additional information necessary to ensure such fairness (Articles 13 and 14 GDPR). Fairness is therefore an indicator to measure the relationship between the data subject and the data controller, and translates into transparency and trust between the data subject and data controller when it comes to the processing of the data.

— Principle of “purpose limitation”. This requirement is set out in Article 5(1)(b) GDPR and basically responds to the need to ensure that personal data are not processed for any purpose other than that expressly consented to by the data subject. According to Article 89(1) GDPR, subsequent processing of personal data for archiving purposes in the public interest, scientific and historical research purposes or statistical purposes shall not be considered incompatible with the initial purposes.

The guideline for determining the suitability, necessity and proportionality of data processing depends on the purpose(s) for which the data have been obtained, as the ECJ has repeatedly held in cases such as in judgment of 24 November 2011 *ASNEF* (C-468/10, EU:C:2011:777). Also, because according to Article 52(1) CFREU, “*any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*”

— Principle of “data minimisation”. Article 5(1)(c) GDPR also states that the data shall be “*adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed* (‘data minimisation’).”

In accordance with the principle of “data minimisation”, no more data may be requested from the data subject than are strictly necessary, and the request must be fully justified bearing in mind the nature and purpose of the processing. As the ECJ stated in judgment of 24 February 2022, *SS SIA* (C-175-20, EU:C:2022:124), “*the controller, even when acting in the context of the task carried out in the public interest conferred on him, may not proceed, in a generalized and undifferentiated manner, to collect personal data and must refrain from collecting data which are not strictly necessary in relation to the purposes of the processing*”.

— Principle of “data accuracy”. Article 5(1)(d) GDPR requires personal data to be “*accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay*”.

— Principle of “storage limitation”. Personal data must be kept for no longer than is necessary to identify the data subjects, having regard to the purposes for which they are to be processed.

Personal data may be retained “*for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject*” (Article 5(e) GDPR).

— Principle of “integrity and confidentiality”. According to Article 5(f) GDPR, data must always be “*processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures*”.

— Principle of “accountability”. Under this principle, the data controller is responsible for personal data being processed lawfully, fairly and in a transparent manner in relation to the data subject, and for proving that this is the case.

5. Conditions for lawfulness of data processing: employment field

5.1 CONDITIONS

Under Article 6 GDPR, data processing may only be lawful when it is based on one of the legal grounds it lists. The GDPR does not draw any distinction between the grounds, which suggests that there is no hierarchy.

5.2 WEAKNESS OF CONSENT

The GDPR lists consent as the first of the grounds for lawful processing of personal data. According to Article 6(1)(a), processing is lawful if “*the data subject has given consent to the processing of his or her personal data for one or more specific purposes*”. Article 4(11) GDPR defines “*consent of the data subject*” as

“any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her”.

But the WP29 points out in its Opinion 2/2017 that free consent is only given in *“exceptional circumstances”* in an employment context owing to the imbalance in power in the employer/employee relationship. For the WP29, the defining characteristics of consent together with the employee’s dependence on the employer and the fact that consent must be revocable means that, as a general rule, an employee’s consent is not a valid [lawful] basis for data processing in this context. The WP29 also indicates that, for consent to be valid, an *“active”* expression of will is needed, and a lack of action means that the necessary consent has not been obtained.

For its part, recital 155 GDPR states that *“Member State law or collective agreements, including ‘works agreements’, may provide for specific rules on the processing of employees’ personal data in the employment context, in particular for the conditions under which personal data in the employment context may be processed on the basis of the consent of the employee (...)”.*

5.3 EMPLOYMENT CONTRACT

Article 6(1)(b) GDPR considers processing lawful when it *“is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract”*.

Regarding the performance of a contract or contractual obligation to justify the processing of personal data at work, the WP29 in its Opinion 2/2017 merely states that employment relationships are often based on an employment contract and therefore personal data must be processed to comply with obligations under that contract, such as paying the employee. It gave the same example in its Opinion 6/2014 on the notion of legitimate interests of the data controller: *“in the employment context this ground may allow, for example, processing salary information and bank account details so that salaries could be paid”*.

5.4 COMPLIANCE WITH A LEGAL OBLIGATION

“Compliance with a legal obligation to which the controller is subject” (Article 6(1)(c) GDPR) is another ground for lawful processing. Recital 45 GDPR

states that “*where processing is carried out in accordance with a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority, the processing should have a basis in Union or Member State law. This Regulation does not require a specific law for each individual processing.*”

5.5 LEGITIMATE INTEREST

Article 6(1)(f) GDPR considers processing lawful if it is “*necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.*”

WP29, in its Opinion 2/2017 on data processing at work, pays special attention to the legitimate interests basis and in particular to assessing the proportionality of the processing. As such, “*regardless of the legal basis for such processing, a proportionality test should be undertaken prior to its commencement to consider whether the processing is necessary to achieve a legitimate purpose, as well as the measures that have to be taken to ensure that infringements of the rights to private life and secrecy of communications are limited to a minimum.*”

5.6 THE PERFORMANCE OF A TASK CARRIED OUT IN THE PUBLIC INTEREST OR IN THE EXERCISE OF OFFICIAL AUTHORITY VESTED IN THE CONTROLLER

According to Article 6(1)(d) GDPR: “*processing is necessary to protect the vital interests of the data subject or of another natural person*” and, according to Article 6(1)(e) GDPR, “*processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.*”

5.7 PROCESSING OF SPECIAL CATEGORIES OF PERSONAL DATA

Article 9(1) GDPR states that “*Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning*

health or data concerning a natural person's sex life or sexual orientation shall be prohibited".

Article 9(2)(a) GDPR exempts cases in which *"the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject"*. Likewise, Article 9(2)(b) GDPR exempts from the prohibition on processing particularly sensitive data, those cases in which processing is necessary *"for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject"*.

6. Guarantees for data subjects: right of access and Österreichische Datenschutzbehörde and Dun & Bradstreet Austria GmbH

The right of access is a key aspect of the right to data protection. The CFREU expressly provides that the right of access forms an integral part of the right to data protection and derives from the function it performs. Only by knowing what personal data a controller holds about them is an individual in a position to check that the processing of their personal data complies with the legal requirements and can they exercise their rights of information and access to personal data, rectification and erasure and to object (Articles 16 to 22 GDPR). Article 15(1) GDPR states that *"The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data relating to him or her are being processed"*.

According to Article 15(3) GDPR, *"The controller shall provide a copy of the personal data undergoing processing"*. In judgment of 4 May 2023, Österreichische Datenschutzbehörde and CRIF (C-487/21, EU:C:2023:369), the ECJ points out that, as regards Article 15(3), *"Although the GDPR does not contain a definition of the term 'copy' thus used, account must be taken of the usual meaning of that term, which refers, as the Advocate General observed in point 30 of his Opinion, to the faithful reproduction or transcription of an original, with the result that a purely general description of the data undergoing processing or a reference to categories of personal data does not correspond to that definition"*.

In judgment of 27 February 2025, Dun & Bradstreet Austria GmbH, (C 203/22), ECLI:EU:C:2025:117), the expression “right to obtain significant information about the applied logic” used in Article 15(1)(h) of the GDPR has been clarified. The ruling stated that this concept should be understood as the “right to an explanation of the procedure and principles actually applied in order to use, by automated means, the personal data of the data subject with a view to obtaining a specific result, such as a credit profile. In order to enable the data subject effectively to exercise the rights conferred on him or her by the GDPR and, in particular, Article 22(3) thereof, that explanation must be provided by means of relevant information and in a concise, transparent, intelligible and easily accessible form.” Therefore, “those requirements cannot be satisfied either by the mere communication of a complex mathematical formula, such as an algorithm, or by the detailed description of all the steps in automated decision-making, since none of those would constitute a sufficiently concise and intelligible explanation.”

Thus, the ‘meaningful information about the logic involved’ in automated decision-making, within the meaning of Article 15(1)(h) of the GDPR, must describe the procedure and principles actually applied in such a way that the data subject can understand which of their personal data have been used in the automated decision-making at issue, with the complexity of the operations to be carried out in the context of automated decision-making not being capable of relieving the controller of the duty to provide an explanation.

The data subject may require the controller to provide ‘meaningful information about the logic involved’, to explain, by means of relevant information and in a concise, transparent, intelligible and easily accessible form, the procedure and principles actually applied in order to use, by automated means, the personal data concerning that person with a view to obtaining a specific result, such as a credit profile.

Furthermore, Recital 63 of the GDPR states that the right of any data subject to access collected personal data concerning them should not adversely affect the rights and freedoms of others, including trade secrets or intellectual property and, in particular, the intellectual property rights that protect software. However, these considerations should not result in a refusal to provide all information to the data subject. Therefore, the judgment concludes that: “Article 15(1)(h) of the GDPR must be interpreted as meaning that, where the controller takes the view that the information to be provided to the data subject in accordance with that provision contains data of third parties protected by that regulation or trade secrets, within the meaning of point 1 of Article 2 of Directive 2016/943, that controller is required to provide the allegedly protect-

ed information to the competent supervisory authority or court, which must balance the rights and interests at issue with a view to determining the extent of the data subject's right of access provided for in Article 15 of the GDPR."

7. Automated data processing: Schufa

Pursuant to Article 22(1) GDPR, every data subject has "*the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her*". Article 22(2) GDPR sets out the following exceptions which apply when the decision "*a) is necessary for entering into, or performance of, a contract between the data subject and a data controller; b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or c) is based on the data subject's explicit consent*". Article 22(3) GDPR incorporates human intervention in these processes by stating that "*the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller; to express his or her point of view and to contest the decision*".

Automated decisions involving special categories of personal data are only permitted if (i) one of the exemptions provided for in Article 22(2) applies; and (ii) Article 9(2)(a) or (g) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place (Article 22(4) GDPR).

In its judgment of 7 December of 2023, *Schufa Holding (Scoring)* (C-634/21, EU:C:2023:957), the ECJ held that under the GDPR, a commercial information agency's automated generation of a probability value from personal data relating to a person and about that person's ability to meet payment commitments in the future constitutes an "automated individual decision" under Article 22(1) GDPR, when that probability value determines whether a third party, to whom that value is communicated, establishes, executes or terminates a contractual relationship with that person. The judgment states that the concept of automated decision-making affecting the data subject referred to in Article 22 GDPR must be interpreted broadly. The ECJ emphasises that the specific prohibition and restrictions laid down in that rule are intended to

address the specific risks that automated decision-making generates in relation to potential discriminatory effects on individuals.

8. DPO: Leistritz AG and X-FAB Dresden GmbH

The GDPR also introduced the role of Data Protection Officer (“DPO”), which all companies must have. The person who holds this post should be an expert on data protection law and practices, and be in a position to operate independently within the company. The DPO is in charge of ensuring the GDPR is complied with and that the rights and freedoms of the data subjects are unlikely to be adversely affected by the processing operations. The DPO must register the processing operations performed or controlled by the company. The DPO can be either an employee or an external consultant.

Basic safeguards are established to help ensure that DPOs can carry out their tasks with a sufficient degree of autonomy within their organisation (Article 38(3) GDPR). In particular, controllers and processors must ensure that the DPO “*does not receive any instructions relating to the performance of his or her tasks*”. The DPO must report directly to the highest management level of the controller or processor (Article 38(3) GDPR) as this direct reporting line helps to guarantee their independence. The DPO cannot be dismissed or penalised by the controller or the processor for performing their tasks as a DPO (Article 38(3) GDPR).

In judgment of 22 June 2022, *Leistritz AG v. LH* (C-534/20, EU:C:2022:495), the ECJ ruled on whether the provisions governing the termination of a DPO’s employment under the Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG) were compatible with the GDPR. The German Federal Data Protection Act only allows termination for “serious cause” and does not include dismissal for organisational reasons. The ECJ held that the German Federal Data Protection Act is in accordance with EU law, stating that Article 38(3) GDPR “*must be regarded as essentially seeking to preserve the functional independence of the data protection officer*” but that provision “*is not intended to govern the overall employment relationship between a controller or a processor and staff members who are likely to be affected only incidentally, to the extent strictly necessary for the achievement of those objectives*”.

In judgment of 9 February 2023 *X-FAB Dresden GmbH & Co. KG* (C-453/21 EU:C:2023:79), the ECJ ruled on the question of whether a works council member may also be a DPO and, if so, the effects of removing them from that position. The ECJ ruled on two (of the four) referred ques-

tions. The first question was whether Article 38(3) GDPR (“[The DPO] *shall not be dismissed or penalised by the controller or the processor for performing his tasks*”) precludes a provision in national law which makes the dismissal of the DPO subject to certain conditions, regardless of whether the dismissal relates to the performance of his or her tasks. The second question was whether there is a conflict of interests within the meaning of Article 38(6) GDPR when the DPO is also the chair of the works council.

In answering the first question, the ECJ pointed out that Article 38 GDPR, which states that the DPO “*shall not be dismissed or penalised by the controller or the processor for performing his tasks*”, does not preclude national rules that provide that a controller or processor may only dismiss a DPO (who is a member of its staff) for serious reasons, even if the dismissal is not related to the performance of their tasks as DPO. In turn, it notes that each Member State will be free to establish more protective provisions on the removal of the DPO, provided that such provisions are compatible with EU law and the GDPR. In view of this answer, the ECJ held that there was no need to answer the second and third questions raised.

But the ECJ did state in response to the second question that a conflict of interests is not *per se* to be presumed when a DPO performs other tasks for the controller or processor, although a conflict of interests may arise when a DPO is entrusted with functions or responsibilities that enable him or her to determine the purposes and means of data processing within the controller or its processor. The ECJ did not assess whether or not it found a conflict of interests in this case, as it considered that this was a matter for the national court to decide on a case-by-case basis in light of all the relevant circumstances.

In conclusion, Member States may develop the GDPR and the requirements to be met to remove a DPO from their post without infringing EU law. *X-FAB Dresden GmbH & Co. KG* also confirms that national courts are competent to determine whether or not there is a conflict of interests when the DPO has a variety of different functions, some of which involve having decision-making power over the purposes and means of the processing (something that happens in a lot of organisations). Therefore, the existence of a conflict of interests must be determined on a case-by-case basis, which requires a thorough *ex ante* analysis, including an assessment of the organisational structure of the controller or processor, as well as the applicable rules (including internal policies), and finally, clarifying that the duties of the DPO do not result in a conflict of interest.

II. EMPLOYMENT AND PERSONAL DATA PROTECTION

1. Pre-recruitment stages: Peter Nowak

Article 6(1)(b) GDPR provides that personal data may be lawfully processed before a contract is entered into insofar as it “*is necessary (...) in order to take steps at the request of the data subject prior to entering into a contract*”.

WP29 Recommendation 1/2001 concluded that personal data can be found in subjective evaluations and judgements of workers and therefore advocated that workers always be able to access and rectify them. To this end, transparency in the processing of this type of data and respect for the exercise of the right of access are essential. In judgment of 20 December 2017 *Peter Nowak* (C-434/16, EU:C:2017:994), the ECJ highlighted this idea, pointing out that “*the definition of the concept of ‘personal data’, within Article 2(a) of Directive 95/46, reflects the aim of the EU legislature to assign a wide scope to that concept, which is not restricted to information that is sensitive or private, but potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it ‘relates’ to the data subject.*”

2. Enforcement of the employment contract: Rechnungshof and Worten

As was made clear in WP29, Opinion 8/2001 on the processing of personal data in the employment context, both Member States and social partners must be aware that many of the activities carried out routinely in a company involve processing workers’ personal data and, on many occasions, sensitive personal information.

The GDPR does not expressly exclude the processing of an individual’s data collected in the form of business contacts, so this data must be considered personal data whenever they refer to an identified or identifiable person, regardless of whether or not a professional-business purpose is sought.

The ECJ has considered that data relating to an individual’s income are also personal data. In judgment of 20 May 2003, *Rechnungshof* (C-465/00, EU:C:2003:294), the ECJ stated that “*data at issue in the main proceedings, which relate both to the monies paid by certain bodies and the recipients, constitute personal data*”.

Details kept about an employee's working time, which include start and end times and any breaks, also fall under the definition of "personal data". In judgment of 30 May 2013, *Worten* (C-342/12, EU:C:2013:355), the ECJ held that "Article 6(1)(b) and (c) and Article 7(c) and (e) of Directive 95/46 do not preclude national legislation, such as that at issue in the main proceedings, which requires an employer to make a record of working time available to the national authority responsible for monitoring working conditions so as to allow its immediate consultation, provided that this obligation is necessary for the purposes of the performance by that authority of its task of monitoring the application of the legislation relating to working conditions, in particular as regards working time".

3. New digital technologies

Article 88(2) GDPR highlights the importance of this area when it specifies that data processing in the workplace "*shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing (...) and monitoring systems at the work place*".

3.1 ELECTRONIC SURVEILLANCE

The WP29's working document on the surveillance of electronic communications in the workplace concludes that "*wherever possible prevention should be more important than detection. In other words the interest of the employer is better served in preventing Internet misuse through technical means rather than in expending resources in detecting misuse. To the extent reasonably possible Internet policy should rely on technical means to restrict access rather than on monitoring behaviour, i.e. by having some sites blocked or installing automatic access warnings. (....) The delivering of prompt information to the worker on the detection of a suspicious use of the Internet is important in order to minimise problems. Even if a necessary measure, any monitoring must be a proportionate response to the risk faced by the employer*". Regarding the use of email, as a practical recommendation, employers could consider the advantages of providing employees with two email accounts; one for strictly professional use, which would be monitored within certain limits; and another for strictly private use (or with authorisation to use

webmail), which would be subject to security measures and would be monitored to prevent email abuse in exceptional cases.

3.2 VIDEO SURVEILLANCE SYSTEMS

Since the GDPR was approved, Member States have passed various regulations on this matter allowing or limiting the use of video surveillance systems at work. European Data Protection Board Guidelines 3/2019 on processing of personal data through video devices start from the premise that “*an employee in his/her workplace is in most cases not likely expecting to be monitored by his or her employer*”.

3.3 GEOLOCATION-BASED CONTROLS

WP29 Opinion 2/2017 points out that while there are various legal grounds that justify this type of processing, such as complying with a legal obligation of the controller (e.g. to ensure the security of the employee’s personal data), or a legitimate interest in locating company vehicles, in all cases it must first be assessed whether the processing for these purposes is necessary and whether the actual implementation complies with the principles of proportionality and subsidiarity. For example, if the private use of a company vehicle is permitted, the employee must be able to disable the location tracking devices on the vehicle.

3.4 BIOMETRIC DATA

The GDPR defines “*biometric data*” as “*personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data*” (Article 4(14) GDPR). Article 3(34) of the Artificial Intelligence Act (Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directive 2014/90/EC of the European Parliament and of the Council of 23 July

2014 on marine equipment and repealing Council Directive 96/98/EC, Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union and Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC) contains a similar definition.

The Artificial Intelligence Act defines “*biometric identification*” (Article 3(35)) as “*the automated recognition of physical, physiological, behavioural, or psychological human features for the purpose of establishing the identity of a natural person by comparing biometric data of that individual to biometric data of individuals stored in a database*”; “*biometric verification*” (Article 3(36)) as “*automated, one-to-one verification, including authentication, of the identity of natural persons by comparing their biometric data to previously provided biometric data*”; and “*biometric categorization*” (Article 3(40)) as “*an AI system for the purpose of assigning natural persons to specific categories on the basis of their biometric data, unless it is ancillary to another commercial service and strictly necessary for objective technical reasons*”.

3.5 FACIAL RECOGNITION

Paragraph 73 of the European Data Protection Board Guidelines 3/2019 on the processing of personal data through video devices states that, “*The use of biometric data and in particular facial recognition entail heightened risks for data subjects’ rights. It is crucial that recourse to such technologies takes place with due respect to the principles of lawfulness, necessity, proportionality and data minimisation as set forth in the GDPR. Whereas the use of these technologies can be perceived as particularly effective, controllers should first of all assess the impact on fundamental rights and freedoms and consider less intrusive means to achieve their legitimate purpose of the processing*”.

4. Off-site monitoring

WP29 Opinion 2/2017 refers to the monitoring of home and remote working devices, indicating that the key issue in these cases is to manage any risks involved in remote working in a proportional manner, considering in particular, when using monitoring technologies, the boundaries between profes-

sional and private use. The WP29 also deals with issues raised by Bring Your Own Device (BYOD), Mobile Device Management (MDM) and wearables.

5. Occupational health data: *Lindqvist*

In judgement of 6 November 2003, *Lindqvist* (C-101/01, EU:C:2003:596), the ECJ stated that “*the expression data concerning health used in Article 8(1) thereof must be given a wide interpretation so as to include information concerning all aspects, both physical and mental, of the health of an individual*”, and therefore the fact that a person has injured their foot and is on “partial leave” (i.e. they are unable to work full-time for medical reasons) constitutes personal data concerning health within the meaning of Directive 95/46.

Article 4(15) GDPR defines data concerning health as “*personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status*”. Article 4(13) GDPR defines “*genetic data*” as “*personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question*”.

5.1 LIABILITY

5.1.1 Civil liability in ECJ case law

Article 82(2) GDPR establishes that “*Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation*”. The liability of the processor is more limited, as it “*shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller*”.

Article 82 GDPR has been the subject of numerous requests for a preliminary ruling from courts in various countries (especially Germany), which have given rise to judgments of the ECJ on: (a) the essential elements of a breach of data protection legislation; (b) the criteria to be met to fall within the scope of liability under Article 2 GDPR; (c) the right to compensation; (d) the

burden of proof; and (e) types of damages: material or non-material under Article 82 GDPR.

This is not a purely objective liability (see judgment of 14 December 23, *Natsionala agentsia za prihodite*, C-340/21, ECLI:EU:C:2023:986). Pursuant to Article 82(2) GDPR, the controller or processor shall be exempt from liability if it “*proves that it is in no way responsible for the event giving rise to the damage*”. The expression “*in no way*” shows that the standard of care required is very high, so it is foreseeable that the courts will apply a quasi-objective approach to liability, linking the obligation to compensate to the existence of a legal infringement (if the other requirements are met: damage and causation).

The claimant must prove that they have suffered damages (judgement of 11 April 2024, *GP and juris GmbH*, C-741/21, ECLI:EU:C:2024:288), the assessment and quantification of which is a matter for the judges and courts (judgment of 21 December 2023 *ZQ and Medizinischer Dienst*, C-667/2021, EU:C:2023:1022).

According to the ECJ, the interested party must prove that the “negative consequences” it has suffered constitute “non-economic damage”. Non-economic damage is similar to the traditional concept of non-material damage/non-monetary losses. The ECJ has accepted that a data subject’s concern that third parties could misuse their personal data (without such use having to have materialised) may, in itself, constitute compensatory non-pecuniary damage (judgment of 14 December -23, *Natsionala agentsia za prihodite*, C-340/21, EU:C:2023:986). This type of damage is very difficult to quantify and it is not possible to predict its amount *a priori*.

5.1.2. *Administrative liability*

Article 83 of the GDPR establishes the general conditions to impose administrative fines and the legislator has indicated that they must have a series of characteristics: they must be individual, effective, proportionate and dissuasive. Article 84 GDPR provides that Member States may impose “*other penalties applicable to infringements of this Regulation in particular for infringements which are not subject to administrative fines pursuant to Article 83, and shall take all measures necessary to ensure that they are implemented. Such penalties shall be effective, proportionate and dissuasive*”.

Responsibility for such sanctioning action, and that it complies with the aforementioned characteristics, clearly lies with each supervisory authority. The GDPR establishes a series of concurrent circumstances for such purpose,

which must be taken into account by each regulator when establishing the sanction for each specific case, as well as in relation to the material fact of establishing in detail the amount of the fine to be imposed. These are regulated in Articles 83(4) and 83(5) GDPR.

III. ARTIFICIAL INTELLIGENCE AND EMPLOYMENT RELATIONSHIPS

1. Artificial intelligence: concept and principles

After a long period of processing and after overcoming various obstacles, the European Parliament has given the green light to Regulation (EU) No 2024/1689 (“Artificial Intelligence Act”). Its purpose is to promote the uptake of human-centric and trustworthy artificial intelligence (AI), while ensuring a high level of protection of health, safety, fundamental rights enshrined in the Charter of Fundamental rights of the European Union, including democracy, the rule of law and environmental protection, against the harmful effects of AI systems in the Union, and supporting innovation. Its staggered entry into force (Article 113 Artificial Intelligence Act) eases matters.

The Artificial Intelligence Act defines the concept of an “*artificial intelligence system*”. This definition is very similar to that proposed by the Organisation for Economic Co-operation and Development (OECD) in May 2019. This is the first time that a Regulation has defined it along with its consequences. It is understood as “*a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments*”. It also seeks to regulate what it describes as “general-purpose AI models” (Article 3(63)), which were referred to in previous versions of the Artificial Intelligence Act as “foundational models”, i.e. generative artificial intelligence, the leading example of which is ChatGPT.

Article 4 of the Artificial Intelligence Act defines “AI literacy” and in Article 3(56) states that: “*Providers and deployers of AI systems shall take measures to ensure, to their best extent, a sufficient level of AI literacy of their staff and other persons dealing with the operation and use of AI systems on their behalf, taking into account their technical knowledge, experience, education and train-*

ing and the context the AI systems are to be used in, and considering the persons or groups of persons on whom the AI systems are to be used”.

A safeguard rule expressly referring to employment is set out in Article 2(11): *“This Regulation does not preclude the Union or Member States from maintaining or introducing laws, regulations or administrative provisions which are more favourable to workers in terms of protecting their rights in respect of the use of AI systems by employers, or from encouraging or allowing the application of collective agreements which are more favourable to workers”.*

AI has three key elements: big data, algorithms and computing power. Big data are the raw material, in other words, *“the air that AI systems breathe”*. The close connection between the Artificial Intelligence Act and the GDPR is evidenced by the multiple and reciprocal interactions between the two regulations. However, the area where there is the greatest overlap is that of biometrics - the metrics of individuals. A review of the categories used by the Artificial Intelligence Act in relation to these systems [*“biometric data”* (Article 3(34)), *“biometric identification”* (Article 3(35)), *“biometric verification”* (Article 3(36)), *“emotion recognition system”* (Article 3(39)), *“biometric categorization system”* (Article 3(40)), *“remote biometric identification system”* (Article 3(41)), *“real-time remote biometric identification system”* (Article 3(42)) and *“post-remote biometric identification system”* (Article 3(43))] shows how important it is, which in turn is projected onto the different models that are linked to different levels of risk.

The Artificial Intelligence Act bases its actions on what we could call its “golden triangle”: risk approach, guarantees and responsibilities.

2. Risk-based approach

Risk is inseparably associated with the changes brought about by the generation of new AI systems. The Artificial Intelligence Act itself states it takes a “risk-based approach”, defined as a *“combination of the probability of an occurrence of harm and the severity of that harm”*. The Artificial Intelligence Act establishes a hierarchy of risks according to the use of AI and, based on the categories detected, sets out a series of obligations. The impact of these obligations on employment issues is more than evident.

Emotion recognition systems are directly prohibited in this area. The Artificial Intelligence Act expressly prohibits *“the placing on the market, the putting into service for this specific purpose, or the use of AI systems to infer emotions of a natural person in the areas of workplace and education institu-*

tions, except where the use of the AI system is intended to be put in place or into the market for medical or safety reasons” (Article 5(1)(f) Artificial Intelligence Act). “[T]he placing on the market, the putting into service for this specific purpose, or the use of biometric categorisation systems that categorise individually natural persons based on their biometric data to deduce or infer their race, political opinions, trade union membership, religious or philosophical beliefs, sex life or sexual orientation (...)” are also prohibited (Article 5(1)(g) Artificial Intelligence Act).

However, the essential part of the system built by the Artificial Intelligence Act is based on setting limits on the use of systems that are classified as “high risk” (Articles 6(1) and (2) in relation to what is established in Annex III of the Artificial Intelligence Act).

Annex III of the Artificial Intelligence Act includes as high-risk AI systems those affecting “*Employment, workers’ management and access to self-employment*” and, in particular, (a) “*AI systems intended to be used for the recruitment or selection of natural persons, in particular to place targeted job advertisements, to analyse and filter job applications, and to evaluate candidates*”, and (b) “*AI systems intended to be used to make decisions affecting terms of work-related relationships, the promotion or termination of work-related contractual relationships, to allocate tasks based on individual behaviour or personal traits or characteristics or to monitor and evaluate the performance and behaviour of persons in such relationships*”.

3. Guarantees associated with high risk levels

The Artificial Intelligence Act includes an important system of safeguards that are tied to the general requirements to be met by high-risk IA systems “*taking into account their intended purpose as well as the generally acknowledged state of the art on AI and AI-related technologies*” (Article 8(1)). This entails the establishment, implementation, documentation and maintenance of a risk management system understood as “*a continuous iterative process planned and run throughout the entire lifecycle of a high-risk AI system, requiring regular systematic review and updating*” (Article 9). This is coupled with the necessary “*data governance*” (Article 10), the requirements for precise technical documentation (Article 11) and the need to ensure a level of traceability of the functioning of the AI system (Article 12). Sufficient transparency for deployers to correctly interpret and use a system’s output information is a fundamental principle (Article 13), together with the need for the de-

sign and development of high-risk AI systems to comply with the human-in-command principle (Article 14). Finally, systems shall be designed and developed to achieve an adequate level of accuracy, robustness and cybersecurity and to operate uniformly throughout their life cycle (Article 15).

Those responsible for the deployment of AI systems incorporating these techniques must adhere to the following (Article 26(7) Artificial Intelligence Act): *“Before putting into service or using a high-risk AI system at the workplace, deployers who are employers shall inform workers’ representatives and the affected workers that they will be subject to the use of the high-risk AI system. This information shall be provided, where applicable, in accordance with the rules and procedures laid down in Union and national law and practice on information of workers and their representatives”*. This requirement is reinforced by Article 86 Artificial Intelligence Act, which recognises the right to receive a clear and meaningful explanation of those uses of AI that affect a worker.

4. Liability rules and associated penalties

Article 99(3) of the Artificial Intelligence Act states that *“Non-compliance with the prohibition of the AI practices referred to in Article 5 shall be subject to administrative fines of up to EUR 35,000,000 or, if the offender is an undertaking, up to 7 % of its total worldwide annual turnover for the preceding financial year, whichever is higher”*. Article 99(4) states that *“Non-compliance with any of the following provisions related to operators or notified bodies, other than those laid down in Articles 5, shall be subject to administrative fines of up to EUR 15,000,000 or, if the offender is an undertaking, up to 3 % of its total worldwide annual turnover for the preceding financial year, whichever is higher”*. Article 99(4)(e) is also relevant, as it refers to non-compliance with *“the obligations of deployers pursuant to Article 26”*.

5. Entry into force

After its publication in the Official Journal of the EU, the AIA will come into force on August 1, 2024, and will be progressively applicable. The general rule is that the AIA will be applicable 24 months from the date of entry into force, that is, from August 2, 2026. However, there are significant exceptions. Specifically, the duty of literacy, its content, impact, and associated duties, as well as the prohibited AI practices, came into force on February 2, 2025.

CHAPTER 38

**DIRECTIVE (EU) 2019/1937 AND THE PROTECTION
OF WHISTLE-BLOWERS**

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**I. THE EUROPEAN WHISTLEBLOWER SYSTEM OF DIRECTIVE
(EU) 2019/1937**

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 sets out a whistleblowing system for private and public organisations. This system is based on a dual internal and external channel, in which, starting from a very broad concept of whistleblower (art. 4), protected whistleblower (art. 6)

and the breaches that may be reported (art. 2), it establishes a protective status, which includes the prohibition of retaliation (art. 19), support measures (art. 20) and measures for protection against retaliation (art. 21).

1. The objective of a European whistleblowing system

The enactment of Directive 2019/1937 (Whistleblowing Directive) is part of a regulatory process that has developed on a global scale in recent years and which is based on the consideration of whistleblowers as a central element in the fight against fraud and corruption¹. Following the amendments introduced by the European Parliament in 2019 to the Commission's initial Proposal of 23/4/2018, the Directive appeals in its preamble to objectives such as improving transparency and accountability and enhancing the application of laws, introducing effective, confidential and secure whistleblowing channels.

Whistleblower protection is the cornerstone of the whistleblowing system, but it is not an end in itself but a tool for enforcement. The aim of the Directive is to reinforce, through the necessary protection of whistleblowers, compliance with Union rules whose violation may lead to harm the public interest. Ultimately, the underlying concern is the lack of detection and the difficulties in uncovering crimes committed within organisations.

However, this communication of information is also connected with the freedoms of information and expression in Articles 11 of the Charter and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, essential pillars of democracy in a state governed by the rule of law.

Focusing our attention on the objectives, the Directive also provides a regulation of minimum European standards on whistleblower protection and aims to establish a harmonised model for whistleblowing in each Member State, with a view to ensuring a comprehensive and coherent framework at national level (Article 2(2) and Recital 5). Finally, the Directive also aims at alleviating the current fragmentation of protection across the EU by providing for horizontal rules, meant for ensuring a homogeneous level of protection for whistleblowers in the EU. The Directive would thus complement sectoral

¹ From the two pioneering countries, USA and Great Britain, and their two models of regulation, the rules have been spreading all over the planet and, in the EU, the most important precedent of Directive 2019/1937 is the Parliament Resolution of 24 October 2017.

rules, which already provide for rules on whistleblowing on breaches of Union law, although respecting their specificities².

As a final general consideration, it should be made clear that the Whistle-blowing Directive does not ignore the rights of persons concerned and provides for effective, proportionate and dissuasive sanctions to prevent malicious and abusive whistleblowing as well as to avoid damage to the reputation of persons concerned. It regulates the protection of whistleblowers without disregarding the rights of the accused. The regulation is therefore aimed at seeking a certain balance between the rights of both and, in particular, in relation to the right to the protection of personal data, in its design of the internal and external channels for complaints.

2. Material scope

Although the Directive is primarily aimed at protecting whistleblowers as an instrument for the prevention of economic crime and public corruption, it extends to the reporting of infringements, regardless of whether they are classified as administrative, criminal or other offences under national law³.

First, breaches are broadly defined in Art. 5 as actions or omissions that are unlawful or that frustrate the object or purpose of the rules. This concept includes both unlawful acts or omissions and abuse of law. The information may relate to breaches that have already occurred, and to offences that have not yet materialised but are likely to be committed, as well as to attempts to conceal breaches.

Secondly, the protected reports are those relating to breaches concerning, *inter alia*, public procurement; financial services, prevention of money laundering and terrorist financing; product safety; transport safety; environmental protection; radiation protection and nuclear safety; food and feed safety, animal health and welfare; public health; consumer protection; protection of personal data and privacy; and security of networks and information systems (Article 2).

Although, in its articles, the Directive follows a model of delimitation of breaches, this is ‘without prejudice to the power of Member States to extend protection under national law as regards areas or acts’ not provided for (Article 2(2)). Furthermore, the Directive appeals in its recitals, both in terms of the matters concerned and in relation to information, to the ‘public interest’, which

² Thus, for example, in the area of financial services, Regulation (EU) No 596/2014 on market abuse and Commission Implementing Directive (EU) 2015/2392, adopted on the basis of that Regulation, already contain detailed rules on whistleblower protection.

³ Moreover, it does not expressly include corruption or the most directly related crimes, crimes against public administration.

is the key concept in the Parliament's Resolution of 24 October 2017 and in the doctrine of the European Court of Human Rights, ECHR judgment of 12 February 08, *Guja v. Moldova*. The above would call for a state complement to this delimitation of the breaches subject to information or complaint, centred around the concept of public interest.

In relation to complaints about breaches of labour and social security law, the Directive does not expressly include them and its preamble clarifies that this is without prejudice to the protection afforded to workers when reporting breaches of labour law. The complaints system in some countries, such as the UK and the US, includes complaints of harassment and occupational health and safety regulations breaches, respectively.

The communication of information affecting national security, defence and security, the protection of classified information, or the professional secrecy of doctors and lawyers, the secrecy of judicial deliberations or criminal prosecution rules are outside the material scope of the Directive (Art. 3.3). The Directive thus does not affect the protection of the confidentiality of communications between lawyers and their clients ('client-attorney privilege') as provided for by national and, where appropriate, Union law, in accordance with the case law of the Court of Justice of the European Union (Recital 26). This is a limitation of the whistleblowing right of lawyers to report wrongdoing in or by the organisation for which they provide professional services which, however, does not include in-house lawyers, as it is not bound by legal professional privilege.

Indeed, the ECJ has made lawyers' duty of confidentiality subject to two conditions: its relation to the rights of defence and the independence of the lawyer, who cannot be linked to his client by an employment relationship. The ECJ considers that the in-house lawyer is subject to a dependent relationship on an organic, hierarchical and functional level, i.e. there is a personal identification with the company (judgment of 18 May 1982, *AM & S v Commission*, C-155/79, EU:C:1982:157, judgment of 14 September 2010, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission*, C-550/07, EU:C:2010:512).

Consequently, in-house lawyers would be protected by the Whistleblowing Directive in case of whistleblowing within the organisation they work for.

3. Personal scope of application

The whistleblower is defined in the Directive on the basis of two characteristic features, who acquired information on breaches in a work-related context (Article 4) and 'their vulnerability', as clarified in Recital 36. The Directive extends its

subjective scope of application to all persons who, by virtue of their activity, have privileged access to information, a category to be defined as broadly as possible and irrespective of the nature of the relationship between this person and the organisation. The risk of retaliation in the workplace and the vulnerability of such a person give rise to the need for specific legal protection. However, the repentant, i.e. the whistleblower who has participated in the crime, is not included.

In an open list of whistleblowers, Art. 4 includes ‘at least’, on the one hand, not only persons having the status of workers (Article 45 TFEU) including already civil servants, but also self-employed persons (Article 49 TFEU), volunteers and paid or unpaid trainees, as well as any person working under the supervision and direction of contractors, subcontractors and suppliers. The Directive will also apply to whistleblowers whose employment relationship has not yet started, in cases where information on breaches has been obtained during the recruitment process or pre-contractual negotiation. Finally, persons who have terminated their employment relationship are already included⁴.

The Directive assumes, in its personal scope of application, under the influence of the British whistleblower system, job applicants, partners of an entity or employees after the termination of their contractual relationship with the organisation which has been reported. The influence of the American system is felt through the inclusion of facilitators, assistants or assistants to whistleblowers and the extension of the protection to contractors and subcontractors. Therefore, analysing the Directive in the context of other previous rules, it is right to broadly identify the whistleblower as the natural person who may have access, in a work-related context, to information on breaches in an organisation and who, due to his or her vulnerability, requires the channels of protection established by the rule (Article 4 and Recital 36). The nature of the relationship is not relevant as it applies to a set of persons who, in a broad sense, are linked to the offending organisation.

II. WHISTLEBLOWING CHANNELS AND RULES OF ARTICULATION

Persons who can provide information on breaches, known in the professional sphere of the entity or organisation concerned, must have various chan-

⁴ On the other hand, the Directive also includes in its scope of application shareholders and persons belonging to the administrative or supervisory body of a company, including non-executive members. Other natural and legal persons who may suffer retaliation, such as facilitators (persons who assist them in the whistleblowing process), third parties related to the whistleblower, such as family members or co-workers, as well as legal entities owned by or related in any way to the whistleblower, are also identified for the purpose of protection (Article 4.4).

nels or channels for reporting and/or disclosing this information, in a secure and confidential manner. The relationship between the internal and external channels is a crucial element in the configuration of any whistleblowing system. The Directive makes a conceptual distinction between reporting (which can be internal or external) and disclosure (a concept it reserves for making information available to the public) and establishes rules for the articulation between them that are relevant for the protection of the whistleblower.

Confidentiality in favour of the whistleblower, application of the principles of personal data protection and the provision for a whistleblowing register are requirements applicable to internal and external whistleblowing (Articles 16, 17 and 18). Consequently, whistleblowing programmes must be set up in compliance with EU data protection rules, the application of which will also be important in the management of whistleblowing. Thus, the principles of Article 5 of the General Data Protection Regulation (GDPR), the conditions established by Art. 6 GDPR for lawful data processing and the principle of proportionality (data must be collected for specified and adequate purposes, relevant and limited to the purpose for which they are processed, and kept for the time necessary for those purposes) must be complied with.

1. The internal reporting channel: the preferred channel for complaints

As a general principle, the Directive states that information on infringements may be communicated through internal channels and procedures (Article 7(1)). For this purpose, Member States shall promote the use of internal channels before recourse is made to external reporting. Member States shall encourage reporting through internal reporting channels before reporting through external reporting channels, where the breach can be addressed effectively internally and where the reporting person considers that there is no risk of retaliation (Article 7(2)).

In such cases, after having exhausted internal channels, if appropriate action had not been taken within three month time, whistleblowers shall report the information about the breach through external reporting channels and procedures (Article 10). In addition, whistleblowers shall report information through an external complaint, directly, e.g. because there are no internal reporting channels (as is the case for entities that are not subject to the obligation to establish such channels, due to the number of persons employed).

Although the Directive prioritises the internal channel, it does not establish it as a prior channel, in any case, to the external reporting channel. This regulation departs from the Commission's Proposal of 23 April 2018, in which whistleblowers were obliged to use internal channels in the first place, and only if these channels did not work or could not reasonably be expected to work could they communicate the information to the competent authorities. Now, although priority is given to the internal channel and the external channel is also configured as a subsidiary channel, it is implicitly admitted that the whistleblower may resort to the external channel, if he/she reasonably considers that he/she may suffer retaliation.

The preference for internal channel is explicit in the doctrine of the European Court of Human Rights as the complainant must, in the first place, take action within the organisation and, if this is not possible, take action before the competent authorities, ECtHR judgments of 12 February 2008, *Guja v. Moldova*; 21 July 2011, *Heinisch v. Germany*; 21 October 2014, *Matúz v. Hungary* and 14 February 2023, *Halet v. Luxembourg*. Parliament's resolution of 24 October 2017 is ambiguous in this respect, as it encourages employers to establish internal complaint procedures (paragraph 32) while at the same time protecting whistleblowers who directly make their complaint publicly (paragraph 37).

2. Internal complaints channel: an obligation on the company

Under the Directive, the establishment of an internal complaints system is an obligation for companies and public sector entities, further to consultation and agreement with employees' representatives, where provided for by national law. In Community law, the obligation to introduce internal reporting systems is not in doubt. States are obliged to ensure that private and public sector legal entities establish appropriate internal channels for the submission of complaints and procedures for their follow-up (Articles 8 and 9). As regards the competences of workers' representatives, the Directive only states that Member States shall "ensure" that legal entities in the private and public sector establish channels and procedures for internal reporting and for follow-up, following consultation and in agreement with the social partners where provided for by national law (Art. 8.1). The solution as regards trade union involvement in the establishment and implementation of internal complaints systems will thus be in line with the nature of the model of collective labour relations in each Member State.

In the private sector, this obligation is imposed on entities with 50 or more employees, as well as those which, regardless of the number of employees, fall within the scope of the Union acts referred to in Parts I.B and II of the Annex (Article 8(3) and (4))⁵. EU states may require companies with fewer than 50 employees to establish internal complaint channels and procedures, following an appropriate risk assessment, and taking into account the nature of the entities' activities as well as the ensuing level of risk for, in particular, the environment and public health (Article 8(7)). This state decision shall be notified in a reasoned manner to the Commission (Article 8(8)). In the private sector, the obligation to establish internal channels is proportionate to the size of the company's workforce and the level of risk its activities pose to the public interest. As a general rule, micro and small companies are exempted from the obligation to establish internal reporting channels. Individuals working in these companies will report directly to external channels, i.e. they can directly inform the competent national authorities.

In the public sector, all public legal entities, including entities owned or controlled by a public legal entity, are obliged to establish such internal whistleblowing procedures. However, Member States may exempt from this obligation municipalities with less than 10,000 inhabitants or less than 50 employees or other entities with less than 50 employees (Article (8)9). A limitation that contrasts with the statement that the obligation to establish internal reporting channels should apply to all public legal entities in order to ensure, in particular, the respect of public procurement rules in the public sector.

3. Whistleblowing is not an obligation for employees

The internal reporting channel is therefore an obligation for the company, but reporting in the Directive is not an obligation for employees or similar persons. This is relevant in view of the obligation to report possible risks and breaches set out in the reporting systems provided for corporate compliance programmes.

4. The management of the internal whistleblowing system

In accordance with the Directive, internal reporting channels may be managed by a person or department designated for this purpose within each

⁵ On financial services, products and markets, and the prevention of money laundering and terrorist financing.

organisation or may be provided externally by a third party. Both in-house and external systems for managing the reporting system are thus possible. Third parties entrusted with the management of a private entity's reporting channels must, like internal managers, respect the safeguards and requirements of security, confidentiality, impartiality, diligence and transparency. In addition, the Directive also foresees joint or pooled internal channel management systems in the private sector and in the public sector. Legal entities in the private sector with 50 to 249 workers may share resources as regards the receipt of reports and any investigation to be carried out. This shall be without prejudice to the obligations imposed upon such entities by this Directive to maintain confidentiality, to give feedback, and to address the reported breach (Article 8(6)). Similarly, in the public sector, Member States may provide for the possibility for several municipalities to share internal reporting channels or for these to be managed by joint municipal authorities, in accordance with national law, provided that the shared internal channels are differentiated and autonomous from the external reporting channels (Article 8(9)).

As follows from the Directive, the designation of the most appropriate persons or services within a private entity to be entrusted with the reception and handling of complaints will depend on the structure of the entity, without being imposed on a specific body within the entity. If there is already a compliance officer or an integrity policy officer, the solution in favour of unifying the management of the internal complaints system in this criminal oversight body would seem to be the right one.

III. WHISTLEBLOWER PROTECTION STATUTE

Whistleblower protection is the key piece of Directive 2019/1937 and comprises a prohibition of retaliation, support measures and measures to protect against retaliation. This protective status is triggered as long as the whistleblower fulfils two conditions. First, they have reasonable grounds to believe that the information reported is true, at the time of the complaint, and that it falls within the scope of this Directive. Second, they must have reported through internal channels in accordance with Article 7 and through external channels in accordance with Article 10, or have disclosed information publicly in accordance with Article 15 of the Directive (Article 6). The former sets the standard of reasonable belief in the veracity of the information and the latter, while formulating a preference for internal reporting, expresses, in fact, submission to the rules of articulation of the various reporting channels. There-

fore, the protection of whistleblowers is subject to two conditions: a reasonable belief in the veracity of the breach and compliance with the rules on the articulation of the avenues of reporting (internal and external), analysed above. But the whistleblower is also protected if he or she resorts to public disclosure in a subsidiary manner, in the event of unsuccessful use of the internal and external channels, in the event of imminent and manifest danger to the public interest and if there is a risk of retaliation or little possibility of effective treatment of the breaches, in the case of external reporting (Art. 15).

1. The requirement of truthfulness of information

The whistleblower protected by the Directive may not have conclusive evidence of the reported breach and may provide only reasonable suspicions (Articles 5 and 6). To be protected, whistleblowers must reasonably believe, in the light of the circumstances and the information available to them at the time of the complaint, that the facts complained of are true, that the information provided is truthful⁶.

The so-called ‘reasonable belief standard’ has therefore been followed in American administrative and judicial practice, the adoption of which represented a notable step forward in the protection of whistleblowers⁷. Similarly, in Great Britain, protected whistleblowing, under the Public Interest Disclosure Act 1998 (PIDA), is identified with information that a worker ‘reasonably believes’ has happened, is happening or will happen in the future. Reasonable belief does not have to be absolute certainty, but must extend to the whistleblowing being ‘in the public interest’. The introduction by the Enterprise and Regulatory Reform Act 2013 of the above test of the whistleblowing being ‘in the public interest’ meant that the requirement for the worker to report ‘in good faith’ was removed. The rationale was that, if the public interest is served by the disclosures, it does not matter what motivation a worker has for making them⁸.

⁶ Safeguard against abusive or malicious complaints, see recital 43 of the Directive.

⁷ Indeed, in relation to the concept of protected whistleblowing in the USA, established in the SOX Act (section 806), in administrative and judicial practice, the ‘definitively and specifically standard’ and the broader ‘reasonable belief standard’ succeeded each other over time. In the field of administrative protection, the change of criterion occurred earlier, in 2011 (*Sylvester v. Parexel Int’l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042 (ARB May 23, 2011)) and in the courts it would be necessary to wait until 2016 (*Beacom v. Oracle Am., Inc.*, 825 F.3d 376 (8th Cir. 2016)).

⁸ In *Hayes v Reed Social Care & Bradford* (MDC ET Case No. 1805531/00) the court would confirm the irrelevance of the statement of reasons. However, courts will have the power to reduce compensation by up to 25% for an injury or dismissal of an employee in connection with a protected disclosure if the disclosure was not made in good faith.

In the doctrine of the European Court of Human Rights, one factor to take into account is the authenticity of the information disclosed. The exercise of freedom of expression entails duties and responsibilities, and any person who decides to disclose information must carefully verify, as far as circumstances permit, that it is accurate and credible, ECtHR judgments of 12 February 2008, *Guja v. Moldova*; 21 July 2011, *Heinisch v. Germany*; 21 October 2014, *Matúz v. Hungary* and 14 February 2023, *Halet v. Luxembourg*.

The motives of the whistleblower in making the complaint should be irrelevant in determining whether that person should receive protection, in line with the European Parliament Resolution of 24 October 2017, as the basis for whistleblower protection should be the information exposed and not the intention of the whistleblower (paragraph 47). In short, the good faith of the whistleblower is not required, which does appear expressly in other sectoral Directives and constitutes a requirement especially valued by the doctrine of the European Court of Human Rights, in order to extend to the whistleblower the mantle of protection of art. 10 of the European Convention on Human Rights. The aforementioned ECHR Judgment of 12-2-08 *Guja v. Moldova*, would affirm that ‘the motive behind the actions of the reporting employee is another determinant factor in deciding whether a particular disclosure should be protected or not’. ‘It is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet, means of remedying the wrongdoing was available to him or her’. The ECtHR Judgment of 14 February 2023, *Halet v. Luxembourg*, also keeps on appealing to the requirement of good faith.

2. The standard of protection of a public discloser

As noted above, the whistleblower is also protected if he or she resorts to public disclosure as a subsidiary means, in the event of unsuccessful use of internal and external channels, in case of imminent and manifest danger to the public interest and if there is a risk of retaliation or little chance of effective treatment of the offence, in case of external reporting (Article 15). The Directive already recalls that the communication of information is connected with the freedoms of information and expression in Articles 11 of the Charter and 10 of the ECHR; essential pillars of democracy in a state governed by the rule of law; which connects us with the issue of the standard of judicial protection of whistleblowers ex Articles 11 of the Charter and 10 of the ECHR. To this

end, it should be noted that the ECtHR has defined a standard of protection for whistleblowers.

Since the Judgment of 12 February 2008, *Guja v. Moldova*, under the protection of the freedom of expression of art. 10 ECHR, the ECtHR has built a protective jurisprudence of whistleblowers (without the Court expressly using this terminology) establishing a ‘control framework’ to determine whether and to what extent the protection of art. 10 of the Convention could be invoked, which has recently been endorsed by the aforementioned ECtHR Judgment 14 February 2023, *Halet v. Luxembourg*⁹. The Court analyses the cumulative criteria that must be met in order to consider the disclosure of corporate information to be justified, among which, for the purposes of comparison with the requirements seen, we should point out, firstly, the preference for the internal channel for making the disclosure, secondly, the authenticity of the information disclosed, thirdly, the good faith in lodging the complaint, and fourthly, the public interest of the information disclosed.

In relation to the requirement regarding the channels used for alerting, the Court has had the opportunity to emphasise that, in principle, priority should be given to internal channels for the transmission of information and that disclosure to the public should only be considered as a last resort, in case of manifest impossibility to act otherwise. But this order of priority between internal and external reporting channels is not, in the Court’s jurisprudence, absolute. The Court accepts that certain circumstances may justify direct recourse to an ‘external means of whistleblowing’, where the internal channel of disclosure lacks reliability or effectiveness, where the whistleblower risks exposure to retaliation or where the information he seeks to disclose relates to the very essence of the activity of the employer concerned. Ultimately, the criterion relating to the channel of whistleblowing must be assessed according to the circumstances of each case¹⁰.

Secondly, the authenticity of the information disclosed is an essential element in the assessment and the whistleblower should seek to verify that the information to be disclosed is genuine before making it public. Anyone deciding to disclose information should take diligent steps to verify that it is accurate and reliable. However, a whistleblower cannot be required to establish,

⁹ Previously, in the same case, the Third Chamber of the ECtHR (Judgment of 11 May 2021, *Halet v. Luxembourg*) considered that his right to freedom of expression had not been infringed. It held that the domestic courts had made a fair balance between, on the one hand, the need to protect the rights of the applicant’s employer and, on the other hand, the need to protect the applicant’s freedom of expression. Also on this issue ECtHR Judgment of 15 November 2022, *Poienaru v. Roumanie*.

¹⁰ See the sections of the *Halet* 2023 Judgment, nos. 121-123.

when reporting, the authenticity of the information disclosed. Whistleblowers who have disclosed erroneous information when they had reasonable grounds to believe its veracity at the time they did so should be protected against possible retaliation. Furthermore, it should be noted that the ECtHR assesses the authenticity of the information, often in conjunction with the good faith criterion, stating that a whistleblower should be considered to be acting in good faith, provided that he or she had reasonable grounds to believe that the information disclosed was true, even if it was later found to be untrue, and provided that it was not for unlawful or unethical purposes¹¹.

Third, the Court recalls that the motivation of the employee making the disclosure is a determining factor in assessing whether or not the process should enjoy protection. In assessing the good faith of an applicant, the Court verifies, in each case, whether or not he was motivated by a desire to obtain a personal advantage from his act, in particular pecuniary gain. However, as I have already pointed out in the Court's case law, the criterion of good faith is not unrelated to that of the authenticity of the information disclosed. The Court thus affirms the good faith of the person who, in making the disputed disclosure, acted in the belief that the information was truthful and that it was in the public interest to disclose it or rules, for example, that an applicant whose allegations were based on mere rumour and who had no evidence to support them could not be considered to have acted in good faith¹².

Fourthly, the ECHR requires in its case law on the protection of whistleblowers a public interest in the information disclosed. In this regard, it is worth noting for the purposes of this paper that the Court considers that the weight of the public interest in the information disclosed will vary depending on whether this information relates to: unlawful acts or practices; reprehensible acts, practices or conduct; or a matter giving rise to a debate that generates a controversy as to whether or not there is harm to the public interest. Indeed, for the Court, information relating to unlawful acts or practices is undeniably of particular public interest.

If we compare the conditions of the Directive and the judicial standard of protection, there are similarities in relation to the public interest of the information, in relation to the objective scope of application of the protection and in relation to the requirement of authenticity or truthfulness of the information disclosed. Likewise, the requirement to use the appropriate channel makes public disclosure, depending on the circumstances of each case, subject to a

¹¹ Paragraphs 124-127.

¹² Citation of judgments in Paragraphs 128-130.

number of conditions that are further specified in the Directive. Therefore, by establishing an internal system and an external channel of information, the protection of those who go directly to the press should be conditional, as provided for in the Directive, on the frustration and ineffectiveness of both channels or on cases of imminent danger or risk.

As can be seen, the main difference lies in the specific requirement of good faith, which, in my opinion, must give way to the relevance or public interest of the information and the requirement of truthfulness (which avoids false communications). In this sense, the ECtHR also advances in linking good faith with the reasonable belief in the authenticity or veracity of the information disclosed. In another case, ‘the criterion of good faith runs the risk of being misinterpreted if one focuses on the motivation of the complainant rather than on the truthfulness and relevance of the information he has disclosed’¹³. In short, what is proposed is what can already be seen in the doctrine of the ECtHR, the approximation of the canon of judicial interpretation to that of the Directive, in cases of information on infringements that fall within its scope of application.

3. The anonymous whistleblower: admission and protection

The Directive leaves it up to the Member States to accept the figure of the anonymous whistleblower. It will be up to the national transposing laws whether or not to accept anonymous reporting (Article 6(2) and Recital 35). The obligation to have anonymous reporting mechanisms remains in force, however, under Union law, in certain areas such as money laundering. If they are accepted, the right to protection must be guaranteed to the person making the report, if they are subsequently identified, and provided they meet the conditions laid down in general terms.

4. System of safeguards and exemption from whistleblower liability

Chapter IV of the Directive, Articles 19, 20 and 21, regulates the protection measures for whistleblowers who meet the conditions set out above. Starting from a broad concept of retaliation that includes, in view of an open list, any act

¹³ ‘It does not matter why the whistleblower made his or her disclosures, as long as they are true’: Report A/70/30 of 8/9/2015 of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

or omission occurring in the employment context and causing unjustified harm to the person, the Directive lays down the obligation for States to prohibit any form of retaliation, including threats and attempts of retaliation (Article 19). Support measures foreseen for whistleblowers include information and counselling (legal, financial and psychological) and certification as a protected whistleblower. Finally, the protective measures in Article 21 include a limited guarantee of immunity, as well as a series of procedural guarantees and measures of full compensation for damages suffered. The procedural safeguards are set out for legal proceedings initiated by the complainant for the reparation of any damages suffered and include the shifting of the burden of proof and injunctive relief.

We will focus our attention on the immunity of the whistleblower for disclosing secrets or confidential information (Article 21 and Recitals 97 and 91). “Without prejudice to (...) where persons report information on breaches or make a public disclosure in accordance with this Directive they shall not be considered to have breached any restriction on disclosure of information and shall not incur liability of any kind in respect of such a report or public disclosure provided that they had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach pursuant to this Directive” (Article 21(2)).

4.1 OBJECTIVE SCOPE OF THE EXEMPTION FROM LIABILITY

The exemption from liability for the disclosure of information expressly extends to prior acts of acquiring or accessing this information. Whistleblowers shall not incur any liability in connection with the acquisition of, or access to, the relevant information, provided that such acquisition or access does not constitute a self-standing criminal offence. In the event of the acquisition or access constituting a self-standing criminal offence, criminal liability shall continue to be governed by applicable national law (Art. 21(3)).

Where the whistleblower has lawfully obtained access to the information disclosed or the documents containing it, he should enjoy immunity from such liability. He or she also enjoys such immunity, even if he or she has acted in breach of contractual or other clauses stipulating that such documents are the property of the organisation. Whistleblowers should also enjoy immunity where the acquisition of the information or documents could give rise to civil, administrative or employment-related liability. Only if such acquisition or access constitutes a criminal offence, criminal liability will continue to be governed by applicable national law (Recital 92).

However, the exemption from liability operates as long as the person reporting the breach or making a public disclosure had reasonable grounds to believe that such information was necessary to disclose an infringement. Outside this guarantee of immunity would be actions not necessary to disclose such information (Article 21(4)). The exemption from liability should therefore not extend to superfluous information that the data subject would have disclosed without reasonable grounds.

4.2 EXEMPTION FROM LIABILITY FOR WHISTLEBLOWING AND BUSINESS SECRETS

Whistleblowing and public disclosure of corporate breaches can sometimes clash with the protection of trade and business secrets. This protection is the subject of Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. For this purpose, Directive (EU) 2019/1937 declares the disclosure of trade secrets made under this rule as a consequence of the reporting of breaches, to be lawful (Article 21(7)). Where a person reports or publicly discloses information about breaches, which contains trade secrets and meets the conditions set out in the Whistleblowing Directive, such reporting or public disclosure will be considered lawful under the conditions set out in Article 3(2) of Directive 2016/943.

Article 3(2) of Directive 2016/943 is already to be applied in accordance with Article 21(7) of Directive 2019/1937. Directive 2016/943 lays down rules aimed at ensuring sufficient and systematic civil remedies in case of unlawful acquisition, use or disclosure of trade secrets. However, it also accepts that the acquisition, use or disclosure of the trade secret will be considered lawful to the extent that it is permitted by EU law. However, persons who disclose trade secrets obtained in a work related context should only benefit from the protection granted by the Whistleblowing Directive (also as regards exemption from civil liability) provided that they fulfil the conditions laid down therein, including the condition that the disclosure was necessary to discover a breach, provided that the infringement falls within the material scope of this Directive (on whistleblower protection).

Ultimately, where those conditions are met, the disclosure of a trade secret will be deemed to be ‘permitted’ by Union law, by virtue of Article 3(2) of Directive 2016/943. The two Directives should be considered complementary and civil remedies, procedures or measures, as well as exemptions under Directive 2016/943, should be interpreted in accordance with the Whistleblowing Directive.

CHAPTER 39

**PREDICTABILITY OF WORKING CONDITIONS. DIRECTIVE
2019/1152**

BELÉN GARCÍA ROMERO

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I. BACKGROUND AND RATIONALE FOR THE NEW DIRECTIVE 2019/1152

Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union repeals the previous Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions which apply to the contract of employment or employment relationship. The repeal takes effect from 1 August 2022, the date on which the deadline for transposition given to Member States by Article 21 expires.

The need for a new regulation arises as a consequence of the profound changes in labour markets due to digitalisation and demographic changes. The shortcomings in protection observed in relation to certain EU workers to whom the 1991 Directive does not apply, as well as in relation to new forms of employment created since that date, make it advisable to extend the information obligation to new workers and to broaden the content of the information to be obtained from the employer. In short, it introduces substantial changes to the purpose, scope and content of Directive 91/533.

The new Directive 2019/1152 is based on Article 31 of the Charter of Fundamental Rights (Recital 1) and Principle 5 of the European Pillar of Social Rights (Recital 2), which recognise the right of all employed persons to working conditions which respect their health, safety and dignity; to limitation of maximum working hours and to daily and weekly rest periods; to an annual period of paid leave; to fair and just treatment as regards working conditions; to social protection and vocational training, encouraging the transition to open-ended forms of employment. It aims to prevent employment relationships leading to precarious working conditions, in particular by prohibiting the abusive use of atypical contracts and requiring that probation periods be of reasonable duration.

Directive 2019/1152, like the 1991 Directive, focuses on workers' rights to information on the essential elements of their employment relationship, albeit in a more complete and detailed manner. At the same time, however, it incorporates a series of guarantees relating to certain working conditions, such as the probationary period, moonlighting, compulsory training, transition to another form of employment, the contract on demand or the identity of the social security institutions that receive the contributions. Finally, it is concerned with the protection of the rights recognised therein, reinforcing the mechanisms for monitoring compliance and establishing guarantees to protect workers, such as a procedure to be followed in the event of breach of contract, dissuasive sanctions, presumptions in favour of the worker, the guarantee of indemnity, etc.

While there is European Court of Justice (thereafter, ECJECJ) case law on issues related to working conditions and working time, as seen in previous judgments on the Working Time Directive 2003/88/EC, no specific ECJ judgments have yet been published directly interpreting or applying Directive 2019/1152 on transparent and predictable working conditions in the European Union. Indeed, although in some cases this directive has been invoked by the referring court (Judgement of 28 October 2021, *Unitatea Administrativ Teritorială D.*, C-909/19), as the facts were prior to the expiry of the deadline for transposition of that directive, it was held that the directive was not applicable *ratione temporis* to the main proceedings. However, it is to be expected that cases will arise in the near future requiring the intervention of the European Court of Justice to clarify aspects of this Directive as Member States implement it and related labour disputes reach the European courts.

II. PURPOSE, SUBJECT AND SCOPE

1. Purpose

The aim of Directive 2019/1152 is to improve working conditions by promoting employment that offers greater transparency and predictability, while ensuring the adaptability of the labour market (Article 1(1)).

This stated dual purpose reflects the idea of “flexicurity”, which seeks to combine two sets of interests: on the one hand, the right of workers to fair and equitable treatment in terms of working conditions, access to social protection and training; and, on the other hand, the guarantee of the necessary flexibility for employers to adapt quickly to changes in the economic and non-standard employment context. At the same time, innovative forms of work should be promoted, entrepreneurship and self-employment encouraged, and occupational mobility facilitated (Recital 2). However, the two objectives are not placed on an equal footing in the European standard, but rather the protection of the social part of the employment relationship takes precedence over the economic one, as it is stated that “employment relationships which lead to precarious working conditions should be avoided, in particular by prohibiting the abusive use of atypical contracts”.

The Directive aims to ensure that all workers throughout the Union enjoy an adequate degree of transparency and predictability regarding their working conditions. The principle of foreseeability aims to ensure that workers have effective knowledge of the content of the employment relationship, as a basis on

which to defend the rest of their rights. In short, both concepts - transparency and foreseeability - refer to the idea of legal certainty, which must be guaranteed to the worker in their employment relationship with regard to their working conditions and which will take on special relevance in relation to the provisions on working time, guaranteeing the establishment of reference frameworks that allow them to have control over their own time, expressly establishing the right to have other activities in parallel. Likewise, in the Directive, predictability is also extended to the field of professional expectations and therefore the right to apply for other, more stable forms of employment is established in the Directive.

2. Scope

According to the 2019 Directive, the recognised rights apply to all workers in the Union who have a contract of employment or an employment relationship as defined by the law, collective agreements or practice in force in each Member State, taking into account the case law of the Court of Justice (Article 1(2)).

Thus, the Directive refers to the legislation of the Member States, bearing in mind that, in accordance with the reiterated doctrine of the ECJ, it is for the Member States to define employment contracts and employment relationships, since the concept of employee, although of a European community nature, is not unequivocal within the scope of the European Union. It is a term to be defined according to the specific Directive to be applied and the circumstances of the case, and it is the national judge who is responsible for such a definition after assessing and evaluating the existence of the elements that characterise the employment relationship¹.

However, as can be seen, in Article 1(2) of Directive 2019/1152 there is an extension of the personal scope of application since, in its case law, the ECJ has established the elements for determining the status of a worker².

¹ Cf. ALONSO-OLEA GARCÍA, B.: «Aspectos sociales del gobierno corporativo y de la responsabilidad social corporativa», LA Ley mercantil, nº 92, June 2022, LA LEY 6260/2022, p. 24.

² Judgment of 3 July 1986, *Lawrie-Blum*, C-66/85, EU:C:1986:284 (trainee teacher), ; Judgement of 14 October 2010, *Union Syndicale Solidaires Isère*, C-428/09, EU:C:2010:612 (workers on educational participation contracts carrying out occasional activities in holiday and leisure centres), ; Judgment of 9 July 2015, *Balkaya*, C-229/14, EU:C:2015:455 (a member of the management of a limited liability company who carries out his activity under the direction and control of another body of the company, who receives remuneration in return for his activity and who does not himself hold any shareholding in that company qualifies as an employee; so is a trainee who does not receive remuneration from the employer but receives financial assistance from a public body responsible for promoting employment), ; Judgment of 4 December 2014, *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411 ('false self-employed'), ; and of 17 Novem-

According to Recital 8 of the Directive, the ECJ's interpretation of these criteria must be taken into account when it comes to application of this Directive. Provided that these conditions are met, domestic workers, on-demand workers, intermittent workers, workers paid by vouchers, workers on online platforms, trainees and apprentices may fall within the scope of this Directive.

Ultimately, a key aspect of the 2019 Directive is the extension of the concept of worker based on the case law of the Luxembourg Court, so that a minimum level of protection is guaranteed to all current and future contractual forms, reducing the possibilities to exclude from this concept workers exercising their activity in the framework of casual or short-term employment relationships.

On the other hand, precisely because they do not meet these criteria, workers who are genuinely self-employed should be excluded, which is not the case for bogus self-employed workers, who should obviously fall within the scope of this Directive (Recital 8).

The Directive will apply to all employees working more than 12 hours per month and Member States are allowed to decide not to apply it to employment relationships where the predetermined and actual working time is equal to or less than an average of three hours per week over a reference period of four consecutive weeks (Article 1(3))³. For the purposes of the three-hour average, the time worked will count for all employers who are part of or belong to the same company, group or entity.

However, this exception will not come into play in the case of workers who do not have a guaranteed predetermined working time before employment starts, including those on a zero-hours contract and some on-demand contracts. Therefore, given the unknown duration of paid work, the provisions of the 2019 Directive will also apply to these workers, irrespective of the number of hours they work (Article 1(4) and Recital 12).

On the other hand, Article 1(6) allows states to decide, “for objective reasons”, not to apply the provisions set out in Chapter III - on minimum requirements related to working conditions - to civil servants, emergency public services, armed forces, police authorities, judges, prosecutors, investigators or other law enforcement agencies.

ber 2016, *Betriebrat der Ruhrlandklinik gGmbH*, C-216/15, EU:C:2014:2411 (nursing staff without an employment contract seconded to a healthcare establishment by a non-profit-making association), ..

³ As explained in Recital 11, as opposed to the system set out under Article 1 of Directive 91/533 (whereby Member States were allowed to exclude certain limited cases of employment relationships, which resulted in an increasing number of workers being excluded from the rights recognised therein), it has been preferred to replace such derogations by the incorporation of a clause allowing the choice not to apply to employment relationships which do not exceed the minimum threshold of three hours per week in a reference period of four consecutive weeks.

Secondly, Article 1(7) provides that Member States may also decide not to apply the obligations laid down in some of its provisions to natural persons belonging to a household who act as employers in cases where the work is carried out for the household at hand. Such derogations may cover the following matters: requests for and responses to different forms of employment (Article 12, on transition to another form of employment), providing compulsory training (Article 13) and providing for redress mechanisms based on favourable presumptions, in the case of missing information in the documentation to be provided to the worker (Article 15(1)(a)). Consequently, this exception does not exclude family workers from the general information duties.

Thirdly, regarding seafarers and fishermen, the provisions of Chapter II of the Directive - concerning minimum information on the employment relationship - apply to them, except for the obligations laid down in a number of areas which do not apply to them because of the specific characteristics of their working conditions (Article 1(8)). These are the provisions on parallel employment (Article 9) where it is incompatible with work on board ships or fishing vessels, the minimum predictability of work (Article 10), the posting of workers to another Member State or to a third country (Article 7), the transition to another form of employment (Article 12) and the provision of information if the pattern of work is wholly or mainly unforeseeable (Article 4(2)(m)) or on the identity of the social security institutions receiving social security contributions, as well as any social security protection provided by the employer (Article 4(2)(o)).

Finally, in relation to the scope of application, of particular interest is the provision envisaged under Article 1(5) of the Directive, according to which Member States may assign all or some of the obligations of predictability and transparency to a natural or legal person who is not a party to the employment relationship. This allows Member States to attribute obligations and responsibilities, including those relating to working time, to companies that decentralise part of their production to self-employed workers or to digital platforms that present themselves as mere intermediaries in the supply and demand of goods and services.

3. Definitions

Article 2 incorporates three essential elements to ensure the predictability of working conditions, in particular those relating to the organisation of working time. These are the concepts of work schedule, work pattern and reference hours and days, which are defined as follows:

- (a) ‘work schedule’ means the working timetable which determines the hours and days on which work begins and ends.
- (b) ‘reference hours and days’ means the time slots in specific days during which work may take place at the request of the employer.
- (c) ‘work pattern’ means the way in which working time is organised and distributed according to a certain pattern determined by the employer.

4. **Provision of information**

The employer is obliged by the Directive to inform each of his employees in writing “*on paper or, provided it is accessible to the worker, that it can be stored and printed, and that the employer retains proof of transmission or receipt, in electronic form*”. (Article 3).

III. INFORMATION ABOUT THE EMPLOYMENT RELATIONSHIP

1. **Minimum information common to any type of employment relationship**

According to Article 4(1) of the Directive, Member States shall ensure that employers are required to report on the essential elements of their employment relationship. This is a *de minimis* Directive which does not prevent countries from establishing legal, administrative or contractual rules that are more favourable to workers (Article 20).

In any case, such information must include at least the following elements (Article 4(2):

- a) The identities of the parties to the employment relationship.
- b) The place of work; in the absence of a fixed or main place of work, the principle that the worker is employed in different places or is free to determine his or her place of work, as well as the headquarters or, where appropriate, the domicile of the employer.
- c) The title, grade and nature or category of work for which the worker has been employed or a brief characterisation or description of the work.
- d) The date of commencement of the employment relationship.
- e) In the case of a fixed-term employment relationship, the date of termination or the expected duration of the employment relationship.

- f) In the case of temporary agency workers, the identity of the user undertakings, when and as soon as known.
- g) Where applicable, the duration and conditions of the probationary period.
- h) If any, the right to employer-provided training.
- i) The amount of paid leave to which the worker is entitled or, if it is not possible to provide this information at the time the information is given, the procedures for allocating and determining such leave.
- j) The procedure, including formal requirements and the length of notice periods, to be observed by the employer and the employee in the event of termination of the employment relationship or, if the length of notice periods cannot be indicated at the time of provision of information, the modalities for determining such notice periods.
- k) The remuneration, including the initial basic remuneration, any other components, if separately stated, and the frequency and method of payment of the remuneration to which the employee is entitled.
- l) The information to be given in case of a foreseeable pattern of work, which will be discussed later in section B).
- m) The information to be given in the event of an unforeseeable work pattern, which is discussed under C).
- n) Any collective agreements governing the terms and conditions of employment of the worker or, in the case of collective agreements concluded outside the business by special joint institutions or bodies, the name of the competent institution or joint body within which such agreements have been concluded.
- o) Where the employer is responsible, the identity of the social security institutions that receive social security contributions arising from the employment relationship, as well as any social security protection provided by the employer.

2. Specific information if the work pattern is entirely or mostly predictable

If the pattern of work is wholly or mostly predictable, the employer must also provide information on the length of the worker's ordinary daily or weekly working hours, as well as any agreement on overtime and its remuneration and, if applicable, any agreement on shift changes (Article 4(2) (l)).

3. **Specific information if the work pattern is wholly or mostly unpredictable**

Article 4(2)(m) of the Directive provides that, if the pattern of work is wholly or mainly unforeseeable, the employer shall inform the worker of:

- 1) The principle that the work schedule is variable, the amount of guaranteed paid hours and the remuneration of work performed outside the guaranteed hours.
- 2) The reference hours and days on which the worker may be required to work.
- 3) The minimum period of notice to which the worker is entitled before the start of the work and, where applicable, the deadline for cancellation referred to in Article 10(3).

4. **The possibility to replace certain information by a reference to its regulation.**

Article 4(3) of the Directive allows the information referred to in points (g), (h), (i), (j), (k) and (l), i.e. information on the length of the probationary period, entitlement to compulsory training, paid leave, procedure for termination of employment, remuneration, length of the normal working day, overtime and shift changes, as well as on the social security institutions receiving the contributions, to be given, where appropriate, in the form of a reference to the provisions laid down by law, regulation, administrative action or administrative action, as well as the social security institutions receiving the contributions, overtime and shift changes, as well as on the social security institutions to which contributions are paid, may, where appropriate, take the form of a reference to the laws, regulations, administrative or statutory provisions or collective agreements governing these matters.

5. **Time and media**

One of the remarkable changes compared to the previous Directive of 1991 is the reduction of deadlines to provide the information (Article 5(1)). Thus, if not previously provided (e.g. in the written employment contract which has been given to the employee), the information concerning the elements provided for in Article 4(2)(a), (b), (c), (d), (e), (g), (k), (l) and (m), are

reduced from one month to seven days, or, following the Directive's terms, such information "*shall be provided individually to the worker in the form of one or more documents, during a period starting on the the first working day and ending no later than the seventh calendar*". The rest of the information (concerning the identity of user undertakings, entitlement to training, paid leave, termination procedure, applicable collective agreement and the identity of the social security institutions receiving social contributions) must be provided within one month (instead of two months, as provided for in Directive 91/533).

As regards the means of information, Member States may develop templates and models for the documents referred to in paragraph 1 and put them at the disposal of worker and employer including by making them available on a single official national website or by other suitable means (Article 5(2)).

Thirdly, in accordance with Article 5(3) of the Directive, Member States shall ensure that information on the laws, regulations, administrative or statutory provisions or universally applicable collective agreements⁴ governing the applicable legal framework to be communicated by employers is generally available, free of charge, in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means, including through existing online portals.

6. Additional information for workers in certain cases

Articles 6 and 7 of the Directive regulate the obligation to provide information on changes that may impact the contractual relationship, as well as additional information to expatriate workers (Article 7).

6.1 IN THE EVENT OF A CHANGE IN THE EMPLOYMENT RELATIONSHIP

The obligation to inform exists not only at the time of recruitment, but also in the event of a subsequent change in the conditions provided for in Article 4(2). To this end, the employer must provide a document stating such changes "*at the earliest opportunity and at the latest on the day on which it takes effect*" (Article 6.1).

⁴ The reference to 'universally applicable' collective agreements should be understood as generally effective agreements, as is the case, among others, in the French and Italian versions.

This document shall not apply to changes which merely reflect a change in the laws, regulations, administrative or statutory provisions or collective agreements cited in the documents referred to in Article 5(1) and, where applicable, Article 7 (Article 6(2)).

6.2 FOR WORKERS POSTED TO ANOTHER MEMBER STATE OR TO A THIRD COUNTRY

Like the previous 1991 Directive for “expatriate” workers, the new Directive also regulates the employer’s duty to provide additional information to workers posted to a Member State or a third country other than the Member State where they usually work. Such information must be provided prior to departure and must cover at least the following matters (Article 7(1)):

- a) The country or countries in which the work is to be carried out and the expected duration of the work. This aspect is included as a new feature in the 2019 Directive.
- b) The currency to be used for the payment of remuneration.
- c) Where appropriate, benefits in cash or in kind linked to the task(s) assigned.
- d) Information on whether repatriation is envisaged and, if so, the conditions for repatriation of the worker.

In the case of a posted worker covered by Directive 96/71 - on the posting of workers in the framework of the transnational provision of services - Member States must ensure that the following additional information is communicated to the worker (Article 7(2)):

- a) the remuneration to which he is entitled under the applicable law of the host Member State;
- b) any specific travel allowances and any provision for reimbursement of travel, board and lodging expenses;
- c) the link to the single official website at national level developed by the host Member State(s) in accordance with Article 5(2) of Directive 2014/67.

Information on the currency in which the remuneration is paid (paragraph 1(b)) or on the remuneration in the host Member State (paragraph 2(a)) may, where appropriate, be given in the form of a reference to the specific

provisions of the laws, regulations, administrative or statutory rules or collective agreements governing such information (Article 7(3)).

Finally, the Directive lays down as a rule, subject to derogation by Member States, the non-application of the additional information provided for in paragraphs 1 and 2 in cases where the duration of the work abroad does not exceed four weeks.

IV. MINIMUM REQUIREMENTS RELATED TO WORKING CONDITIONS

Chapter III of the Directive - Articles 8 to 14 - contains the most innovative part of its regulation and is the main reason for its adoption. In order to offer a unified response at European Union level to the major changes that have taken place in the field of labour relations, with new, non-conventional forms of employment. The aim is to ensure that all companies are subject to the same requirements of transparency and predictability, avoiding social dumping.

1. Maximum duration of any probationary period

The first European measure on working conditions is the probationary period (Article 8), which is based on principle 5(d) of the European Pillar of Social Rights, which states that “*any probation period should be of reasonable duration*”.

Based on this principle, Article 8 incorporates five imperative mandates regarding the probationary period:

- 1) Firstly, a maximum duration of six months.
- 2) Secondly, in the case of fixed-term employment relationships, Member States shall ensure that the length of such a probationary period is proportionate to the expected duration of the contract and the nature of the work.
- 3) Thirdly, in the case of renewal of a contract for the performance of the same function and tasks, the employment relationship shall not be subject to a new probationary period.
- 4) Fourthly, it states that ‘longer probationary periods may be established on an exceptional basis in cases where this is justified by the nature of the job or is in the interests of the worker’.

5) Finally, ‘in cases where the worker has been absent during the probationary period, the probationary period may be extended accordingly in relation to the duration of the absence’.

2. Parallel employment

Article 9 of the Directive seeks to limit the ability of employers to prohibit moonlighting. To this end, it establishes the worker’s right to accept employment with other employers outside the working timetable and not to be subjected to unfavourable treatment on that ground (Article 9(1)). This right may only be restricted for objective reasons, such as health and safety, the protection of business confidentiality, the integrity of the public service or the prevention of conflicts of interest.

3. Minimum predictability of work

Articles 10 (‘minimum foreseeability of work’) and 11 (on on-demand contracts) are the most innovative contents of Directive 2019/1152.

According to Article 10.1, if a worker’s work pattern is wholly or mainly unforeseeable, the employer may not compel the worker to work unless the following two conditions are met⁵ :

- a) The work takes place at predetermined reference hours and on predetermined reference days (which were communicated to the worker in accordance with Article 4(2)(m)(ii).
- b) The employer informs the worker of an assigned task with reasonable notice established in accordance with national law, collective agreements or practice.

If one or both of above requirements are not met, the worker may refuse the task without any unfavourable consequences (Article 10(2)).

⁵ These requirements are also applicable to on-call duty, a paradigmatic example of a totally or mostly unpredictable work pattern, in that the worker is obliged to be reachable and ready to perform the work immediately if called upon. If the transposition of Directive 2019/1152 establishes general legal guidelines to guarantee minimum foreseeability in on-call duty, the case law of the ECJ on on-call duty in the interpretation of Directive 2003/88/EC on working time (among others, judgment of 9 September 2021, *Dopravní podnik hl. m. Prahy*, Case C-107/19, EU:C:2021:722 and 9 March 2021, *Radiotelevizija Slovenija*, C-344/19, EU:C:2021:182, and judgement of 9 March 2021, *Stadt Offenbach am Main*, C-580/2019, EU:C:2021:183).

On the other hand, Article 10(3) of the Directive provides that, if national laws allow the employer to cancel an assigned task, the worker must be guaranteed compensation if a reasonable notice period is not observed.

4. Complementary measures for on-demand contracts

Article 11 of the Directive lays down a number of accompanying measures for on-demand contracts - although it does not define them - where they exist because they are authorised by the Member State concerned, which are intended to prevent abusive practices. To this end, Member States must adopt one or more of the following measures, of which they must inform the Commission:

- a) limitations on the use and duration of on-demand contracts or similar employment contracts;
- b) a rebuttable presumption of the existence of an employment contract with a minimum amount of paid hours on the basis of the average number of hours worked during a given period;
- c) other equivalent measures to ensure effective prevention of abusive practices.

5. Transition to another form of employment

Article 12 of the Directive recognises for those who have been with the same employer for at least six months and have, where applicable, passed the probationary period, the right to request “a form of employment with more predictable and secure working conditions where available and receive a reasoned written reply”, with Member States being allowed to limit the frequency of such requests. The employer must send the reasoned reply within one month or within three months of the request in the case of micro, small or medium-sized enterprises and individual employers, allowing an oral reply to a subsequent similar request made by the same worker if the justification for the reply in terms of the worker’s situation has not changed.

6. Mandatory training

Article 13 of the Directive stipulates where an employer is required by Union or national law or by collective agreements to provide training to a

worker to carry out the work for which he or she is employed, such training shall be provided to the worker ‘free of cost’, shall ‘count as working time’ and, where possible, shall take place ‘during working hours’.

On this point, it is worth mentioning the Judgement of 28 October 2021, *Unitatea Administrativ Teritorială D.*, C-909/19, EU:C:2021:893, (paragraph 27), since the referring Court mentions Article 13 of Directive 2019/1152, from which it is clear that the EU law classifies as working time the time which a worker spends on training in order to carry out the work for which he has been recruited. However, that directive was not held to be applicable *ratione temporis* to the main proceedings which were ruled on the grounds of Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time⁶.

7. Collective agreements

Finally, Article 14 of the Directive provides for the possibility for the social partners, if the Member States so provide, to allow the social partners to maintain, negotiate, conclude and enforce collective agreements, in accordance with the national law or practice, which, while respecting the overall protection of workers, establish arrangements concerning the working conditions of workers which differ from those referred to in Articles 8 to 13.

V. THE PROTECTION OF THE RIGHTS RECOGNISED IN THE DIRECTIVE

From the perspective of Directive 2019/1152, the foreseeability of employment relationships is not limited to imposing certain obligations on the employer and giving the employee the power to waive compliance with orders that do not meet the minimum requirements of foreseeability, but also seeks to achieve this objective by strengthening the employee (as the weaker party to the contract) with guarantees that ensure his or her indemnity in the exercise of his or her rights.

⁶ The European Court held that Article 2(1) of Directive 2003/88 must be interpreted as meaning that “the period during which workers attend vocational training required by their employer, which takes place away from their usual place of work, at the premises of the training services provider, during which they do not perform their normal duties, constitutes working time within the meaning of that provision”.

To this end, the last chapter of the new Directive, under the heading “Horizontal Provisions”, envisages several enforcement mechanisms which are more advanced than those ones described by the old 1991 Directive. These measures are set out in Articles 15 to 19.

1. Legal presumptions and early settlement mechanism

Article 15 regulates the consequences of total or partial failure to deliver the documents referred to in Article 5(1) or Article 6. Member States may choose one or both of the following systems:

- a) Firstly, “the worker shall benefit from the favourable presumptions defined by the Member State, which employers shall have the possibility to rebut” (Article 15(1)(a)).

According to Recital 39, the evaluation of the 1991 Directive revealed that systems based solely on claims for damages are less effective than systems that also include penalties, such as payment of lump sums or loss of permits, for employers who fail to produce written statements. It also revealed that employees rarely seek redress during their employment relationship. This is why it is necessary to introduce enforcement provisions that ensure the use of favourable presumptions in case of failure to provide information on the employment relationship or on the procedure. Such presumptions may include the presumption that the employment relationship is for an indefinite period, that there is no probationary period or that the worker has a full-time position in the absence of relevant information.

- (b) Second, ‘the worker shall have the possibility to submit a complaint to a competent authority or body and to receive adequate redress in a timely and effective manner’ (Art. 15.1(b)).

The second paragraph of Article 15(2) provides that Member States may make the application of the presumptions and other mechanisms provided for in paragraph 1 ‘subject to the notification of the employer and the failure of the employer to provide the missing information in a timely manner. Although at first sight redundant, taking into account the provisions of Recital 39, it seems that the purpose could be to give the employer the opportunity to comply with his obligation to provide the missing infor-

mation in a complete and correct manner and to sanction him if he fails to do so, through a procedure triggered by the employee or a third party, such as the employee's representative or another competent body or authority.

2. Right to redress

According to Article 16 of the Directive, Member States shall ensure that workers, including those whose employment relationship has ended, have access to effective and impartial dispute resolution and a right to redress in the case of infringements of their rights arising from this Directive.

3. Protection against adverse treatment or consequences and burden of proof

Member States are being compelled under Article 17 to introduce the measures necessary to protect workers, including those who are workers' representatives, from any adverse treatment by the employer and from any adverse consequences resulting from a complaint lodged with the employer or resulting from any proceedings initiated with the aim of enforcing compliance with the rights provided for in this Directive.

More innovative is Article 18, on protection against dismissal or 'its equivalent' and all preparations for dismissal of workers, which includes a sort of reversal of the burden of proof, extending to this field a mechanism typical of anti-discrimination law. Thus, in addition to stating that States shall adopt measures to prohibit this type of reprisals for having exercised the rights provided for in this Directive (Article. 18(1)), it provides that workers who have been victims of such actions may request the employer to provide duly substantiated reasons in writing for the dismissal or the equivalent measures⁷ (Article 18(2)). In addition, States must ensure that when workers establish before a court or other competent authority or body facts from which it may be presumed that such dismissal or equivalent measures have taken place, it shall be for the employer to prove that the dismissal was based on grounds other than those referred to under paragraph 1 (Article 18(3)). On this point, Member

⁷ A measure equivalent to dismissal could be the total cessation of the assignments, or the lack of call-up in permanent discontinuous contracts.

States are allowed to establish rules of evidence which are more favourable to workers (Article 18.4), such as lowering the requirement of proof of the facts to the mere existence of *prima facie* evidence.

Article 18 concludes with two provisions on the non-application of the alteration of the burden of proof regulated in paragraph 3. Thus, on the one hand, it is stated that Member States are not obliged to apply paragraph 3 to proceedings in which the investigation of the facts is the responsibility of the courts or other competent authority or body (Article 18(5)). On the other hand, its application to criminal proceedings is ruled out, unless Member States decide otherwise (Article 18(6)).

4. Penalties

In accordance with Article 19, Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive or the relevant provisions already in force concerning the rights which are within the scope of this Directive. The penalties provided for shall be effective, proportionate and dissuasive.

VI. FINAL PROVISIONS

The Directive closes with several provisions containing formal indications addressed more to the Member States (which must transpose the Directive), rather than to workers and employers.

The first provision contains a non-regression clause and the traditional indication of the admissibility of transpositions more favourable to workers (Article 20).

Article 21 sets the deadline to comply with this Directive by 1 August 2022, with Member States being required to inform the Commission of the national measures adopted (Articles 21(1) and 21(4)) and to include a reference to the Directive in these measures (Article 21(2)). With effect from that date, Directive 91/533 is repealed (Article 24).

On the other hand, it seeks to involve the social partners to whom Member States may entrust the implementation of this Directive (Article 21.5).

As transitional rules, it is foreseen that workers already employed on 1 August 2022 will only be affected by the new information provisions referred to in Articles 5(1), 6 and 7 if they expressly request it (Article 22).

On the other hand, at the end of the transposition deadline, the rights and obligations set out in the Directive will apply to all employment relationships.

Finally, Article 23 includes a review clause, according to which no later than five years after the end of the implementation period (by 1 August 2027), the Commission shall, after consulting the Member States and the social partners at Union level and taking into account the impact on micro, small and medium-sized enterprises, review the implementation of the Directive and propose, where appropriate, legislative amendments.

ANNEX

Judgment of 3 July 1986, *Deborah Lawrie-Blum v Land Baden-Württemberg* (trainee teacher), C-66/85, ECLI: EU:C:1986:284

Judgement of 14 October 2010, *Union Syndicale Solidaires Isère v Premier minister and Others*, C-428/09, ECLI: EU:C:2010:612 (workers on educational participation contracts carrying out occasional activities in holiday and leisure centres).

Judgment of 9 July 2015, *Ender Balkaya v Kiesel Abbruch-und Recycling Technik GmbH*, C-229/14, ECLI: EU:C:2015:455 (a member of the management of a limited liability company who carries on his activity under the direction and control of another body of the company, who receives remuneration in return for his activity and who does not himself hold any shareholding in that company is a worker; so is a trainee who does not receive remuneration from the employer but receives financial assistance from a public body responsible for promoting employment).

Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13 ECLI: EU:C:2014:2411 ('false self-employed').

Judgement of 17 November 2016, *Betriebrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*, C-216/15, ECLI: EU:C:2014:2411. (nursing staff without an employment contract seconded to a healthcare establishment by a non-profit-making association),

Judgement (Tenth Chamber), *BX and Unitatea Administrativ Teritorială D.*, C-909/19, 28 October 2021 ECLI:EU:C:2021:893, paragraphe 27.(regarding Mandatory training, the Court states that Article 2(1) of Directive 2003/88/EC must be interpreted as meaning that “the period during which a worker undergoes vocational training provided by his employer and which takes place away from his normal place of work, on the premises of the provider of the training services, and during which he does not perform his normal duties constitutes ‘working time’ within the meaning of that provision”.

Judgement of 9 March 2021, *Radiotelevizija Slovenija*, C-344/19, EU:C:2021:182 (organisation of working time – Directive 2003/88/EC – Article 2 – Concept of ‘working time’ – Stand-by time according to a stand-by system – Specific work maintaining television transmitters situated far away from residential areas)

Judgement of 9 March 2021, *Stadt Offenbach am Main*, C-580/2019, EU:C:2021:183 (Organisation of working time – Directive 2003/88/EC – Article 2 – Concept of ‘working time’ – Period of stand-by time according to a stand-by system – Professional firefighters)

Judgment of 9 September 2021, *Dopravní podnik hl. m. Prahy*, C-107/19, EU:C:2021:722 (Directive 2003/88/EC – Organisation of working time – Concepts of ‘working time’ and ‘rest period’ – Break during which the employee must remain ready to respond to a call-out within a two-minute time limit – Primacy of EU law.)

CHAPTER 40

**EU PRIVATE INTERNATIONAL LAW AND THE EMPLOYMENT
CONTRACT**

FRANCISCO JAVIER GÓMEZ ABELLEIRA

INDEX: I. Introduction. II. The private international law regulations and the employment relationship. III. Scope of Rome I. IV. The concept of “applicable law”; in particular, the inclusion of collective bargaining agreements within the concept. V. The determination of the law applicable to the employment relationship.

I. INTRODUCTION

The most basic legal problem posed by the transnational mobility of workers is to determine the national law applicable to issues arising in the course of the employment relationship. This problem is common in the EU due to the intense exchange of goods and services across borders and the corresponding transnational movement of workers.

There is a clear correlation between European economic integration and the production of legal instruments that unify conflict of laws rules in the face of the diversity of national laws. The long process of European harmonization of employment law does not eliminate the important differences between the employment laws of the Member States, for example in the area of dismissal. Hence, the importance of having a unified set of conflict of laws rules. These rules are embodied in the Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

Part I of this chapter identifies the various pieces of legislation pertaining to private international law related to the employment contract and clarifies the relationship between them. Part II examines the scope of Rome I. Part III deals with the concept of the applicable law. Part IV analyses the determination of the law applicable to employment issues.

II. THE PRIVATE INTERNATIONAL LAW REGULATIONS AND THE EMPLOYMENT RELATIONSHIP

In contractual matters, the European unification of conflict rules was first embodied in the Rome Convention of 1980 (Convention 80/934/EEC), which entered into force on 1 April 1991, and later in Rome I, which came into force on 17 December 2009. The fact that Rome I reproduces most of the solutions contained in the Convention makes it possible to continue to benefit, *mutatis mutandis*, from the case law developed under the Convention.

From an employment perspective, Rome I is closely connected to four other pieces of EU legislation: Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis), Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, and Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. Let us have a brief look at each of these four connections.

- 1) Rome I and Brussels I bis. - Though both regulations deal with clearly distinct issues -one thing is the determination of the law applicable to the merits of the case and another thing is jurisdictional competence -, jurisdiction conditions the application of Rome I. First, if the competent judicial body is not from the EU, Rome I will not be applied. Second, in spite of the objective of uniformity pursued by Rome I, the application of the criteria provided by the Regulation to determine the law applicable to the employment contract is far from mechanistic. This means that the jurisdiction in which the dispute is litigated is not irrelevant to the outcome of the dispute. It has been said that “jurisdiction has an important but indirect influence on the question of the applicable law” (De Keersmaecker, 2005: 347). Third,

jurisdiction may be relevant to the substantive solution because Rome I allows the application of the overriding mandatory provisions of the law of the forum (article 9(2)) and also allows any national court to refuse the application of a provision of the law of any country specified by Rome I “if such application is manifestly incompatible with the public policy (*ordre public*) of the forum” (article 21).

On another note, the close relationship between the Rome system and the Brussels system has been repeatedly shown by the ECJ: for instance, when interpreting “the Rome Convention in the light in particular of the provisions of the Brussels Convention relating to individual contracts of employment” (Judgment of 14 September 2017, C-168/16, EU:C:2017:688, paragraph 56). The ECJ promotes “the objective of consistency in application” of both Rome and Brussels systems (Judgment of 15 June 2017, C-249/16, EU:C:2017:472, paragraph 32); hence, “similar concepts” used in both Regulations should be given similar meanings (Judgment of 15 March 2011, C-29/10, EU:C:2011:151, paragraph 33).

- 2) Rome I and Rome II. - Rome II sets out the rules of conflict of laws regarding non-contractual obligations. Rome II is of interest in labour matters because it deals with the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, including an employment contract (*culpa in contrahendo*: article 12). It also deals with unjust enrichment, which covers the payment of amounts wrongly received, though in this case Rome II gives way to Rome I if the unjust enrichment is closely connected with a pre-existing contract between the parties (article 10). Furthermore, Rome II contains a provision dealing specifically with labour matters: article 9 on industrial action. It says that “the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.” This will be so unless where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, in which case the applicable law will be that of that country (article 4(2)).
- 3) Rome I and the Regulation 883/2004 on the coordination of social security systems. - The latter Regulation designates the law applicable to social security situations, basically the social security contri-

butions and the various benefits granted by a given system. The designation is based on the principle of unicity of the applicable law: “Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only” (article 11(1)). Contractual and social security matters receive, for the purposes of the applicable law, separate treatments: both are substantially different and are based on different principles. The difference must be explained in terms of the public law nature of social security. However, as the ECJ points out, the public social security aspect is not disconnected from the private employment relationship in such a manner that social security should be taken into account when assessing the factors indicative of a close relationship between the contract and a country: “among the significant factors suggestive of a connection with a particular country, account should be taken in particular of the country in which the employee pays taxes on the income from his activity and the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes” (Judgment of 12 September 2013, C-64/12, EU:C:2013:551, paragraph 41).

- 4) Rome I and Directive 96/71/EC. - The connection between these two pieces of legislation is so deep that the former mentions the latter in its recital 34 in order to make clear that the law applicable to the employment contract pursuant to the Regulation “should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC.” The Directive may lead to the splitting of the law applicable to the employment relationship, because it allows to keep the law resulting from Article 8 of Rome I and, at the same time, to claim the application of the minimum provisions resulting from the law of the temporary place of work, at least in certain matters. The Directive thus remedies a major shortcoming of the unified regulation.

After the amendment of Directive 96/71 by Directive (EU) 2018/957, if the posting lasts for more than 12 months, the host Member State must ensure that employers posting workers to its territory guarantee all the applicable terms and conditions of employment which are laid down in the Member State where the work is carried out. Thus, although the law applicable to the employment contract remains the same under Rome I, almost all working conditions are governed by the law of the State in which the work is carried out, even on a temporary basis. The ECJ has made it clear that

the provisions imposing the obligation to apply the law of the host State “constitute special conflict-of-law rules, within the meaning of Article 23 of the ‘Rome I’ Regulation.” (Judgment of 8 December 2020, C-626/18, EU:C:2020:1000, paragraph 133).

III. SCOPE OF ROME I

The Rome I Regulation deals with the designation of the applicable law in matters of contractual obligations, whenever the situation involves a conflict of laws. “Contractual obligations” clearly include those arising from an individual employment contract (see Art. 8), since in the tradition of European private international law they belong to ‘civil and commercial matters’ (Art. 1(1)). However, the specificity of labour matters is not fully captured by the Rome I Regulation. As P. Mankowski has written, “the private law regulation of individual employment contracts is only part of the picture” (Mankowski, 173). The connecting link between an employee and a legal system, which the Rome I Regulation creates by virtue of its various criteria, may not be adequate for many aspects of the development of the employment relationship. This inadequacy does not result from the fact that such aspects are not technically “contractual”, but from the fact that in them the relational or material aspect of the execution of the work, which is intimately connected to the place in which the execution or relationship takes place, weighs more heavily. This is what Rodríguez-Piñero calls “territoriality interference”. To give an illustrative example, when a worker provides services in Spain, even if the contract is subject to English law, it is difficult not to apply the legal and even social or cultural rules that determine something as relevant as working hours or holidays. All these relational aspects or those directly linked to the performance of the work are not well resolved in the Regulation, since neither the conception of Art. 8 probably concerns them, nor are they easy to fit into stricter concepts, such as public order or police regulations.

In contrast to individual contracts, the scope of application of the Rome I Regulation does not include union or collective matters. The legal regime of trade unions and employers' associations is certainly not covered, as results from the express exclusion contained in Article 1(2)(f) of the Regulation. The Regulation does not cover workers' representative bodies. Neither collective bargaining nor collective agreements are covered by the Regulation (which has nothing to do with the fact that the “applicable law” includes not only state rules, but also conventional rules, as will be seen below); nor is collective action within the scope of the Regulation, and in particular strike action, to whose hypothetically

harmful consequences, as we have seen, art. 9 of the Rome II Regulation refers. The entire exclusion of collective labour law implies that each State defines the scope of application of their legislation, freely establishing “connecting criteria”, provided that they “are objective and non-discriminatory” (Judgment of 18 July 2017, C-566/15, ECLI:EU:C:2017:562, paragraph 36).

Pre-contractual matters are not formally included in the scope of the Regulation either. Specifically, it excludes from its scope of application “obligations arising out of dealings prior to the conclusion of a contract” (Art. 1(2)(i)). These obligations do, however, fall within the scope of the Rome II Regulation. Article 12 deals with culpa in contrahendo and establishes the general rule that “the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.” The Rome II Regulation thus refers back to the Rome I Regulation, which will designate the law applicable to the hypothetical contract. Since it may be difficult to determine the law applicable to a contract that has not been concluded and, therefore, has not given rise to any provision of services, Rome II establishes some subsidiary criteria, including the country in which both parties have their habitual residence (Art. 12(2)(b)) and the country with which the case is most closely connected (Art. 12(2)(c)).

Nor does the Rome I Regulation apply to administrative or tax matters with an impact on the employment relationship (Art. 1(1)). Thus, for example, a claim for payment of wages directly from an employee to his employer is a purely contractual matter, and therefore subject to the provisions of the Rome I Regulation; but the same claim addressed to a wage guarantee institution is no longer subject to the aforementioned Regulation (Judgment of 25 February 2016, C-292/14, ECLI:EU:C:2016:116, paragraphs 44-46), so that the criteria for subjecting such a claim to one or the other are more uncertain. It is true that Article 9 of Directive 2008/94/EC, on the protection of employees in the event of insolvency of a company, provides, for situations in which a company carries out “activities in the territory of at least two Member States” and becomes insolvent, that “the institution responsible for meeting employees’ outstanding claims shall be that in the Member State in whose territory they work or habitually work”. But the fact is that “the reference to the *lex loci laboris* is insufficient”, as the aforementioned ruling of 25 February 2016 clearly shows.

The designated applicable law applies to any substantive aspect of the employment relationship, as opposed to procedural aspects. For these purposes, the institution of the statute of limitations is considered substantive and is therefore governed by the law applicable to the employment contract.

The international character of the contract seems to be a requirement for the application of the Regulation; a logical requirement insofar as the Regulation is not intended to deal with purely domestic situations. But the “international employment contract” certainly has a “chameleon-like character”, it is a figure of diffuse profiles. In particular, the wording of Article 3(3) of the Regulation has given rise to debate as to whether a contract that is only subjectively international, but objectively internal, falls within its scope of application. The very important limitations to the autonomy of conflict in the employment contract certainly cause the debate to be, in the labour sphere, more theoretical than practical, but it would not be unthinkable, of course, that a judicial body would consider as completely null and void and ineffective the choice of a law with which the employment contract has no link other than the purely voluntary and subjective choice of the parties to the contract itself. The technical support for this decision could be found in the first and fundamental requirement of the Regulation that it must deal, from the outset, with “situations involving a conflict of laws” (art.1(1)).

In the EU, with the exception of Denmark, the Rome I Regulation has replaced the Rome Convention of 1980 for all legal issues arising from employment contracts concluded after 17 December 2009 (art.28). For contracts concluded prior to this date, therefore, the Convention continues to apply, even if the dispute arises under the Regulation. The determining factor for the application of the Regulation is, therefore, the date of stipulation of the contract, not the date on which the dispute arises or the date on which a specific contractual obligation arises (Judgment of 18 October 2016, C-135/15, ECLI:EU:C:2016:774, paragraphs 25-31). The question has been raised as to whether a radical modification of the employment contract can lead to the conclusion of a new one for the purposes of the application of the Rome I Regulation. The ECJ’s answer is to deny that any contractual modification can produce such an effect, but without excluding that “a contract concluded before 17 December 2009 may be subject, on or after that date, to a variation agreed between the contracting parties of such magnitude that it gives rise not to the mere updating or amendment of the contract but to the creation of a new legal relationship between the contracting parties, so that the initial contract should be regarded as having been replaced by a new contract, concluded on or after that date, for the purposes of Article 28 of the Rome I Regulation” (Judgment of 18 October 2016, C-135/15, ECLI:EU:C:2016:774, paragraph 37).

The territorial application of the Rome I Regulation in the EU - with the exception of Denmark - does not mean that the designated law must always be that of an EU State; nor does it mean that it should not apply in international

situations where the foreign element is located in a non-EU country. With regard to the former, the Regulation, like the Convention, has a universal character, which is clear from Article 2: “Any law specified by this Regulation shall be applied whether or not it is the law of a Member State”. Regarding the latter, what is decisive for the application of the Regulation is that the authority, administrative or judicial, deciding on the dispute is that of any EU State -except Denmark-, regardless of whether part or even all of the alien elements of the situation are located in a non-EU country.

IV. THE CONCEPT OF “APPLICABLE LAW”; IN PARTICULAR, THE INCLUSION OF COLLECTIVE BARGAINING AGREEMENTS WITHIN THE CONCEPT.

When we speak of “applicable law”, we are in fact speaking of the legal system of a country, thus including all the sources from which that system draws. Applicable law means, therefore, the entire legal system in force in a country. For this purpose, and in particular, the applicable law includes not only state rules, but also conventionally created rules: collective bargaining agreements. This conclusion is easy to support in a system, such as the Spanish one, in which collective bargaining agreements are integrated into the system of sources of law. But the same conclusion should probably be reached with respect to those collective instruments of contractual effectiveness. In this sense, a contractually effective collective agreement must be applicable to the employee whose applicable law is the law that protects that same agreement.

It is true that the collective agreement has a “territorial projection”, but this is not an exclusive feature of the agreement; the law also has a territorial projection, although it is true that territoriality is more marked in the agreement, as it is explicit, i.e., as the agreement expressly regulates its “territorial scope of application”. The collective labour agreement must define its territorial scope for the simple reason that “territorial” agreements (i.e., provincial or autonomous community agreements) are frequent, so that not every collective labour agreement applies to the whole of the national territory. However, this does not make the nature of the agreement essentially different from that of the law in terms of its projection on individual labour relations. Collective bargaining agreements, like the law, have legal projection beyond their geographical scope, to the extent that the legal situation in question falls within their scope of application, which is not a coarse or physically territorial notion, but refers to a more immaterial link, of a purely legal nature.

V. THE DETERMINATION OF THE LAW APPLICABLE TO THE EMPLOYMENT RELATIONSHIP

1. **A problem prior to the application of the conflict rule: the classification of the contract**

A particularly important question, prior to the application of Article 8 of the Regulation, and which is not clearly resolved therein, is that of which law should govern the classification of the contract as an employment contract or not. It should be noted that, if the contract is not an employment contract, the aforementioned Article 8 will not be applied, but rather the provisions of Articles 3 and 4 of the Regulation. The question of contractual classification has at least three possible solutions: the solution resulting from the application of the *lex fori*, the solution resulting from the *lex causae* or, finally, the application of an autonomous (EU law) concept of worker. Theoretically, the most appropriate solution would be the latter, not only because it would avoid the specific problems posed by the other two, but also because it is the most congruent with the purposes of the autonomous system designed in the Regulation itself. The application of an autonomous concept of employment contract or worker would, in effect, guarantee a uniform application of the EU rules, which, it should be emphasized, are called “uniform rules” (Regulation Rome I, heading of Chapter II).

It is true that the EU legal system has a basic or fundamental concept of “worker”, which is constructed early in the legal field of the free movement of workers on the basis of the ordinary meaning that this concept has traditionally had in European legal culture: as summarized in the classic “Lawrie-Blum” judgment (1986), the “essential feature of an employment relationship” is “that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.” But the clarity of these notions in the abstract is one thing, and it is quite another for the EU legal definition to provide an unequivocal answer to the multiplicity of situations that can be included in the “gray areas” of the employment contract. If a national definition of worker does not guarantee an unequivocal judicial response in all cases, it is even less to be expected that judges in different national jurisdictions will be able to give an unequivocal response in all cases, as it has been stated that judges have “virtually unlimited power” in this matter.

It must be admitted, therefore, that this EU law concept of worker or employment contract may lack the richness of nuances that it usually has in most

domestic legal systems. For this reason, on many occasions, the courts may find it necessary to use, for the finer points of disquisition, the more refined criteria that are proper to the law of the forum. The *lege fori* classification will not be the optimal solution in the case of a European Regulation, “but there is nothing else available today”. The solution of making the contractual classification in accordance with the *lex fori*, finds support, for instance, in Article 12.1 of the Spanish Civil Code, which states: “The qualification to determine the applicable conflict rule will always be made in accordance with Spanish law”. The *lex fori* qualification may be made as long as it respects the concept of worker that has been coined in EU case law. In this way, a hybrid solution is adopted, in which an attempt is made to respect the uniformity of the concepts used in the Regulation without discarding the legal richness of the national labour law traditions. From what has been said, it seems clear that the *lege causae* qualification should not find any place in the system, not only because of the obvious disturbances it causes in the legal proceedings (by using a concept of a law whose final application is still uncertain), but also because it lacks legal support.

2. Autonomous choice of law

The choice of the applicable law by the parties is the fundamental principle of European private international law in matters of contractual obligations. The Rome I Regulation has sought to reflect the importance of the principle also in matters of employment contracts, starting the specific regulation of this contract with the emphatic statement: “An individual employment contract shall be governed by the law chosen by the parties...” (art.8.1). It should be noted that the Rome Convention, in the corresponding art.6.1, started in a quite different way, stressing the limits to the autonomy, rather than the autonomy itself. Nothing has changed in substance, it is true, since both the Convention and the Regulation recognize conflict autonomy in labour matters with identical limits: the choice may not result in depriving the worker of the protection provided by the “mandatory rules” (Convention) or by “provisions that cannot be derogated from by agreement” (Regulation) of the law applicable in the absence of choice.

Placing, therefore, the idea of conflict autonomy at the forefront of the text and relegating the mention of its important limits to the background, is more an aesthetic position than a substantive approach. It is not wrong to state that formally the first criterion or “connecting point” for the designation of the

law applicable to the employment relationship is the choice of the parties, nor is it wrong to maintain that “freedom of contract of the contracting parties as to the choice of the applicable law constitutes the general principle laid down by the Rome I Regulation” (Judgment of 18 October 2016, C-135/15, ECLI:EU:C:2016:774, paragraph 42); provided, however, that it is then made clear that this choice is subject to very important limits: not only the general ones that art. 9 of the Regulation calls “overriding mandatory provisions”, but also, and above all, those resulting from the mandatory employment provisions of the legal system applicable in the absence of choice.

The choice of the legal system applicable to the contract can be made in several ways (art.3.1). The first one is the “express manifestation”, i.e. by explicit terms of designation of the country to whose law the contract is anchored (*pactum de lege utenda*). In such a case, with an express and clear choice, there can be little doubt about the choice itself, unless it is contradicted by some other clause of the contract. The ECJ has stated that as regards “the question whether the inclusion by the employer in a pre-formulated employment contract of a clause providing for the choice of the applicable law makes it possible to establish that there is no freedom of choice, contrary to Article 3 of the Rome I Regulation, it should be noted that that regulation does not prohibit the use of standard clauses pre-formulated by the employer. Freedom of choice, within the meaning of that provision, can be exercised by consenting to such a clause and is not called into question solely because that choice is made on the basis of a clause drafted and included by the employer in the contract” (Judgement of 15 July 2021, C-152/20, ECLI:EU:C:2021:600, paragraph 40).

The second way entails that the choice of law is implied from the “terms of the contract” or the “circumstances of the case”. This second way is a normal exercise of contract interpretation, and in this normal exercise it would seem that there is a tacit choice of a given national legal system, for example, if the contract mentions legislative texts specific to this legal system, if it is formalized in an official model specific to the same legal system, or if it refers to a collective agreement of that legal system. Article 3.1 of the Regulation requires that the interpreter's inference must be “clear”: the choice must be “clearly demonstrated by the terms of the contract or the circumstances of the case”. This requirement makes it possible to affirm that if the terms are doubtful or the circumstances are debatable or flimsy, the parties cannot be understood to have made any choice. Nor is it possible, in any case, for the judge to supplant the will of the parties and ask what the latter would have chosen had the question arisen: this hypothetical choice is totally forbidden.

The choice of the applicable law can be made for the whole contract or only for a part of it. The first option is the most common, the one that naturally arises in a large majority of cases. Technically, it is also the simplest option, the easiest to administer, as all contractual obligations are subject to the same national law. This avoids possible problems of regulatory consistency, which can arise more frequently between different legal systems. The option of splitting up the contract and subjecting part of it to a specific law (*dépeçage* or splitting) can be made under Art. 3(1) of the Regulation. This legislative splitting of the contract can be of two types: partial splitting and complete splitting. Partial splitting means that the parties choose the law applicable to a clause or part of the contract; thus, the parties to the employment contract may determine a specific national law to govern, for example, the non-compete clause or the protection of confidentiality or variable remuneration in the form of stock options, etc.

Although partial splitting is the only one literally covered by Art. 3(1) of the Regulation, there is no reason not to allow the so-called complete splitting, which implies that the parties choose different laws to apply to different parts of the contract, with the result that no part of the contract is left without elective designation. The reason for allowing complete splitting is, according to authoritative doctrine, that “if the contracting parties may choose the law applicable to a part of their contract, by analogy, it must be considered that the contracting parties may also choose the law governing various parts of the same contract” (Carrascosa González, 2000: 17). Thus, for example, it would be possible to designate the law of one State as the law applicable to the stock options or to the non-compete agreement and the law of another State for the rest of the contract. In any event, the splitting of the law applicable to the contract cannot result in the isolation of one part of the contract from the rest: to continue with the example, the remuneration in stock options may be subject to the law of a certain State, but this cannot prevent the effects that such remuneration produces at various levels of the employment relationship (consideration as part of the salary for purposes of calculating severance pay, etc.).

The choice of the applicable law can be made at the beginning of the employment relationship, but it can also be made at any time thereafter (art.3(2)). The supervening choice can be made either if it replaces a previous choice or if such a previous choice does not exist and what then occurs is that the chosen law replaces the law applicable in the absence of choice. The supervening choice cannot affect the consolidated rights of the employee, apart from the fact that, like any choice, it is subject to the general limit of respect for the rights that the employee may have by virtue of mandatory provisions of the law applicable in

the absence of choice. The election subsequent to the commencement of the employment relationship may take place after the commencement of litigation between the parties, and the existence of a tacit subsequent election may even be inferred from the fact that the plaintiff bases his claim on a certain state law and the defendant bases his defense on the same law.

3. Limits to the freedom of choice: overriding mandatory provisions and mandatory domestic provisions

In all cases, the parties' choice of applicable law is subject to two insurmountable limits. On the one hand, the general limit to conflict autonomy constituted by the “overriding mandatory provisions” (art.9). On the other hand, the specifically labour-related limit, and in practice the most important one, constituted by the “provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable” (art.8.1).

An overriding mandatory provision is imposed for the resolution of a specific case in three scenarios: (1) when it belongs to the legal system of the trial court (*lex fori*) (art.9.2); (2) when it belongs to the legal system “of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful” (art.9.3); and (3) of course when it belongs to the legal system of the law applicable to the merits of the case (*lex causae*). The first two scenarios are those expressly contemplated by art.9, while the third results from arguing that neither article 9 (mandatory rules) nor article 12 (scope of the applicable law) of the Regulation Rome I exclude the application of the internationally mandatory rules of the *lex causae*.

According to the definition contained in Art. 9(1) of the Regulation, which is inspired by the case law of the ECJ (vgr. Judgment of 23 November 1999, C-369/96, ECLI:EU:C:1999:575, paragraph 30), an overriding mandatory provision is one “the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under [the] Regulation”. Such a provision is always “exceptional”, incorporates “considerations of public interest” into the judgment (Regulation Rome I, Recital 37) and deserves a strict interpretation “as a derogating measure” (Judgment of 18 October 2016, C-135/15, ECLI:EU:C:2016:774, paragraph 44). It has been said that the application of an overriding mandatory provision

in the cases referred to in Art. 9(2) (lex fori) and (3) (law of the country of enforcement) of the Regulation constitutes an act of “non-application” - therefore, an act of “negation” - of the applicable law, and this on the basis that its “application” is fundamentally incompatible (repugnant) with the lex fori or with the law of the country of enforcement (Harris, 2009: 297). However, the overriding mandatory provisions of the lex fori will find a simpler and more natural channel of application than those of the country of enforcement; for the latter, art. 9(3) refers to judicial discretion (“effect may be given”), requires the “illegality” of the enforcement activity (criminal illegality?, or merely civil illegality?) and demands the consideration of additional elements (“their nature and purpose”, “the consequences of their application or non-application”). The mandatory rules of the forum will, moreover, overlap to a large extent with the public policy exception of the forum in Art. 21 of the Regulation (“The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum”), although in their technical operation differences can be appreciated (e.g. the ex post character of the public policy versus the ex ante character of the overriding mandatory rules of the forum, or the “last ratio” character of the public policy exception).

The Spanish labour courts, for instance, have considered that the fundamental human rights recognized in the Constitution can be invoked as overriding mandatory provisions of the forum. Thus, in cases of dismissal or termination of the employment contract, Spanish courts find that the violation of a fundamental right caused by such dismissal or termination that does not receive adequate protection under the applicable foreign law can be protected under Spanish public policy (of the forum). This can lead to a dismissal that is lawful under the applicable law being declared null and void by a Spanish court, using the criterion that “the failure of the Court's decision to assess the plaintiff's fundamental right to compensation [...] is manifestly incompatible with our constitutional legislation”, which obliges the judge to “rule on the cause of nullity of the plaintiff's dismissal that he has alleged in his lawsuit even though this right does not exist in Qatari labour law” (Superior Court of Justice of Madrid, judgment of 20-7-2016, appeal 422/16). The right to strike in transnational situations has also been protected as Spanish public order (Superior Court of Justice of Catalonia, judgment 182/2022 of 13-1-2022).

In addition to the internationally mandatory provisions, which are imposed in any of the contractual matters included in the scope of application of the Rome I Regulation - therefore, also in matters of employment contracts -, the most practical and everyday limit to conflict autonomy in the world of em-

ployment relations is generated by the significant mandatory burden of employment law in many countries. Thus, when the applicable law in the absence of choice is that of a country with a high level of mandatory regulation, the autonomy of the parties to designate the applicable law is more theoretical than real and its operability is very substantially reduced. This limit responds to the so-called “material orientation” of the regulation of conflict of laws in the employment sphere and to the principle of protection of the weaker contracting party; the result is, for this weaker party, conflict rules “more favorable to its interests than the general rules” (Regulation Rome I, Recital 23). It should be noted that the Regulation does not establish as a criterion the application of the most favorable national law, but simply introduces the purpose of protecting the worker through the limit to conflict autonomy. Thus, the CJ says that in so far as the objective of the Regulation is “to guarantee adequate protection for the employee, that provision must ensure that the law applied to the employment contract is the law of the country with which that contract is most closely connected. However, as the Advocate General pointed out in point 36 of his Opinion, that interpretation must not automatically result in the application, in all cases, of the law most favourable to the worker” (judgment of 12 September 2013, C-64/12, ECLI:EU:C:2013:551, paragraph 34).

The limit is formed, in essence, by the “internally mandatory rules”, which are those “that cannot be derogated from by agreement” (Regulation CE/593/2008 art.8.1). The judgment of the non-derogability of the provision must be made “by virtue of the internal law” that would have been applicable in the absence of choice (Judgement of 15 July 2021, C-152/20, ECLI:EU:C:2021:600, paragraph 29). This means that non-derogability is not an autonomous (or European law) concept, but rather a unique concept of each national system. This whole set of “non-derogable” provisions – or “mandatory” rules in the terminology of art. 6.1 of the Rome Convention – does not prevent, in the normal functioning of employment regulations, the most beneficial agreement for the worker, and this is what the Recital 35 of the Regulation wants to make clear, when it states that “employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.”

The existence of a choice of applicable law and the play of limits coming from internally mandatory provisions lead, in practice, to carry out an activity of comparison of provisions. Once a mandatory provision of the law applicable in the absence of choice has been identified, this provision must be compared with the corresponding provision of the chosen law, in order to elucidate which of them is more favorable for the worker. This is the specific meaning

of the concept of "protection" referred to in art.8.1 of the Regulation; protection of which the choice of law cannot "deprive the employee." The comparison of provisions does not consist, of course, in a general comparison of regulations, not only because such a thing would be simply impossible, but because the comparison judgment must be able to be carried out in view of a specific case or litigation. In other words and as an example: a relationship may have been subject to "chosen" German law for years, and the worker has been able to take advantage of the provisions of that law all that time, but if a court has to decide on a dismissal and if it turns out that the provisions on dismissal of the law that would have been applicable in the absence of choice are more favorable, the worker may take advantage of them. The result is the "fragmentation" of the employment contract due to the application of mandatory provisions. This is what happens every day, and what allows us to reach the practical conclusion that, in reality, choosing an applicable law is not recommended for the company and, on the other hand, useful for the employee, who can always, when the time comes, request the application of the most favorable provisions of the law applicable in the absence of choice.

4. The law applicable in the absence of choice ("objective law")

The identification of the law applicable in the absence of choice – which we will call "objective law" – is an operation that must be carried out in all litigious or conflictive cases. It must be done, of course, when there is no choice of applicable law. But it must also be done when such a choice exists, precisely because the main limit to conflictual autonomy is given, as has been seen, by the mandatory provisions of the law applicable in the absence of choice. In terms of individual employment contracts, this identification of the objective law must be carried out in accordance with sections 2, 3 and 4 of article 8 of the Regulation. The relationships between these sections and the structure that they make up is the first issue that we must address.

Sections 2 and 3 are characterized by two connection points. Paragraph 2 contains a simple connection point, although mutable in time: the habitual place of work. Paragraph 3 contains another simple, but temporally immutable, connecting point: the place of the worker's place of employment. The relationship between these two paragraphs is quite clear: paragraph 3 only applies when the application of paragraph 2 has been frustrated, i.e. when it has not been possible to determine, by virtue of it, an applicable law. For this purpose, the connecting factor in paragraph 2 (place of work) "must be inter-

puted broadly” and “must be taken into account as a matter of priority”, the criterion in paragraph 3 being absolutely “subsidiary” (Judgement of 15 March 2011, C-64/12, ECLI:EU:C:2013:551, paragraphs 31 and 32). The Rome Convention was more specific in conditioning the application of the criterion of the place of recruitment to the fact that the worker did not “habitually carry out his work in the same country” (Convention 80/934/EEC art.6.2.b). This condition is not so specific in the Regulation, which more generally subjects the application of the criterion to the fact that “the applicable law cannot be determined by virtue of paragraph 2”. It must therefore be an “impossibility”, which will be the case when there is no single “usual” place of work.

Paragraph 4 contains, rather than a connecting point, an escape clause, which allows the judge to take into consideration a “set of circumstances” (not determined) that may be indicative of “closer links” with a country. If paragraph 3 is conditional on the impossibility of applying paragraph 2, the application of paragraph 4, on the other hand, does not depend on “impossibility”, but on “convenience” or “opportunity”, because even if there is a habitual place of work, the application of this flexible connection is not barred: “where a contract is more closely connected with a State other than that in which the work is habitually carried out, the law of the State where the work is carried out must be disregarded in favour of the law of that other State” (Judgment of 15 March 2011, C-64/12, ECLI:EU:C:2013:551, paragraph 39). This conclusion is greatly strengthened by the reference to “a country other than that indicated in paragraphs 2 or 3”, overcoming the confusion to which the more obscure structure of Article 6.2 of the Rome Convention had led. Note that we are not dealing with an “exception clause” but with a mere “escape clause”: Article 8(4) of the Regulation does not even require “manifestly” or “clearly” closer links - as it does require in other passages for other contracts - which allows to conclude that, in employment matters, the escape clause is of “non-exceptional application and conflict-oriented”.

Having clarified the relationship between paragraphs 2, 3 and 4 of Article 8 of the Regulation, it is time to analyze in some detail each of the points of connection referred to (usual place of work, place of business), as well as the escape clause.

4.1 HABITUAL PLACE OF WORK

The application to the employment relationship of the law of the place of work (*lex loci laboris*) is surely the most traditional and universal solution to

the conflict of laws in this area. So powerful is the connection of work with the place where it is carried out that even in cases where the applicable law is not that of the place of work, this law will govern in no small part, as a result of the mandatory protection afforded by laws that every country considers that must be applied to any situation within its territory; Directive 96/71/EC being an example of this principle. In general, the *lex loci laboris* rule is an indisputable solution, especially because it leads to identity between the law applicable to the contract and employment law as territorial law. The latter is particularly important, at least in the classic employment contexts - still largely predominant - of concentration of workers at a place or workplace, and has implications not only at the contractual level, but also at the level of organization and of the regulatory regime linked to the notion of workplace (e.g., workers' representatives). In any case, the determination of the place of work must be carried out in accordance with "uniform criteria which it is for the Court to lay down" (Judgement of 13 July 1993, C-125/92, paragraph 16; see also judgement of 15 March 2011, C-29/10, ECLI:EU:C:2011:151, paragraph 32).

The point of connection is, in fact, the habitual place of work. It was in the Rome Convention and is in the Rome I Regulation. The adjective "habitual" is obviously necessary because of the possible existence of more than one place of work. This plurality can be, in turn, simultaneous or successive. In the first case, the worker provides services in different States, in normally short periods of time, without being able to be said to have established himself professionally in a specific one in a definitive manner. This plurality is resolved on the basis of two possible criteria, which are not mutually exclusive: qualitative and quantitative. The qualitative criterion involves taking into account the place of "principal" fulfillment of the work obligations, the place where the employee performs the most important or most characteristic services of those corresponding to him/her; it is a criterion that appears, for example, in the "Mulox" judgment (C-125/92): "Where the work entrusted to the employee is performed in the territory of more than one Contracting State, it is important to define the place of performance of the contractual obligation, within the meaning of Article 5(1) of the Convention, as being the place where or from which the employee principally discharges his obligations towards his employer" (paragraph 24).

The quantitative or temporal criterion takes into account the time spent in one country or another, as the CJ did in the "Rutten" judgment or in the "Weber" judgment. In the former, the Court says that "the fact that the employee carried out almost two-thirds of his work in one Contracting State — the remainder of his work being performed in several other States — and

that he has an office in that Contracting State where he organized his work for his employer and to which he returned after each business trip abroad, as was the case in the main proceedings, is relevant” (judgement of 9 January 1997, C-383/95, paragraph 25). In the latter, the CJ had the opportunity to point out that when the type of work or activity considered is the same in the various countries, “any qualitative criteria relating to the nature and importance of work done in various places within the Contracting States are irrelevant” (judgement of 27 February 2002, C-37/00, ECLI:EU:C:2002:122, paragraph 51). The Court also specified in “Weber” that the logical implication of the temporal criterion, “which is based on the relative duration of periods of time spent working in the various Contracting States in question, is that all of an employee's term of employment must be taken into account in establishing the place where he carries out the most significant part of his work and where, in such a case, his contractual relationship with his employer is centred” (paragraph 52).

Successive plurality occurs in cases in which the employee changes his/her place of work in a foreseeably definitive manner. In these cases, it is possible to maintain a single employment contract, based on a unitary expatriation pattern, or to sign several successive employment contracts, based on a plural expatriation pattern. In the first alternative (unitary pattern), the habitual place of work can be understood to be the last one; but it can also be understood that if the actual duration of the work in the latter is short in comparison with that of a previous place, the quantitative criterion referred to above could be applied. In the second alternative (plural employer), the usual place of work is, in fact, unique for each contract. The problem here will be to determine to what extent this contractual partitioning responds to more than mere elusive or fraudulent business practices. The criteria established in this respect in the “Pugliese” judgment (judgement of 10 April 2003, C-437/00) may be relevant to resolve the latter: “the fact that the conclusion of the second contract was envisaged when the first was being concluded, the fact that the first contract was amended on account of the conclusion of the second contract, the fact that there is an organisational or economic link between the two employers, the fact that there is an agreement between the two employers providing a framework for the coexistence of the two contracts, the fact that the first employer retains management powers in respect of the employee, the fact that the first employer is able to decide the duration of the employee's work for the second employer” (paragraph 24). In any case, the difficulty in determining “the” habitual place of work in all these cases may lead directly to the application of the general criterion of paragraph 4 (closer connection).

The successive change of place of work seems necessarily to be “definitive” or “permanent”, not “temporary”, as established in the last paragraph of Article 8(2) of the Regulation: “The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country”. Recital 36 of the Regulation provides the most authoritative interpretative criterion in this respect: “work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad”. It should be noted that the concept of temporariness used in Art. 8(2) is not so much based on the idea of duration as on the expectation of return. There are several considerations that deserve to be noted here.

First. It seems that under Recital 36 the temporary posting to provide services in another country could be of any duration, even an exaggeratedly long duration. Indeed, by judging temporariness according to a qualitative criterion (expectation of return) and not introducing any quantitative limit, it would be sufficient to include in the contract or in the posting or expatriation document or letter an agreement to that effect for the applicable law to be that of the country of origin, not that of the country of destination. A strict application of this criterion would lead to such apparently absurd results as applying the law of the country of origin to a contract made for the purpose of immediately posting the worker to another country, at the end of which the return agreement is not fulfilled and the contract is simply extinguished: the entire duration of the relationship has elapsed in the country of destination, so that the only *locus laboris* is this one.

Second. For certain issues (termination, for example) it is desirable, for reasons of legal certainty, that the law applicable to the contract remains stable throughout an employment relationship that can in fact be considered a single employment relationship (“unity of the relationship”) and not a succession of differentiated employment contracts. The problem arises precisely because of the latter: when is there a unity of the relationship and when are there contracts which, although successive, may be differentiated. What the second clause of Recital 36 provides is very obvious and does little to resolve the question: “The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.” It is true that stipulating a new contract or changing the employer within the same group of companies may be a mere formality that does not preclude its consideration as an episode within a single employment relationship. The parties, on many occasions, do not see it

this way, and hence, in contrast to the classic unitary pattern of expatriation, the plural pattern proliferates, in which each episode of expatriation takes the form of its own employment contract, which is initiated and terminated in accordance with the episode itself and in application of a law that is normally that of the place of work during the expatriation. This plural pattern, however, has the threat that in a retrospective analysis a court will appreciate the essential unity of the relationship and calculate a compensation for unfair dismissal on the basis of all the seniority of that single relationship (this issue arises in the case decided by the Superior Court of Madrid on 31 January 2017, Rec 549/16; and also in the case decided by the Superior Court of Balearic Islands on 30 November 2021, no. 463/2021).

Third. It would seem that maintaining the law of the country of origin in situations where it is assumed that the worker will resume work in the country of origin after performing his work abroad contradicts the nature of the relationship between the regime of the work and the territory in which it is performed. This contradiction is a source of major political and social conflicts, which Directive 1996/71/EC attempted to address. The idea of a set of labour regulations that must be respected in the country where the work is carried out - even from the very first moment - somehow challenges the conflict solutions of private international law, by opting for pure territoriality, albeit only for a very specific and minimum set of conditions - those set out in Art. 3 of the Directive.

Fourth. Temporariness understood as a situation linked to the expectation of return is a sure source of all kinds of “undue and fraudulent advantage”. It is precisely to avoid them that Directive (EU) 2017/64 is dictated, which seeks to avoid “abuses and circumventions”, by identifying the “genuine posting” and therefore the discovery of the “non-genuine” one, so that the provisions of the Rome I Regulation are properly applied to the latter. This mention seems to indicate, rather, the pure and simple application of the *lex loci laboris*, if it is concluded that the worker only provides services in one country.

The place of work is not determined exclusively by the place “in which” the services are provided; it may also be determined by the place “from which” the services are provided. This is a distinction of jurisprudential origin, now codified in art. 8(2) of the Regulation. It was the “Koelzsch” judgment (judgment of 15 March 2011, C-29/10, ECLI:EU:C:2011:151) which, in a case involving a truck driver, imported the concept of “place from which” from the judicial precedents on jurisdiction (“Mulox”, “Rutten”, “Weber”), with the result of reducing the scope of applicability of the criterion of the place of establishment of the contract. This reduction is based on the fact that the purpose

of the rules here is the application of the law of the State in which the employee “carries out his working activities rather than that of the State in which the employer is established” (Koelzsch, paragraph 42). The “place from which” or “base” criterion involves taking into account facts such as “the place from which the employee carries out his transport tasks”, the place where he “receives instructions” and “organizes his work”, the place where “his work tools are situated”, the place to which the worker “returns after completion of his tasks” (Koelzsch, paragraph 49).

4.2 THE PLACE OF BUSINESS THROUGH WHICH THE EMPLOYEE WAS ENGAGED

The criterion of the place of the worker's place of employment was seriously affected in the judicial battle waged in the aforementioned “Koelzsch” case. Originally designed for “highly international labour cases” (Palao, 2017: 594), in which it is impossible to identify a habitual place of work, its scope of application is now very narrow, due to the simultaneous expansion of the criteria of Article 8(2) and (4) of the Regulation. In the “Voogsgeerd” case, this narrowing was clearly highlighted by the CJ's insistent reminder, as a preliminary remark, that the criterion of the place of the recruitment establishment, which was the subject of the question referred for a preliminary ruling, can in no case displace the predominant criterion of the habitual place of work, even correcting the referring court by stating that “the matters characterising the employment relationship in issue in the main proceedings, which were put forward by the referring court to justify the submission of the reference for a preliminary ruling, seem to correspond more to the criteria in Article 6(2)(a) than to those in Article 6(2)(b)” (judgement of 15 December 2011, C-384/10, ECLI:EU:C:2011:842, paragraph 31).

The criterion of the place of business through which the employee was engaged has a very different nature from the rest of the criteria in Article 8 of the Regulation. To begin with, and because of the above, it is a “subsidiary” criterion, deserving of a “strict interpretation” (Voogsgeerd, paragraph 47). Moreover, it is a temporally immutable point of connection. This characteristic results from the interpretation formulated by the CJ in the aforementioned “Voogsgeerd” case, in which it rejects that the criterion refers to the establishment where the worker must appear during his employment relationship or where he receives instructions or where any other action takes place in the development of the employment relationship and the provision of services. On the contrary, the point of connection is fixed at the moment in which the con-

tract is stipulated and is completely “unrelated to the conditions under which the work is carried out” (paragraph 48). What must be considered here are, therefore, the elements inherent to the hiring process: “the place of business which published the recruitment notice and that which carried out the recruitment interview”, with a view to determining “the real location of that place of business” (paragraph 50). It is not necessary that the establishment in question be endowed with legal personality (paragraph 58).

4.3 THE ESCAPE CLAUSE: THE CLOSER CONNECTION

Rather than a connecting point, Art. 8(4) of the Regulation contains an escape clause; not an exception clause, but a genuine escape clause, as stated above. The effect of this clause is to give the court a wide margin of flexibility to not apply the law of the place of work or the law of the place of contracting establishment when, on the basis of a “set of circumstances”, it considers that the contract is in fact “more closely connected” with another country. Given the practical tendency of courts to apply, if legally possible, the law of the forum, the escape clause is often used as a technical and formal justification for the choice or preference for the *lex fori*. The escape clause allows, in effect, an overall assessment of the case to be tried. Given the indefiniteness of the “set of circumstances” that a judge may assess, the escape clause substantially erodes the objectives of the Rome I Regulation to achieve “a high degree of predictability” (Recital 16) and to achieve identity of remedy irrespective of the competent jurisdiction (Recital 6).

The vagueness of the set of circumstances that may be considered in order to determine with which State the contract is most closely connected requires a task of jurisprudential and doctrinal construction. Elsewhere (Gómez Abelleira, 2016) I have detailed the possibly most relevant circumstances, which would include subjective circumstances -related directly to the parties- and objective circumstances -related to the contract, the employment relationship, its creation, content and execution-. Therefore, circumstances such as the worker's habitual residence and, in particular, his/her main center of economic and personal interests, which in turn would include factors such as his/her family situation and family ties or tax residence, should be taken into consideration. Also relevant is the place of the employer's headquarters, where its central administration is located. Although it may merit some critical considerations, the nationality of the parties is also a circumstance worthy of consideration in an assessment which, it must be insisted, must be global.

The objective circumstances will probably be the most powerful, the ones that will weigh most heavily in this overall assessment. It is important, for example, the places where the job offer is published, where the selection process is carried out, and where the contract is stipulated. This includes information such as the places where the services are actually rendered, but also the employee's position in the company's organization chart, his or her hierarchical integration in a given country, the person to whom he or she reports, the origin of the economic benefits and the place and currency in which they are paid, the geographical projection of the fruits of labour, the agreements relating to return or repatriation, etc.

Even the social security registration may be important. It is true that the country to whose social security system contributions are made is not an element of choice, but is imposed by rules, such as those of the EC Regulation 883/2004, which indicate the applicable law with less flexible and more precise criteria than those laid down by the Rome I Regulation. However, the CJ had the opportunity to point out, in the important “*Schlecker*” judgment, that “among the significant factors suggestive of a connection with a particular country, account should be taken in particular of the country in which the employee pays taxes on the income from his activity and the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes” (judgement of 12 September 2013, C-64/12, ECLI:EU:C:2013:551, paragraph 41).

If the assessment of a set of circumstances such as those described above shows that the employment contract has a closer connection with a country other than the country of the habitual place of work that could be identified or other than the place of recruitment (if it is impossible to identify a habitual place of work), the court will have to apply the law of that country. Note that this is not a discretionary power of the judge: Article 8(4) of the Regulation states that “the law of that other country shall apply”, not that the judge may apply it. It must be admitted that the discretion lies in the assessment of the circumstances, due to the indeterminacy of their list and their relative weight, but not in the consequence to be derived when a closer link with a certain country is appreciated. Some of these “circumstances” may be planned, foreseen and constructed *ad hoc* by the employer, precisely with the purpose of anchoring the employment relationship to the legal system preferred by the employer. Article 8 of the Regulation is thus not exempt from the risk of law shopping, a practice “that treats national laws as products competing in an international market of rules”.

CHAPTER 41

**JURISDICTION. RECOGNITION AND ENFORCEMENT
OF JUDGMENTS**

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I. INTERNATIONAL JURISDICTION IN THE EUROPEAN UNION

1. Introduction

Pursuant to Article 81 of TFEU (former Article 65 of TEC), the Union shall develop judicial cooperation in civil matters with cross-border repercussions, in order to promote the free movement of judicial and extrajudicial decisions, which some authors have been referring to as the "fifth Community freedom", which would be added to the free movement of goods, persons, services and capital.

Nowadays, when it comes to delimitation of jurisdiction in civil matters (and, most specifically, jurisdiction over individual contracts of employment), such cooperation is enshrined through two main legal instruments:

- Regulation (EU) No 1215/2012 of the European Parliament and of the Council, of 12 December 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter, Regulation 1215/2012).
- The Lugano Convention of 30 October 2007, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano (also known as Lugano II), signed, on the one hand, by all the member countries of the European Union, and on the other, by certain Member States of the European Free Trade Association (specifically, the Kingdom of Norway, the Swiss Confederation and the Republic of Iceland).

These instruments must be applied on the basis of a principle of hierarchy, by virtue of which the Member States will be obliged to attend, as a matter of priority, to the regulation of international judicial jurisdiction established by European Union law, in such a way that, only and exclusively when its applicability has been ruled out, the rules of jurisdiction contemplated under the domestic law of the Member States may be taken into consideration.

Having said so, this chapter will focus on the rules of jurisdiction, recognition and enforcement of judgments applicable to disputes in matters relating to individual contracts of employment, provided for in Regulation 1215/2012.

2. **The EU Regulation 1215/2012 (Brussels I Regulation, recast). Background, effectiveness and scope of application**

2.1 BACKGROUND TO REGULATION 1215/2012

Regulation UE/1215/2012 finds its starting point in the Brussels Convention of 27-9-68, on international jurisdiction and the enforcement of judgments in civil and commercial matters, drawn up by virtue of the former Article 220 of the TEC, which, after being signed by the six original members of the European Community, came into force in 1973. This Convention was the subject of successive extensions through accessions in 1978, 1982 and 1989.

Although the Brussels Convention did not originally refer expressly to the individual employment contract, the truth is that, later on, when the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic was signed on 26 May 1989, a specific mention was introduced in Article 5, under Section 2 ("Special jurisdiction") of its Title II ("Jurisdiction").

Subsequently, when the Treaty of Amsterdam was signed, the judicial cooperation in civil matters with cross-border implications was incorporated into Title IV of the EC Treaty, amending its Article 65 TEC (nowadays, Article 81 TFEU), which, in turn, allowed the drafting of secondary law in this field, as a result of which, Regulation CE/44/2001 on jurisdiction and the recognition and enforcement of judgments (also known as "Brussels I", hereinafter referred to as Regulation CE/44/2001), was enacted.

Once Regulation 44/2001 was approved, the contents of the Brussels Convention of 27-9-68 were transformed, turning it into Community law of direct application to all the Member States of the Union, including a specific section envisaging jurisdiction over individual employment contracts, which were provided with rules of attribution more favourable to the employee, as the weaker party in the contractual relationship (see Regulation 44/2001, Recital 13).

Recital 28 of Regulation 44/2001 stated that, no later than five years after its entry into force, the Commission would submit a report on its application, proposing, where appropriate, any amendments deemed necessary. In this re-

gard, the Green Paper on the review of the Regulation was drawn up, aimed at putting forward several improvement proposals.

These proposals for improvement led to Regulation 1215/2012, which recasts, extends and repeals its predecessor, granting greater protection to the worker, as the weaker party in the employment contract relationship.

2.2 THE EFFECTIVENESS OF THE REGULATION

Regulation 1215/2012 is characterised by its "dual" nature, given that not only it provides rules for attribution of jurisdiction but also regulates recognition and enforcement of judicial decisions.

Furthermore, as secondary EU law, Regulation 1215/2012 is directly effective and prevails over the national law of each Member State, so that, once a claim has been brought before the court of a Member State, it becomes obliged to declare itself to have jurisdiction when so required by European law and, likewise, to deny jurisdiction when so provided by the same Regulation.

In compliance of the principle of primacy of EU law, Regulation 1215/2012 supersedes each Member State's private international law rules of jurisdiction, which only apply in a subordinate and residual manner in the event that the Regulation does not apply or, if it does apply, the Regulation refers to domestic law.

2.3 SCOPE OF REGULATION 1215/2012.

2.3.1 *Temporal scope of Regulation 1215/2012. Its relationship with previous legal instruments*

After being published on 20 December 2012, Regulation 1215/2012 entered into force 20 days later, i.e. on 10 January 2013. Pursuant to its Article 81, it became applicable as of 10 January 2015, with the exception of Articles 75 and 76, which entered into force on 10 January 2014.

According to Article 66, Regulation 1215/2012 will only apply to proceedings instituted on or after 10 January 2015. Notwithstanding the repeal of Regulation 44/2001 by Regulation 1215/2012, the former will continue to apply to judgments rendered as a result of actions brought before 10 January 2015.

On the other hand, it should be noted that, insofar as Regulation 1215/2012 replaces the provisions of the Brussels Convention of 27 September 1968, any

reference to that Convention shall be understood as a reference to Regulation 1215/2012, by virtue of its Article 68. Such provision is a further development of Recital 34 of Regulation 1215/2012, which expresses the European legislator's desire to ensure continuity between the Brussels Convention of 27-9-68, Regulation 44/2001 and Regulation 1215/2012 itself, both in terms of its content and interpretation.

In this regard, it should be borne in mind that there are several ECJ precedents confirming that case law issued on the provisions of the Brussels Convention of 27 September 1968 will be equally valid to interpret, *mutatis mutandis*, Regulation 44/2001 (and, hence, Regulation 1215/2012), as long as the provisions of these instrument can be classified as equivalent (see Judgments of 11 April 2024, *Credit Agricole Bank Polska*, C-183/23, EU:C:2024:297, 14 September 2017, *Nogueira*, C-168/16, EU:C:2017:688; 7 July 2016, *Höszig*, C-222/15, EU:C:2016:525; 10 September 2015, *Holterman Ferho Exploitatie*, C-47/14, EU:C:2015:574).

2.3.2 Territorial scope

Regulation 1215/2012 applies to the current Member States of the European Union, namely Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

Without prejudice to the above, it should be noted that the Kingdom of Denmark decided not to be bound by Regulation EC/44/2001, invoking Protocol 22 annexed to the TEU. However, on 19 October 2005, Denmark signed an agreement with the European Community on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters whereby, as from 1 July 2007, that regulation also applied to the Danish State, albeit not as secondary legislation, but as an international convention entered between the European Union and the Kingdom of Denmark.

Subsequently, once Regulation 44/2001 was repealed and replaced by Regulation 1215/2012, Denmark made use of the right conferred on it by Article 3 of the aforementioned Agreement of 19 October 2005 (whereby it could notify the EU Commission of its decision whether or not to apply the content of future amendments to the Regulation), expressing its decision to apply the content of Regulation 1215/2012 by letter of 20 December 2012.

Regulation 1215/2012 is no longer directly applicable to the UK as of 1 January 2021, following the end of the transitional period provided for in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

However, as provided for in art. 67(1) of the aforementioned Agreement, the provisions of Regulation 1215/2012 shall continue to apply in situations involving the United Kingdom, in respect of legal proceedings instituted before the end of the transition period (31 December 2020), as well as in connection with proceedings or actions that are related to such legal proceedings pursuant to Articles 29, 30 and 31 of Regulation 1215/2012 (*lis pendens* and related actions).

Furthermore, according to Article 67(2) of the same Agreement, in the United Kingdom and in the Member States in situations involving the United Kingdom, Regulation 1215/2012 shall also apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period, as well as to court settlements approved or concluded before the end of the transition period.

Finally, with regard to the geographical scope of application of Regulation 1215/2012, it should be noted that, in accordance with Article 355 of the TFEU, Regulation 1215/2012 will also apply to the territories of Guadeloupe, French Guiana, Martinique, Réunion, Saint Barthélemy, Saint Martin, the Azores, Madeira, the Canary Islands and the Åland Islands. In any event, provisions of Article 355(2) and (5) shall apply to the territories excluded from its application.

2.3.3 *Material scope*

Regulation 1215/2012 establishes the rules for attribution of jurisdiction in international disputes, in line with Article 81 of the TFEU from which it derives (referring to judicial cooperation in civil matters with cross-border implications), which, in the words of EU case law, requires the presence of an “international element”.

In this respect, the ECJ has held that the international nature of a legal relationship may result from the fact that the dispute may raise questions relating to the determination of the jurisdiction of the courts in the international sphere. This would include, among others, relationships between courts of a single Member State and those of non-Member States, and may not necessar-

ily derive from involvement of a number of Member States, either because of the subject-matter of the proceedings or the respective domiciles of the parties (see judgments of 1 March 2005, *Owusu*, C-281/02, ECLI:EU:C:2005:120; 14 November 2013, *Maletic*, C-478/12, ECLI:EU:C:2013:735; or 17 November 2011, *Hypoteční banka*, C-327/10, ECLI:EU:C:2011:745).

Jurisdiction over individual contracts of employment is ruled under Chapter II, Section 5 of Regulation 1215/2012. It should be noted that at no point does Section 5 define what is to be understood by an employment relationship.

ECJ case law has consistently established that the term “employee” cannot be interpreted differently in view of each Member State’s law, but in light of an autonomous and uniform interpretation of EU law.

It follows that the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person in return for which he/she receives remuneration (judgment of 3 July 1983, *Lawrie-Blum*, C-66/85, ECLI:EU:C:1986:284), being bound by a lasting relationship which brings the worker to some extent within the organizational framework of the business of the undertaking or employer (judgment of 10 September 15, *Holterman Ferho Exploitatie*, C-47/14, ECLI:EU:C:2015:574). Similarly, it is specified that the relationship of subordination must be assessed in each specific case, in light of all facts and circumstances at hand.

On the other hand, as stated in the *Mahamdia* case (judgment of 19 July 2012, *Mahamdia* C-154/11, ECLI:EU:C:2012:491), the set of rules applicable to the individual employment contract forms a comprehensive system that will apply not only to relations between different Member States, but also to relations between a Member State and a third State.

Bearing in mind all the above, the following considerations should be made:

- Pursuant to Article 1.2.c) of Regulation 1215/2012, its rules will not be applicable in matters of Social Security (as it is a matter of public law) as long as the Administration acts in the exercise of its *imperium*.

Thus, as stated in judgment of 14 November 2002, *Baten*, C-271/00, ECLI:EU:C:2002:656, the exclusion of Social Security concerns exclusively disputes arising out of relations between the Administration and employers or employees. Under this interpretation, the concept of “Social Security” includes the material scope of

Regulation (EEC) No 1408/71, of the Council of 14 June 1971 on the application of Social Security schemes to employed persons and their families moving within the Community.

However, the European Court clarifies in that decision that the exclusion does not extend to possible actions for recovery brought by the administration against a third party liable for injury, or when it is subrogated as regards that third party to the rights of a victim insured by it, since it is then acting under ordinary law.

On the other hand, taking into account how the concept of Social Security is construed under EU case law, it follows that Regulation 1215/2012 will apply to disputes concerning voluntary improvements to Social Security protection (as a matter of example, retirement plans voluntarily provided by the employer), insofar as they may be considered part of the "individual employment contract".

- Regulation 1215/2012 will not be applicable to arbitration, in accordance with Article 1(2)(d) thereof.
- The majority of authors consider that the scope of application of Regulation 1215/2012 (and its precedents) would not extend to employment claims of a collective nature. However, several authors defend its applicability over claims concerning the individual exercise of collective rights. Some judicial precedent in this regard will be analyzed later on in this chapter.

II. JURISDICTION IN EUROPEAN UNION LAW UNDER REGULATION EU/1215/2012. COMPETENCE FORA

1. Introduction

Regulation 1215/2012 sets out the rules of international jurisdiction in matters of individual employment contracts on the basis of a system in which, leaving aside the concept of nationality as a possible criterion of attribution, it establishes, firstly, a general forum (corresponding to the defendant's domicile) and, secondly, some special forums, which (as occurs with the regulation of consumer matters or insurance contracts) take into consideration the contractual asymmetry or different bargaining power that is present at any employment relationship.

Underlying European legislation is, in short, the aim of facilitating access to the jurisdiction for the weaker contracting party, or the party likely to seek

greater protection. Hence, as we shall see, the regulation either facilitates bringing judicial actions into the forum which is closer to the employee (reducing the associated costs for the plaintiff), or limits freedom of choice of forum when it comes to prorogation of jurisdiction agreements.

Once international jurisdiction has been attributed to a certain Member State by virtue of the fora provided for in the Regulation, its local delimitation in such Member State will be determined in accordance with relevant domestic law.

2. Fora applicable to the plaintiff employee

2.1 GENERAL FORUM: THE DEFENDANT'S DOMICILE

In accordance with Article 21(I)(a) of Regulation 1512/2012, an employer domiciled in a Member State may be sued before the courts of the State in which it is domiciled. This being the "general forum", some author has pointed out that the domicile of the defendant serves both to set the limits for the applicable law and to attribute jurisdiction regardless of the subject matter of the proceedings, the type of claim or the location of the disputed facts.

The Regulation only defines the domicile for legal entities, but not for natural persons, providing in Article 63 that a company or other legal person, or association of natural or legal persons shall be deemed to be domiciled at the place where it has (i) its statutory seat, (ii) its central administration, or (iii) its principal place of business.

In contrast, under Article 62(1), when it comes to natural persons, in order to determine whether they are domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law. In turn, and in accordance with Article 62(2) of the European Regulation, when a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.

2.2 SPECIAL FORA

In addition to the general forum by which the employee is entitled to bring proceedings before the courts of the Member State in which the defendant is domiciled, Regulation 1215/2012 envisages the possibility of bringing an action, alternatively and concurrently, before the courts of the place "where or from

where" the work is habitually performed, or of "the last place" in which it was performed (Article 21(1)(b)(i)), or, in the absence of services performed on a regular basis in a single State, before the courts of "the place where the business which engaged the employee is or was situated" (Article 21(b)(ii)).

The special forums above referred will apply regardless of whether the defendant employer is domiciled in a Member State or in a third State outside the European Union, pursuant to Articles 6.1 and 21(2) of EU Regulation 1215/2012. It should be noted in this regard that, where jurisdiction is conferred on the courts of a Member State by such provisions, their application takes precedence over the national rules for attribution of jurisdiction, even if these are more favourable to employees (Judgment of 20 October 2022, *ROI Land Investments Ltd*, C604-2020, EU:C:2022:807).

Under Article 20(1) of Regulation 1215/2012, in relation to Article 7(5) thereof, in matters of individual contracts of employment where disputes relate to the operation of branches, agencies or any other establishment of an employer of a Member State, such employer may be sued in the courts of another Member State where the branch, agency or other establishment is located.

Finally, according to Article 20(2) of Regulation 1215/2012, where the employer is not domiciled in a Member State but has a branch, agency or any other establishment in a Member State, the employer shall be deemed to be domiciled in the Member State where the branch, agency or establishment is located for all disputes arising out of the operation of the branch, agency or establishment.

We will therefore analyse the most relevant aspects of the above-mentioned forums.

2.2.1 *The concept of the "habitual / usual place of work" or the "last place" where the work was carried out (Regulation 1215/2012 Article 21(1)(b)(i))*

EU law does not specify what should be construed as habitual place of work, without, once again, being possible to clarify this concept by reference to the internal legislation of the Member States. Consequently, and as it happens in so many other matters of EU law, it makes it necessary to establish uniform criteria which is consistent with the objectives and the scheme of attribution of jurisdiction of the Regulation (Judgment 13 July 1993, *Mulox*, C-125/92, EU:C:1993:306).

The concept of "habituality" is associated with the place where the most relevant part of the employment contract is developed, as well as the effective

centre of the worker's professional activity in which he plans and organises his services, in order to ensure that the competent forum is as closely connected as possible with the contractual relationship at stake. In short, the aim is to guarantee greater protection for the employee, as the weaker contractual party, by bringing him geographically closer to the jurisdiction of the place where he fulfils his obligations, insofar as, as a general rule, it will be the place where he can defend himself at a lower cost.

Thus, it is concluded that the usual place of performance must be identified on a case-by-case basis, taking into account qualitative, organisational or quantitative criteria.

From a qualitative and organisational perspective, determination of the usual place of work will take into account either the nature and importance of the services rendered or the place where the actual centre of the employee's professional activities is located (his office), from which the workers carries out and plans the essential part of his obligations towards the company and to which he returns after each business trip (judgements of 1 January 1997, *Rutten*, C-383/95, EU:C:1997:7 and 13 July 1993, *Mulox*, C-125/92, EU:C:1993:306).

In line with this last criterion, when it comes to air transport sector (see judgment of 14 September 2017, *Nogueira*, C-168/16, ECLI:EU:C:2017:688), regard must be had, *inter alia*, to (i) the place from which the employee carries out his tasks, (ii) the place to which he returns after accomplish them, (iii) the place where he receives instructions concerning his duties and organizes his work and (iv) the place where the working tools are located.

Despite the European Court stating that the concept of "place where the worker habitually carries out his work" cannot be assimilated to the concept of "base" provided for in European aviation legislation under Annex III of Regulation EEC/3922/91, it confirms that it may entail a significant element in its identification. However, its relevance may be neutralized if there are closer links with a place other than the "base". It should also be noted that the European Court denies the relevance of the nationality of the aircraft on which the cabin crew member flies, in order to determine the Member State from which he can be understood to habitually carry out his work.

In contrast, when there are two or more workplaces of equal relevance from a qualitative and organisational standpoint (so that none of them can be attributed a preponderant point of connection over the others), a quantitative or temporal criterion must be taken into account, which will bear in mind the duration of the employment relationship in its entirety, so that, in the absence of any other criterion, the place where the worker has spent most of the time

providing services will be considered to be the habitual place of work (Judgment of 27 February 2002, *Weber*, C-37/00, ECLI:EU:C:2014:212).

Additionally, the plaintiff employee will also be entitled to bring his action before the courts of the Member State of the last place where he provided his services.

It seems that the latter case refers to situations such as those referred to in the above-mentioned "*Weber*" judgment, where, after providing services for a certain period in a particular place, the employee then takes up his work activities on a permanent basis in a different place, which may be construed as the place where the parties consented to consider as the new habitual place of work.

Apart from the criteria set out above, it is worth highlighting, due to the peculiarity of the case, the Judgment of 25 February 2021, *Markt24*, C-804/19, EU:C:2021:134, which analyses the attribution of jurisdiction based on the forum of the habitual place of provision of services with respect to an employment contract which, following its signature, is not fulfilled. In such a case, it is held that jurisdiction must be determined by reference to the intention expressed by the parties as to the place where, or from which, the employee would have been called upon to discharge the essential part of his obligations pursuant to the contract of employment.

Finally, it is equally worth to mention Judgment of 20 October 2022, *ROI Land Investments Ltd*, EU:C:2022:807, which decides on a claim brought by a worker domiciled in Germany against a company of Canadian nationality (ROI Land Investments Ltd), in relation to the "guarantee agreement" that the latter had signed, guaranteeing the fulfilment of the employment obligations arising from the employment relationship held between said worker and his Swiss employer (R Swiss AG). In such a case, the ECJ confirms that German courts have jurisdiction over proceedings instituted against a person other than the employer, as responsible for the performance of the obligations under the employment contract and as those courts are the ones of the last place in which, or from which, the employee habitually carried out his work.

2.2.2 *The "place where the business which engaged the employee is or was situated" (Regulation 1215/2012 Article 21(1)(b)(ii)), as well as "branches, agencies or establishments" (Regulation 1215/2012 Articles 20(2) and 7(5), in relation to 20(1))*

Pursuant to Article 21(1)(b)(ii) of EU Regulation 1215/2012, if the employee does not or has not habitually carried out his work in a single State, he

may bring his action before the court of the place where the business which engaged him is or was located.

This is a forum of subsidiary application (applicable both to employers whose domicile is located in a Member State and to those whose domicile is outside the Union), which will only come into play once it has been ruled out that the employee provides services or has habitually done so in a single State.

The term "establishment" should be interpreted in a broad sense, including both the head office and an agency or branch of the employer. When setting out its scope, some authors refer to the ECJ case law rendered on the interpretation of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, given the conceptual similarity with respect to the regulation on international jurisdiction, and, more specifically, to the Judgment of 15 December 2011, *Voogsgeerd* C-384/10, EU:C:2011:842).

Under the interpretation provided by the European Court, the concept of "establishment" refers to the place where the employee was recruited and not the one to which he may be linked by his actual occupation, adding that this term covers all stable structures of a company, i.e. not only subsidiaries and branches, but also other units, such as the offices of an undertaking, even though they do not have legal personality.

On the other hand, pursuant to Article 20(2) of Regulation 1215/2012, when an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall be deemed to be domiciled in the Member State where the branch, agency or other establishment stands. In accordance with Judgment of 19 July 2012, *Mahamdia*, C -154/11, EU:C:2012:491, this forum requests the existence of a centre of operations that has the appearance of permanency, as the extension of a parent body. That centre, the Court adds, must have a management and be materially equipped to negotiate with third parties who are dispensed from dealing directly with the parent body. The same interpretation is followed in Judgment of 18 March 1981, *Blankaert & Willems*, C-139/80, EU:C:1981:70.

The purpose of this rule is to enable the employee to institute proceedings before the court that is closest to his interests, even if the employer is not domiciled in a Member State.

The above provision is complemented, by the provisions of Article 7(5) of Regulation 1215/2012, to which Article 20(1) refers, according to which a claim against an employer who is domiciled in a Member State may also be brought in the courts where its "branches, agencies or any other establishment" are located, in disputes relating to its operations.

2.3 ANALYSIS OF SPECIFIC SCENARIOS

2.3.1 *Several defendants located in different jurisdictions*

Under Article 8(1) of Regulation 1215/2012, if the action is brought against several defendants, a person domiciled in a Member State may also be sued before the courts of any of them, provided that the actions are so closely connected that it is appropriate to hear them together, in order to avoid potentially contradictory judgments in the event that the cases are heard separately. This provision applies to Section 5 of EU Regulation 1215/2012 on jurisdiction over individual contracts of employment, by virtue of Article 20(1) thereof.

Inexplicably, this possibility now existing under Regulation 1215/2012 did not apply to disputes arising from individual employment contracts under its predecessor, Regulation EC/44/2001, according to EU case law.

In Judgment of 22 May 2008, *Glaxosmithkline and Laboratoires Glaxosmithkline*, C-462/06, ECLI:EU:C:2008:299, the Court ruled on a case in which, relying on Regulation 44/2001, the employee brought a dismissal action seeking joint and several liability against a company domiciled in the United Kingdom and another domiciled in France (both belonging to the Glaxosmithkline group of companies), on the grounds that these companies had been his "co-employers". The ECJ held that the European rules of jurisdiction in force at the time would not allow an employee to sue all employers domiciled in different Member States before the courts of a single State, even if the claims that had to be brought separately against each of those employers were clearly connected and could meet the general objective of the sound administration of justice.

The reason is that Section 5 of Regulation 44/2001 (which deals with jurisdiction over individual contracts of employment), would not make an explicit reference to its Article 6, according to which, if there were several defendants, proceedings may be brought before the court of the domicile of any of them.

This being so, and since the provisions of Section 5 would not only be specific but also exhaustive in nature, the Court held that the employee could not bring related actions before a single court against a plurality of defendants (without prejudice to the fact that, *de lege ferenda*, it would be desirable to reach a different solution in favour of greater protection for employees who found themselves in situations such as the one described).

Articles 20(1) and 8(1) of Regulation/1215/2012 have therefore amended this issue, including explicit reference to the aforementioned special rule of

jurisdiction, so that, also in matters of employment contracts (and provided that the claim is brought against an employer, not an employee), when there are several defendants it is possible to bring a claim before the court of the domicile of any of them.

2.3.2 *Diplomatic Missions and Consulates*

The European Court has also analysed the jurisdiction applicable to employment claims brought against diplomatic missions or consulates of non-EU Member States, but located in Member States.

Article 1(1) of Regulation 1215/2012 is plain and clear stating that actions seeking liability of a State for acts and omissions in the exercise of State authority (*acta iure imperii*) fall beyond its scope of application.

Having said so, it should be noted (see Judgment of 19 July 12, *Mahamdia*, C-154/11, EU:C:2012:491) that a diplomatic mission may carry out acts related to the exercise of the sovereignty of the State it represents (*acta iure imperii*), as well as acts of management or administration not linked to such sovereignty (*acta iure gestionis*).

The former (*acta iure imperii*) are covered by immunity of jurisdiction, as they are linked to the international law principle of independence, sovereignty and equality of States (*par in parem imperium non habet*), whereby a State cannot be sued before the courts of another State, nor can what has been judged in the latter be enforced against it. The *acta iure gestionis* entail a modulation of the privilege of immunity from jurisdiction, whereby this privilege is waived when it comes to actions that do not belong to the sphere of public authority.

If the tasks performed by the employee are not related to the exercise of public powers, Regulation 1215/2012 allows the employee to bring proceedings before the courts of the Member State where the embassy of the non-Member State he is working or has worked for is located. More specifically, in the judgment of 19 July 12, *Mahamdia*, C-154/11, EU:C:2012:491, it is held that an embassy can be assimilated to a centre of operations which has the appearance of permanency and contributes to identifying and representing the State from which it emanates. This interpretation has been extended analogically to consular agencies by Judgment of 3 June 2021, *Generalno konsulstvo na Republika Bulgaria* judgment, C-280/20, EU:C:2021:443.

From this perspective, the embassy or consulate qualifies as an "establishment" within the meaning of Article 20(2) of Regulation 1215/2012, when

the functions discharged by the employee do not fall within the exercise of public powers. If so, proceedings may be instituted before the courts of the Member State where diplomatic or consular mission stands.

2.3.3 *Services rendered in a scenario of inter-companies cooperation*

The ECJ has also addressed the attribution of jurisdiction in scenarios of contractual relationships developed for several companies within a business cooperation framework.

Reference must be made to Judgment of 10 April 2003, *Pugliese*, C-437/00, EU:C:2003:219, concerning an employee who, after being hired by an Italian company (Aeritalia Aerospaziale) to provide services in Turin, asked for a leave of absence to be transferred to a post in the German company Eurofighter, whose registered office was in Munich, and in which Aeritalia Aerospaziale held a 21% stake.

Aeritalia accepted and undertook to pay contributions in Italy on a voluntary insurance basis, as well as to recognise the seniority accumulated in Eurofighter upon the employee's return. She would also be reimbursed for certain travel and rental costs. After signing a contract with Eurofighter and serving in Munich for eight years, the Italian employer called on the employee to return to work at the end of her leave of absence. As the employee did not comply with the Italian employer's request, it took disciplinary measures against her, which in turn led to the employee bringing an action before German courts against her Italian employer.

The ECJ holds that, where an employee is connected to two different employers, the first employer (in this case, the Italian) may be sued in the courts of the place where the employee carries out her work for the second employer (in this case the German employer) only if the first employer has, at the time of conclusion of the second contract, an interest in the performance of the work which the employee carries out for the second employer at the place determined by the latter.

The Court notes that the concurrence of such an interest cannot be verified strictly in light of formal and exclusive criteria, but in a global manner, taking into account, *inter alia*, whether (i) the conclusion of the second contract was foreseen when the first contract was signed, (ii) the first contract was modified in the light of the conclusion of the second contract, (iii) there is an organizational or economic link between the two employers, (iv) there is an agreement between the employers providing for the coexistence of the two

contracts, (v) the first employer retains management power over the employee, and (vi) the first employer can decide on the duration of the employee's activity for the second employer.

2.3.4 *Collective actions*

Although the majority of authors are inclined to consider that Regulation 1215/2012 does not apply to collective labour claims, some defend its application when it comes to seek individual assertion of collective rights. Likewise, some author points out the existence of decisions handed down by the ECJ in claims for damages against trade unions, by assimilation to tort or quasi-delict, which would be included in the scope of application of Regulation 1215/2012 (see Judgment of 5 February 2004, *DFDS Torline*, C-18/02, EU:C:2004:74).

2.3.5 *Posting of workers in the framework of the provision of services*

In addition to the protective forums enshrined under Regulation 1215/2012, the EU legal system envisages other ones besides that legal instrument, such as the one provided for in Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation 1024/2012 on administrative cooperation through the Internal Market Information System.

In accordance with Article 6 of Directive 1996/71/EC, in order to safeguard the right to the working and employment conditions guaranteed therein, legal action may be brought in the Member State in whose territory the employee is or has been posted. In turn, pursuant to Article 11(1) of Directive 2014/67/EU, to ensure compliance with the obligations imposed by Article 6 of Dir 1996/71/EC, Member States shall ensure that posted employees who consider that they have suffered damage or loss as a result of a breach of the applicable rules have effective mechanisms for bringing proceedings also in the Member State in whose territory they are or have been posted (and this is without prejudice to the rules laid down in Union law instruments).

In application of this alternative forum, the ECJ rendered Judgment of 8 July 2021, *Rapidsped*, C-428-19, EU:C:2021:548, ruling on a claim brought by lorry drivers hired by a company domiciled in Hungary, who had habitually performed their work by travelling to France, acknowledging their status as posted employees and the right to bring actions in the State to which they were

posted, or before that of their employer, if applicable, by virtue of EU Regulation 1215/2012.

3. **Fora applicable to the plaintiff employer**

The rules on attribution of jurisdiction when the employer is the plaintiff are yet another example of the protection that Regulation 1215/2012 affords the employee, as the weaker party to the individual employment contract.

In contrast to the variety of forums that are made available to workers with a view to favouring their access to the courts, Article 22(1) of Regulation 1215/2012 limits the employer's room for procedural manoeuvre to the point that he is only allowed to institute proceedings before the court of the Member State in which employees are domiciled.

However, according to Article 22(2) of Regulation 1215/2012, this limitation does not apply in the event that the employer becomes a counterclaimant, in which case, it may bring such a claim before the court where the original claim is pending.

It should be noted that, according to judgment of 21 June 2018, *Petronas Lubricants Italy SpA*, C-1/17, EU:C:2018:478, the employer is entitled to bring a counterclaim following the main claim, provided that both claims have a common origin.

4. **Prorogation of jurisdiction**

As far as prorogation of jurisdiction is concerned, Regulation 1215/2012 distinguishes depending on whether there is an agreement conferring jurisdiction entered into between the parties, or it is tacitly accepted when the defendant enters an appearance.

4.1 **AGREEMENTS CONFERRING JURISDICTION**

Pursuant to Article 23 of Regulation 1215/2012, choice of court agreements in employment relationships are valid and effective provided that (i) they are entered into once the dispute has arisen, or (ii) they allow the employee to bring proceedings before courts other than those ones referred to in Section 5 of the aforementioned instrument. These provisions are complemented

by Article 25 of Regulation 1215/2012, according to which the agreement conferring jurisdiction must be concluded in writing or orally with written confirmation, and in a form that accords with practices that the parties have established between themselves.

This is a forum that depends on the free will of the parties and which prevails over the protective forums envisaged in Section 5, provided that the above requirements set out above are met. In short, it is assumed that, if the agreement is made after the dispute has arisen, the traditional contractual asymmetry existing in all employment relationships is mitigated, on the assumption that the employee will not necessarily be obliged to accept the prorogation of jurisdiction proposed by the employer.

The ECJ sheds light over Article 23 of Regulation 1215/2012 in its Judgment of 19 July 2012, *Mahamdia*, C-154/11, EU:C:2012:491, declaring that an agreement conferring jurisdiction entered into prior to the commencement of the dispute will be equally valid and effective, as long as (i) it allows the employee to bring claims before courts other than those that would result from applying the rules contained in the Regulation, and (ii) it does not exclude the forums established in favour of the employee by that regulation. This, regardless of whether the new forums "added" by the explicit submission agreement confer jurisdiction on the courts of other Member States or third States outside the Union.

In other words, the prorogation agreement reached prior to the litigation will be valid if it extends the jurisdictional forums available to the claimant employee, without restricting or excluding those provided for in EU Regulation 1215/2012. This interpretation is reiterated by Judgment of 14 September 2017, *Nogueira*, C-168/16, EU:C:2017:688.

4.2 TACIT PROROGATION

Tacit submission takes account of the behavior developed by the defendant, who does not contest the jurisdiction of the court seised. If so, it follows that the absence of objection is tantamount to a willingness to accept the jurisdiction of such court. This possibility is regulated in Article 26(1) of Regulation 1215/2012, which confers jurisdiction on the court of a Member State before which the defendant enters an appearance, unless the purpose of the appearance is precisely to contest the jurisdiction of that court.

Art.26(2) of Regulation 1215/2012 incorporates the suggestions made by the ECJ in its Judgment of 20 May 2010, *ČPP Vienna Insurance Group*,

C-111/09, EU:C:2010:290, echoing the observations submitted by the Czech and Slovak governments, according to which an appearance should only qualify as a tacit submission (in disputes where the defendant is the weaker party) provided that the defendant is given the opportunity to be fully aware of the consequences of such an appearance.

Hence, unlike in Regulation 44/2001 (which was silent on the matter), now, pursuant to Article 26(2) of EU Regulation 1215/2012, before assuming jurisdiction by virtue of a tacit submission under Article 26(1), the court will be obliged to ensure that the employee defendant has been informed of his right to contest the jurisdiction of the court, as well as of the consequences of appearing or not. This is confirmed, among others, in Judgment of 11 April 2024, *Credit Agricole Bank Polska*, C-183/23, EU:C:2024:297.

III. RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN THE EUROPEAN UNION

1. **The applicable legal frame for recognition and enforcement of judgments in the EU**

If the unification of the rules of jurisdiction is, in the words of the European lawmaker, necessary to ensure the sound operation of the internal market, the same applies to recognition and enforcement of judgments handed down in the respective Member States.

The rules for recognition and enforcement of judgments regulated in Chapter III of Regulation 1215/2012 entail a clear advance over its predecessor (Regulation 44/2001), characterised mainly by the elimination of the exequatur procedure. Thus, under the new system, it is no longer necessary to resort to a prior incident to validate judgments handed down within the Union, allowing their direct enforcement, which, however, will still coexist with certain mechanisms for control in the State of enforcement.

Pursuant to Article 66(2) of Regulation 1215/2012, its predecessor, Regulation EC/44/2001, will continue to apply to judgments rendered as a result of actions brought before 10 January 2015, as well as to court settlements approved or concluded before that date that fall within the scope of application of the aforementioned regulation. On the other hand, and with regard to the material and territorial scope of application of the Regulation, the comments already made in previous sections when dealing with the regulation of international jurisdiction (and to which we refer), will be applicable.

On the other hand, the content of Regulation EC/1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), *inter alia*, must be taken into consideration, which, as we shall see, may be relevant when considering certain grounds for refusal of recognition.

2. Decisions subject to recognition and enforcement

According to Art. 2(a) EU Regulation 1215/2012, the term 'judgment' shall cover any judgment given by a court of a Member State, whatever it may be called, including a decree, order, decision or writ of execution, or the one that may be taken on determination of costs. Furthermore, for the purposes of Chapter III of the Regulation, which lays down the rules applicable to recognition and enforcement, the term 'judgment' comprises provisional measures (including protective) ordered by a court having jurisdiction as to the substance of the matter, but does not include provisional measures (including protective) ordered *inaudita parte*, unless they have been notified to the defendant prior to enforcement.

The Court of Justice of the European Union has ruled in favour of a broad interpretation of the types of judgments that may be subject to recognition and enforcement. Thus, in its judgment of 15 November 2012, *Gothaer Allgemeine Versicherung and others*, C-456/11, EU:C:2012:719, we are reminded that one of the objectives of the EU legislation is to simplify the formalities for the rapid recognition and enforcement of judgments of courts of Member States. This calls for an interpretation of the concept of 'judgment' which does not take into account the way in which the law of a Member State qualifies an act adopted by a national court, since otherwise, if account is taken of the particular interpretative features of each Member State, this would be an obstacle to the attainment of that objective. This precedent is particularly interesting, since it refers to the concept of *res judicata* in European Union law, recognising it not only to the operative part of the judicial decision in question, but also to the legal grounds on which the judgment must necessarily be based and which are inseparable from it.

Similarly, in Judgment of 14 October 2004, *Maersk Olie Gas*, C-39/02, EU:C:2004:615, it is stated that the concept of "judgment" covers any decision adopted by a judicial body of a Member State, without making any distinction according to the content of the judgment in question. And, likewise, it is not

limited to judgments which bring all or part of a dispute to an end, but also includes provisional or interlocutory decisions.

Finally, it is worth to mention that the ECJ has held in its Judgment of 7 April 2022, *H Limited*, C-568/20, EU:C:2022:264, that the concept of "judgment" will also cover an order for payment made in March 2019 by a court of a Member State (then the UK) on the basis of final judgments delivered in a non-EU third State (the Kingdom of Jordan) (although such judgments which were delivered in a third State would not, as such, be enforceable in the Member States).

3. Recognition under Regulation 1215/2012

3.1 AUTOMATIC RECOGNITION

Through recognition, a foreign judgment will be capable of producing in a Member State other than the one in which it was given the same effects as it has in its State of origin, beyond its enforceability (*res judicata*, declaratory effect, constitutive effect).

This principle is endorsed by several ECJ precedents, including, among others, Judgment of 15 February 2012, *Gothaer Allgemeine Versicherung and others*, C-456/11, EU:C:2012:719, where (quoting Judgment of 4 February 1988, *Hoffmann* C-145/86, EU:C:1988:61) it is stated that recognition must entail that judgments are attributed the authority and effectiveness they deserve in the State in which they were issued, and this (as the latter judicial decision points out), in order to facilitate, as far as possible, their free movement.

According to the recitals (*inter alia*, recital 26) of EU Regulation 1215/2012, mutual trust in justice within the Union justifies the principle that judgments given in one Member State should be recognised in all Member States, without the need for any special procedure. The Regulation also expresses the European legislator's desire to reduce the duration and costs of cross-border litigation, which in turn supports the abolition of a prior declaration of enforceability to allow enforcement of a judgment rendered by the Court of a Member State by the courts of the Member State addressed.

Hence, Article 36 of Regulation/1215/2012 establishes the obligation of recognition without requesting a prior procedure or incident for this purpose, enshrining the principle of automatic recognition of decisions issued within the Union. From this perspective, automatic recognition implies a presumption of the legitimacy of the decision from the very moment it is rendered.

In any event, the person seeking recognition must, in accordance with Article 37(1) of EU Regulation 1215/2012, provide a copy of the judgment that meets the necessary requirements for it to be considered authentic, as well as the certificate issued in accordance with Article 53 thereof. Such certificate consists of a form with the information attached under Annex I to the Regulation, which shall include details of the court of origin, identification of the plaintiffs and defendants, the type of judgment to be recognised and details of the judgment.

Pursuant to Article 37(2) Regulation 1215/2012, the court of the Member State where the judgement is to be recognized may ask the party which invokes it to provide a translation or a transcript of the contents of the certificate. It may also require a translation of the judgment instead of a translation of the contents of the certificate, if it cannot continue its proceedings without such a translation.

3.2 APPLICATION FOR RECOGNITION

Pursuant to Article 36 of Regulation 1215/2012, any interested party may apply for a decision declaring that there are no grounds for refusal of recognition (within those ones envisaged under Article 45 thereof) of a Judgment. Through this application the interested party will anticipate to a possible challenge of recognition of the decision by those to whom its contents may be prejudicial.

And, conversely, under Article 38(b) of Regulation 1215/2012, a litigant may apply for a decision declaring that recognition must be refused on one of the same grounds as those listed in Article 45 of the Regulation.

In either scenario, the application for recognition will be the main subject matter of proceedings specifically instituted and conducted to confirm whether a decision fulfils the conditions necessary for it to have effects in a Member State.

In the event that it is confirmed that there are no grounds for the refusal of recognition, it may be requested, without the effectiveness of the judgment in question being called into question at a later date. In the opposite case (confirmation of the existence of grounds for non-recognition), the counterpart may successfully challenge any future application for enforcement of the judgment.

It should be noted that the Regulation does not envisage any specific procedure to file an application for recognition once it becomes the main purpose of the proceedings, but merely refers to the procedure provided for in Chapter III, Section 3, Subsection 2 of the Regulation, which rules refusal of enforcement.

3.3 INCIDENTAL RECOGNITION

Although, in principle, and if the European Regulation applies, recognition should be automatic, it is possible that the party against whom it is sought to be enforced may challenge the effectiveness of the decision by invoking one of the grounds for refusal of recognition, among those provided for in Article 45 of Regulation 1215/2012.

Unlike the scenario where recognition itself would entail the subject matter of the dispute, in the case provided for in Article 36(3) of Regulation 1215/2012, the debate on whether recognition should be refused will take place in the context of pre-existing main proceedings, within which such a discussion will arise as an incident to be inserted therein.

3.4 GROUNDS FOR REFUSAL OF RECOGNITION

Despite the abolition of exequatur as a prior recognition procedure, recognition may be challenged by the parties, in accordance with Article 45 of Regulation 1215/2012 and based on the grounds described below.

3.4.1 *Recognition manifestly contrary to public policy (ordre public) in the Member State addressed*

As the Court of Justice has held (among others, judgments of 21 March 2024, *Gjensidige*, C-90/22, EU:C:2024:252; 28 April 2009, *Apostolides*, C-420/07, EU:C:2009:271; or 6 September 2012, *Trade Agency* C-619/10, EU:C:2012:531), refusal of recognition on the grounds that the decision is contrary to the public policy of the requested Member State must be interpreted restrictively, as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Regulation. Although it is not for the Court of Justice to define the content of the concept of public policy of a Member State, it is for it to review the limits within which the courts of a Member State may rely on that concept in order not to recognize a judgment given by a court of another Member State.

Likewise, according to the European case law, when the Regulation prohibits review of the foreign judgment on the merits, it also forbids the State addressed from refusing recognition solely on the grounds of a discrepancy between the rule applied by the court of the State of origin and the rule that would have been applied by the court of the State addressed if the dispute had

been brought in the latter. In a similar way, the court of the State addressed cannot review the accuracy of findings of fact or law made by the court of the State of origin (Judgment of 28 March 00, *Krombach* C-7/98, EU:C:2000:164).

Finally, it should be noted that the same judicial doctrine states that the public policy clause can be applied only if the recognition or enforcement of the judgment given in another Member State would be in unacceptable conflict with the legal order of the State addressed because it would undermine a fundamental principle. The infringement must constitute a manifest violation of a rule of law regarded as essential in the legal order of the State addressed or of a right recognized as being fundamental in that order (Judgments of 7 September 2023, *Charles Taylor Adjusting*, C-590/21, EU:C:2023:633 and 21 March 2024, *Gjensidige*, C-90/22, EU:C:2024:252).

3.4.2 *Judgment in default of appearance*

Recognition may be refused when a judgment is rendered in default of appearance if the defendant was not served with the document instituting the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless he failed to challenge the judgment when it was possible for him to do so. As in other cases, the Regulation does not provide its own definition of what is to be understood by the concept of "default of appearance".

To that effect, the Court of Justice of the European Union has held, *inter alia*, that:

- Taking steps in the proceedings without knowledge of the defendant by means of “service by public notice” restricts the defendant's rights of defence, although this may be justified in light of the plaintiff's right to effective remedy (since, otherwise, that right would be meaningless), and provided that the rights of the persons concerned are duly protected (judgment 15 March 2012, *G v Cornelius de Viss-er*, C-292/10, EU:C:2012:142).
- A decision rendered by default on the basis that the document which institutes the proceedings was not served on the defendant in due time, and with sufficient time to enable him to arrange his defence, must be recognized if the defendant did not take the initiative to bring an appeal against that decision when he could have done so, and, even more so where the defendant did indeed bring an appeal

and it enabled him to argue that the document instituting the proceedings or the equivalent document had not been served in due time and in proper form and such appeal was dismissed (Judgment of 28 April 2009, *Apostolides*, C-420/07, EU:C:2009:271).

Pursuant to Article 19(4) of Regulation 1393/2007 on the service of judicial and extrajudicial documents, in transnational litigation in which a judgment has been given against a defendant who did not enter an appearance, he may be relieved from the effects of the expiry of time for appeal, if (i) through no fault of his own, he did not have knowledge of the judgment in time to appeal and (ii) the defendant has disclosed a *prima facie* defence to the action on the merits. If the defendant does not assert his right to apply for relief from preclusion when he was able to do so, recognition of a judgment given against him in default of appearance cannot be refused (judgment of 7 July 2016, *Lebek*, C-70/15, EU:C:2016:524).

- In order that the defendant may have the chance to bring an appeal against the judgment in default of appearance he must have knowledge of its contents, which presupposes that it was served on him. The requirement for refusal of recognition does not have to be regular delivery or notification in all respects (as required by the Brussels Convention), but knowledge of the content of the decision in sufficient time to defend oneself is sufficient (Judgment of 14 December 2006, *ASML*, C-283/05, EU:C:2006:787).

3.4.3 *The judgment is irreconcilable with a judgment given between the same parties in the Member State addressed*

The purpose of this ground for refusal is to avoid contradictory decisions in the event that institution of two simultaneous proceedings could not be prevented through the correct prior application of the rules of jurisdiction. In short, it is a matter of guaranteeing the principle of legal certainty, avoiding concurrent proceedings with regard to which there is a connection or identity in their object.

In accordance with ECJ case law, this objective should be achieved through a broad interpretation that covers, in principle, all situations of *lis pendens* before the courts of Member States, regardless of the domicile of the parties (Judgment of 14 October 2004, *Maersk Olie & Gas*, C-39/02, EU:C:2004:61).

As stated in Judgment of 6 June 2002, *Italian Leather*, C-80/00, EU:C:2002:342 in order to determine if two decisions are irreconcilable, it

must be examined whether they entail legal consequences that are mutually exclusive. Furthermore, this ground for refusal can be invoked both in the case of decisions given in the context of proceedings deciding on the merits and in interlocutory proceedings.

3.4.4 *The judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed*

In this case, lack of compatibility arises between the judgment to be recognised and the judgment given in another Member State or third State, provided that the judgment is capable of recognition in the Member State in which recognition is sought. It is not necessary that recognition of the judgment given in the non-Member State has already been sought; it is sufficient that there is a potential incompatibility.

What is required here is an identity of subject-matter and cause of action between the proceedings at hand, which, in short, points to a case of *lis pendens*, as that institution is understood by the ECJ case law.

The judgment conflicts with Section 5 of chapter II of the Regulation (individual contracts of employment) when the employee is the defendant

The legal frame given by Regulation 1215/2012 on this ground for refusal differs from its predecessor, Regulation 44/2001, in that the latter only referred to insurance, consumer contracts and exclusive jurisdiction, whereas now its scope is extended to employment contracts. In addition, and as a new feature compared to the pre-existing regulation, it is indicated that this ground of refusal will only be applicable in favour of the defendant employee.

As some author has pointed out, in accordance with interpretation given by the ECJ under Judgment of 3 April 2014, *Weber* C-438/12, EU:C:2014:212, if the first proceedings are instituted before a court of a Member State which does not have jurisdiction under the forums envisaged by Article 45(1)(e) of Regulation 1215/2012, the court second seised in compliance with such jurisdiction rules cannot stay its proceedings or decline jurisdiction. As a consequence of it (i) the court second seised will have to give a ruling on the substance of the action, and (ii) the judgment of the first court will not be recognised in the State of the second court, in compliance of Article 45(1)(e) of Regulation 1215/2012.

This ground for refusal means, in short, that recognition is refused when the rules for attribution of international jurisdiction have not been observed.

4. Enforcement under Regulation 1215/2012

4.1 APPLICATION FOR ENFORCEMENT

Pursuant to Article 41 of EU Regulation 1215/2012, a judgment given in a Member State which is enforceable in the Member State addressed shall be enforced in the latter under the same conditions as if it had been rendered by its own courts. The application for enforcement will include the documentation requested under Article 42 of Regulation 1215/2012, consisting of (i) a copy of the judgment that meets the requirements to be considered authentic, and (ii) the certificate referred to in Article 53 of Regulation 1215/2012, stating that the judgment is enforceable and including an extract of the judgment as well as, where appropriate, information on the costs imposed in the proceedings and the calculation of interest.

The enforcement system devised by the Regulation is based on the use of standardised forms and certificates, which replace the *exequatur* procedure by assisting the enforcing court in defining the obligation that must be complied with. Despite a translation of the judgment and the certificate is not mandatory to file the application for enforcement, the enforcement authority may request translation or transcription of the certificate's contents and a translation of the judgment (although, in the latter case, just in case it cannot continue its proceedings without the translation). The following aspects of the European regulation are noteworthy:

- Pursuant to Article 41(3) of EU Regulation 1215/2012, the applicant for enforcement is not required to have a postal address in the requested Member State, nor an authorised representative, unless this is mandatory, regardless of the nationality or domicile of the parties.
- The European regulation exempts (under its Article 56) the applicant for enforcement from the obligation to lodge any guarantee or deposit on the grounds of being a foreign citizen, or due to the lack of domicile or residence in the addressed Member State (which, in short, eliminates any possibility that a *cautio iudicatum solvi* may be demanded).
- According to Article 54(1) of EU Regulation 1215/2012, if the judgment to be enforced contains a measure or order which is not known in the legal system of the requested Member State, it shall, as far as possible, be adapted to a measure or order known in the legal system of that Member State which has equivalent effects and serves similar purposes and interests. Obviously, in the case of monetary enforce-

ment, this should not pose major problems. However, the European mandate may be more difficult to enforce with respect to other types of orders than a mere payment obligation. In order to overcome this hurdle, the Regulation itself provides that the adaptation authorized by Article 54(1) of the Regulation may not have effects other than those provided for in the law of the Member State of origin (and this is without prejudice to the parties being entitled to challenge such adaptation, in accordance with its Article 54(2)).

- The European regulation provides for the possibility of adopting precautionary measures under the provisions of its Article 40.

The addressee of the enforcement application must be served with the certificate issued in accordance with Article 53 of Regulation 1215/2012, together with the enforceable judgment if it has not already been served on him. This notification must take place before the first enforcement measure is undertaken (without the Regulation setting out a specific deadline, but just a mere reference in its Recital 32 to providing information of enforcement reasonably in advance).

To ensure the defence of the defendant and a proper understanding of the enforcement order, the defendant may request a translation of the judgment for the purpose of contesting it, if he is domiciled in a Member State other than the Member State of origin and the judgment is not written in or accompanied by a translation into (i) a language which he understands, or (ii) the official language of the Member State in which he is domiciled, or (if there are several official languages in that Member State) the official language or one of the official languages of the place where he is domiciled. It should be noted that the defendant is entitled to receive a translation of the judgment if the above conditions are met, but not of the certificate, which, in the latter case, may only be required by the court, pursuant to Article 42(3) of Regulation 1215/2012.

4.2 REFUSAL OF ENFORCEMENT

The person against whom enforcement has been sought may, in turn, apply for its refusal on any of the grounds provided for in Article 45 Regulation 1215/2012, pursuant to Article 47 thereof. This application, which will be ruled through the procedure established by the requested Member State, must enclose copy of the judgment and, where necessary, its translation or transcription (the applicant may be exempted from providing such documentation if the

court already has it, or considers it unreasonable to demand its provision). The rules on the obligation to have a postal address in the requested Member State, or an authorised representative, will be the same as those described above for the applicant for enforcement.

4.3 THE GROUNDS FOR REFUSAL OF ENFORCEMENT (REFERENCE TO THE GROUNDS FOR REFUSAL OF RECOGNITION)

The grounds for opposition and refusal of enforcement, which are directly linked to the cross-border nature of enforcement, are the same ones as those ruled under European law for refusal of recognition. Thus, as provided for in Article 46 of Regulation 1215/2012, the enforcement of a judgment shall be refused, at the request of the person against whom enforcement has been sought, on any of the grounds provided for in Article 45 of the same Regulation, relating to the refusal of recognition. Hence, we refer to the comments and case law already quoted in previous sections in connection with refusal of recognition, which will fully apply to refusal of enforcement.

CHRONOLOGICAL ANNEX OF CITED CASES

ANTONIO V. SEMPERE NAVARRO

Note: for the purposes of identifying a judgment or an order, the abbreviations ECJ (regardless of the name given to the Court at any given time) and EGC (for the General Court) have been used.

CHRONOLOGICAL ANNEX OF CITED CASES.

1950

1959

1959 02 04 (C-1/58), Stork & Cie.

1960

1962

1962 05 18 (C-13/60), Geitling.

1963

1963 02 05 (C-26/62), Van Gend en Loos.

1964

1964 03 19 (E-75/63), Unger.

1964 07 15 (C-100/63), Van der Veen.

1964 07 15 (C-6/64), Costa v. ENEL.

1967

1967 12 05 (C-19/67), Van der Vecht.

1969

1969 12 11 (C-29/69), Stauder.

1970

1970

1970 12 17 (C-11/70), mbH.

1971

1971 05 25 (C-80/70), Defrenne I.

1973

1973 06 07 (C-82/72), Walder.

1974

1974 02 12 (C-152/73), Sotgiu.

1974 04 04 (C-167/73), Commission v France.

1974 05 14 (C-4/73), Nold.

1974 06 21 (C-2/74) Reyners.

1974 12 04 (C-41/74), van Duyn.

1974 12 12 (C-36/74), Walrave.

1975

1975 10 21 (C-24/75), Petroni.

1975 10 28 (C-36/75), Rutili.

1976

1976 04 08 (C-43/75), Defrenne II.

1978

1978 03 08 (C-135/77), Robert Bosch.

1978 03 09 (106/77), Simmenthal.

1978 06 15 (C-149/77) Defrenne III.

1979

1979 03 28 (C-175/78), Saunders.

1979 04 05 (C-148/78), Ratti.

1979 07 12 (C-237/78), Toia.

1979 12 13 (E-44/79), Hauer.

1980

1980

1980 06 26 (C-136/79), Panasonic.

1980 07 03 (E-157/79), Regina/Pieck.

1981

1981 03 31 (C-96/80), Jenkins.

1981 05 14 (C-98/80), Romano.

1982

1982 02 09 (C-12/81), Garland.

1982 03 23 (C-53/81), Levin.

- 1982 03 23 (C-79/81), Baccini.
- 1982 05 26 (C-149/79) Commission v Kingdom of Belgium.
- 1982 08 15 (C-245/81), Edeka.
- 1982 10 06 (C-283/81). Cilfit.
- 1982 10 28 (C-52/81), Faust.
- 1983
- 1983 10 26 (C-163/82), Commission v Italy.
- 1984
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- 1984 07 12 (184/83), Hofmann.
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- 1986 06 03 (C-139/85), Kempf.
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- 1987 10 22 (E-314/85), Photo-Frost.
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2011 11 22 (E-214/10), KHS AG.

2011 11 24 (C468/10 and C469/10), ASNEF.

2011 12 06 (E-329/11), Achughbabian.

2011 12 09 (E-349/11), Yangwei.

2011 12 15 (E-384/10), Voogsgeerd.

2011 12 15 (C-257/10), Bergström.

2012

- 2012 01 24 (C- 282/10), Domínguez.
- 2012 01 26 (C-586/10), Küçük.
- 2012 02 09 (C-556/11), Lorenzo Martínez.
- 2012 03 10 (E-393/10), O'Brien.
- 2012 03 08 (E-251/11), Huet.
- 2012 03 15 (E-157/11), Sibilio.
- 2012 04 19 (C- 415/10), Meister.
- 2012 04 24 (C571/10), Kamberaj.
- 2012 05 03 (E-337/10), Neidel.
- 2012 06 14 (C-542/09), Commission v. Netherlands.
- 2012 06 21 (E-78/11), ANGED.
- 2012 07 05 (E-141/11), Hornfeldt.
- 2012 09 05 (C-71/11), Federal Republic of Germany v. Y and Z.
- 2012 10 04 (E-115/11), Format.
- 2012 10 18 (C-302/11 to C-305/11), Valenza.
- 2012 10 18 (C583/10), Nolan.
- 2012 11 08 (E-40/11), Iida.
- 2012 11 08 (C-229/11 and C-230/11), Heimann and Toltschin.
- 2012 11 22 (C-385/11), Elbal Moreno.
- 2012 12 06 (E-152/11), Odar.
- 2012 12 06 (C-430/11), Sagor.

2013

- 2013 01 07 (E-416/10), Krizan.
- 2013 01 31 (C-394/11), Belov.
- 2013 02 21 (C-282/11), Salgado González.
- 2013 02 21 (E-46/12), L.N.
- 2013 02 21 C-194/12), Concepción Maestre.
- 2013 02 26 (E-617/10), Akerberg.
- 2013 02 26 (E-399/11), Melloni.
- 2013 02 28 (E-427/11), Kenny et al.
- 2013 03 07 (E-178/12), IMDECO.
- 2013 03 07 (E-393/11), Bertazzi.
- 2013 04 11 (C-290/12), Della Rocca.
- 2013 04 11 (C-335/11 and C-337/11), Ring and Werge.
- 2013 04 11 (E-401/11), Soukupová.
- 2013 04 16 (E-202/11), Anton Las.
- 2013 04 18 (C247/12), Meliha Veli Mustafa.
- 2013 04 25 (C398/11), Hogan.

2013 04 25 (C81/12), AsociaVia Accept.
 2013 05 08 (C-87/12), Ymeraga.
 2013 05 30 (E-342/12), Worten.
 2013 06 13 (E-415/12), Brandes.
 2013 06 20 (C-635/11), Commission v Netherlands.
 2013 06 20 (E-7/12), Riežniece.
 2013 06 20 (C-20/12), Giersch.
 2013 07 18 (E-426/11) Alemo-Herron.
 2013 09 12 (E-614/11), Kuso.
 2013 09 12 (E-64/12), Schlecker.
 2013 09 19 (C-5/12), Betriu Montull.
 2013 09 19 (C-140/12), Brey.
 2003 11 06 (C-413/01), Ninni-Orasche.
 2013 11 07 (E-522/12), Isbir.
 2013 11 28 (C-309/12), Gomes Viana Novo.
 2013 12 12 (E-327/12), Soa Nazionale Costruttori.
 2013 12 12 (E-361/12), Carratù.
 2013 12 12 (E-50/13), Papalia.

2014

2014 01 15 (E-176/12), Association de Médiation sociale.
 2014 01 23 (E-296/12) European Commission v. Belgium.
 2014 02 13 (C-512/11 and C-513/11), Terveys-ja.
 2014 02 27 (E-588/12), Lyreco Belgium.
 2014 03 06 (E-458/12), Amatori.
 2014 03 06 (C-595/12), Napoli.
 2014 03 06 (E-206/13), Siragusa.
 2014 03 13 (E-38/13), Nierodzik.
 2014 03 13 (E-190/13), Márquez Samohano.
 2014 03 18 (E-167/12), C.D.
 2014 03 18 (C-363/12), Z.
 2014 03 27 (C-265/13), Torralbo Marcos.
 2014 04 08 (C-293/12 and C-594/12), Digital Rights.
 2014 04 30 (C-89/13), D'Aniello.
 2014 05 13 (E-131/12), Google Spain and Google.
 2014 05 22 (E-356/12), Glatzel.
 2014 06 05 (C-255/13), Mr. I.
 2014 06 12 (E-118/13), Gülay Bollacke.
 2014 06 19 (C501/12 to C506/12, C540/12 and C541/12), Spetch.
 2014 06 19 (C-507/12), Jessy Saint Prix.

2014 07 03 (C-362/13 and others), Fiamingo.
2014 07 08 (E-83/13), Fonnship.
2014 07 10 (C198/13), Julián Hernández.
2014 07 17 (E-173/13), Leone.
2014 09 03 (C201/13), Deckmyn and Vrijheidsfonds.
2014 09 03 (C318/13), X.
2014 09 04 (E-152/14), Bertazzi.
2014 09 11 (E-91/13), Essent.
2014 09 11 (C-112/13), B and others.
2014 09 11 (E-328/13) Österreichischer Gewerkschaftsbund.
2014 09 18 (C-549/13), Bundesdruckerei.
2014 10 15 (C-221/2013), Mascellani.
2014 11 05 (C-476/12), OG.
2014 11 05 (E-311/13), O.Tümer.
2014 11 11 (C-333/13), Dano.
2014 11 11 (E-530/13), Schmitzer.
2014 11 13 (E-416/13), Vital Pérez.
2014 11 26 (E-22/13 and others), Mascolo.
2014 12 03 (C-315/13), De Clercq and Others.
2014 12 04 (E-413/13), FNV Kunsten Informatie en Media.
2014 12 11 (C576/13), Commission v. Spain.
2014 12 11 (E-86/14), León Medialdea.
2014 12 11 (C- 249/13) Boudjlida.
2014 12 18 (C-354/13), Kaltoft.
2014 12 18 (E-523/13), Larcher.

2015

2015 01 14 (E-171/13), Demirci.
2015 01 21 (C-529/13), Felber.
2015 01 28 (E-417/13), Starjakob.
2015 01 28 (C-688/13) San Andrés Sports Gym.
2015 02 05 (E-117/14), Nisttahuz Poclava.
2015 02 12 (E-396/13), Sähköalojen ammattiliitto.
2015 03 17 (E-533/13) AKT.
2015 03 19 (C-266/13), Kik.
2015 03 26 (C-238/14), Commission v Luxembourg.
2015 03 26 (E-316/13), Fenoll.
2015 04 14 (E-527/13), Cachaldora Fernández.
2015 04 30 (E-80/14), USDAW.
2015 05 13 (E-182/13), Lyttle.

- 2015 05 13 (E-392/13), Rabal Cañas.
- 2015 05 21 (E-65/14) Rosselle.
- 2015 06 11 (E-189/14), Chain.
- 2015 07 09 (C-177/14), Regojo Dans.
- 2015 07 09 (C-229/14), Ender Balkalla.
- 2015 07 16 (E-83/14) CHEZ-Razpredelenie Bulgaria.
- 2015 07 16 (E-222/14), Maïstrellis.
- 2015 09 08 (E-105/14), Taricco.
- 2015 09 09 (C-20/13), Unland.
- 2015 09 09 (E-160/14), Ferreira da Silva.
- 2015 09 10 (E-266/14), TYCO.
- 2015 09 15 (E-67/2014), Alimanovic.
- 2015 10 01 (C-290/14), Skerdjan Celaj.
- 2015 10 06 (C-203/14), Consorci Sanitari del Maresme.
- 2015 10 15 (C-352/14 and C-353/14), Iglesias Gutiérrez.
- 2015 11 11 (E-219/14), Greenfield.
- 2015 11 11 (E-422/14), Pujante Rivera.
- 2015 11 17 (E-115/14), RegioPost.
- 2015 11 26 (C-509/14) Aira Pascual.
- 2015 12 17 (C-407/14), Arjona Camacho.
- 2016
- 2016 01 21 (E-453/14), Knauer.
- 2016 02 23 (C-179/14) Commission v. Hungary.
- 2016 02 25 (E-292/14), Elliniko Dimosio.
- 2016 02 25 (C-299/14), García-Nieto.
- 2016 03 03 (C-12/14), Commission v. Malta.
- 2016 04 19 (E-441/14), Dansk Industri.
- 2016 06 07 (E-47/15), Affum.
- 2016 06 14 (C-308/14), Commission v United Kingdom.
- 2016 06 16 (C-351/14), Rodríguez Sánchez.
- 2016 06 16 (E-159/15), Lesar.
- 2016 06 21 (E-122/15), C.
- 2016 06 28 (C-423/15), Kartzer.
- 2016 06 30 (E-178/15), Sobczyszyn.
- 2016 07 14 (C-335/15), Ornano.
- 2016 07 20 (E-341/15), Hans Maschek.
- 2016 09 14 (C-596/14), by Diego Porras I.
- 2016 09 14 (C-184/15 and 197/15), Vitoria City Council.
- 2016 09 14 (E-16/15), SMS.

2016 09 21 (E-614/15), Popescu.
2016 09 21 (E-631/15), Álvarez Santirso.
2016 10 18 (E-135/15), Nikiforidis.
2016 10 24 (C-269/15), Hoogstad.
2016 10 27 (E-465/14), Wieland.
2016 11 10 (C-548/15), Lange.
2016 11 15 (C-258/15), Salaberría Sorondo.
2016 11 17 (E-216/15), Ruhrlandklinik.
2016 11 24 (C-443/15), Parris.
2016 11 24 (C-454/15), Jürgen Webb-Sämann.
2016 12 01 (C-395/15), Daouidi.
2016 12 13 (T-713/14), IPSO v ECB.
2016 12 14 (C-238/15), Linares Verruga.
2016 12 21 (E-76/15), Vervloet.
2016 12 21 (E-201/15), AGET Iraklis.
2016 12 21 C (539/15), Bowman.

2017

2017 02 01 (C-430/15), Tolley.
2017 02 09 (E-443/16), Polytechnic University.
2017 02 16 (E-503/15) Margarit Panicello.
2017 02 16 (E-578/16), C.K.
2017 03 02 (C-245/15), Noasträ House.
2017 03 02 (E-97/16), Pérez Retamero.
2017 03 09 (E-406/15), Milkova.
2017 03 14 (E-157/15), Achbita.
2017 03 14 (E-188/15), Bougnaoui.
2017 03 24 (C-269/16), Barba Giménez I.
2017 04 06 (E-336/15) Unionen.
2017 04 06 (E-668/15), Jyske Finans.
2017 04 27 (C-620/15), A-Pink.
2017 04 27 (C-680/15 and C-681/15) Asklepios Kliniken.
2017 05 10 (E-133/15), Chavez Vilchez.
2017 05 16 (E-682/15), Berlioz Investment Fund.
2017 05 18 (E-99/16), Lahorgue.
2017 06 13 (E-258/14), Florescu.
2017 06 15 (E-249/16), Kareda.
2017 06 21 (E-449/16), Martínez Silva.
2017 06 22 (C-20/16), Bechtel.
2017 06 22 (C-126/16) Smallsteps BV.

2017 07 05 (C-190/16), Fries.
 2017 07 13 (E-89/16), Szoja.
 2017 07 13 (E-354/16), Kleinsteuber.
 2017 07 18 (C-566/15), Erzberger.
 2017 07 19 (E-143/16), Abercrombie.
 2017 07 20 (E-416/16) Piscarreta.
 2017 07 26 (C-175/16), Hälvä and others.
 2017 09 07 (C-174/2016), H.
 2017 09 07 (C-298/16), Ispas.
 2017 09 13 (570/15), X.
 2017 09 14 (E-168/16), Nogueira.
 2017 09 21 (E-149/16), Socha.
 2017 09 21 (C-429/16), Ciupa.
 2017 10 18 (E-409/16), Maria-Eleni Kalliri.
 2017 10 19 (C-531/15), Otero Ramos.
 2017 10 19 (E-200/16), Securitas.
 2017 11 09 (C-98/15), Espadas Recio.
 2017 11 09 (E-499/16), AZ.
 2017 11 09 (E-306/16), Maio Marqués Da Rosa.
 2017 11 29 (E-214/16), King.
 2017 12 05 (E-42/17). M.A.S.
 2017 12 14 (C-243/16), Miravittles Ciurana.
 2017 12 20 (C-434/15), Elite Taxi (Uber).
 2017 12 20 (E-102/16), Vaditrans.
 2017 12 20 (E-158/16), Vega González.
 2017 12 20 (C-419/16), Simma Federspiel.
 2017 12 20 (E-434/16), Nowak.
 2017 12 20 (E-442/16), Gusa.

2018

2018 01 18 (C-279/16), Ruiz Conejero.
 2018 01 25 (C-473/16), F.
 2018 02 06 (C-359/16), Altun and others.
 2018 02 07 (C-142 and 143/17), Maturi and others.
 2018 02 08 (C-181/17), Commission v. Spain.
 2018 02 21 (E-518/15), Matzak.
 2018 02 22 (E-103/16), Porras Guisado.
 2018 02 27 (E-64/16), Associação Sindical dos Juízes Portugueses.
 2018 02 28 (E-46/17), John.
 2018 03 01 (E-297/16), CMVRO.

2018 03 07 (E-494/16), Santoro.
2018 03 07 (E-651/16), DW.
2018 03 14 (E-482/16), Stollwitzer.
2018 03 15 (C-431/16), Blanco Marqués.
2018 03 15 (C-575/16), Commission v. Czech Republic.
2018 03 20 (C-537/16), Garlsson Real Estate and others.
2018 03 21 (E-551/16), Klein Schiphorst.
2018 03 21 (C-133/17), Podilv and others.
2018 03 22 (E-315/17), Centeno Meléndez.
2018 04 10 (C-320/16), Uber France.
2018 04 12 (C-432/16), Minayo Luque.
2018 04 17 (C-195/17 and others), Krüsemann and Others.
2018 04 17 (E-414/16), Egenberger.
2018 04 19 (C-525/16), Meo-Serviços de Comunicações e Multimédia.
2018 06 05 (C-210/16), Wirtschaftsakademie Schleswig-Holstein.
2018 06 05 (C-574/16), Grupo Norte Facility.
2018 06 05 (E-677/16), Montero Mateos.
2018 06 06 (C-250/17), Tarragó da Silveira.
2018 06 21 (C-1/17), Petronas Lubricants Italy.
2018 06 26 (E-451/16), MB.
2018 06 27 (C-246/17), Diallo.
2018 06 28 (C-2/17), Crespo Rey.
2018 06 28 (E-57/17), Czech Honored.
2018 07 10 (E-25/17), Jehovah todistajat.
2018 07 11 (C-356/15), Commission v Belgium.
2018 07 11 (C-60/17), Somoza Hermo and Ilunion Seguridad.
2018 07 25 (E-679/16), A (Aid for Persons with Disabilities).
2018 07 25 (E-96/17), Vernaza Ayovi.
2018 07 25 (E-338/17), Guigo.
2018 08 07 (C-472/16), Colino Sigüenza.
2018 08 07 (E-61/17 and others), Bichat.
2018 08 07 (E-123/17), Yün.
2018 08 21 (C-212/17), Rodríguez Otero.
2018 09 06 (C-527/16), Alpenrind and others.
2018 09 06 (C-17/17), Hampshire.
2018 09 11 (E-68/17), IR.
2018 09 19 (E-41/17), González Castro.
2018 09 19 (E-312/17), Bedi.
2018 09 20 (E-466/17), Motter.

- 2018 09 26 (E-513/17), Baumgartner.
- 2018 10 02 (C-207/16), Public Prosecutor's Office.
- 2018 10 04 (C-12/17), Dicu.
- 2018 10 25 (C-260/17), Anodiki.
- 2018 10 25 (E-331/17), Sciotto.
- 2018 10 25 (E-426/17), Barba Giménez II.
- 2018 10 25 (E-451/17), Walltopia.
- 2018 11 06 (C-569/16 and 570/16), Bauer.
- 2018 11 06 (E-619/16), Kreuziger.
- 2018 11 06 (C-684/16), Max-Planck-Gesellschaft zur Förderung der Wissenschaften.
- 2018 11 13 (E-33/17), vepelnik.
- 2018 11 14 (C-18/17), Danieli & C. Officine Meccaniche and others.
- 2018 11 15 (C-457/17), Maniero.
- 2018 11 20 (E-147/17), Sindicatul Familia Constanva.
- 2018 11 21 (E-619/17), by Diego Porras II.
- 2018 11 21 (C-245/17), Viejobueno Ibáñez and de la Vara González.
- 2018 12 04 (C-378/17), Minister for Justice and Equality and Commissioner of the Garda Síochána.
- 2018 12 06 (C-675/17), Preindl.
- 2018 12 13 (E-385/17), Hein.
- 2019
- 2019 01 15 (C-258/17), E.B.
- 2019 01 22 (E-193/17), Cresco Investigation.
- 2019 01 23 (E-272/17), Zyla.
- 2019 01 24 (C-477/17), Balandin.
- 2019 02 07 (E-322/17), Bogatu.
- 2019 02 07 (C-49/18), Escribano Vindel.
- 2019 02 14 (E-345/17), Buivids.
- 2019 02 14 (E-154/18), Horgan and Keegan.
- 2019 02 28 (E-579/17), Gradbeništvo Korana.
- 2019 03 13 (E-437/17), Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach.
- 2019 03 14 (E-134/18), Vester.
- 2019 03 19 (C-293/18), CCOO.
- 2019 03 21 (C-465/17), Falck Rettungsdienste and Falck.
- 2019 04 04 (E-699/17), Allianz Vorsorgekasse.
- 2019 04 11 (C-483/17), Tarola.
- 2019 04 11 (E-603/17), Bosworth and Hurley.

- 2019 04 11 (C-29/18), Charges for Auxiliary Services.
2019 04 11 (C-254/18), Syndicat des cadres de la sécurité intérieure.
2019 05 02 (E-309/18), Lavorgna.
2019 05 07 (C-431/17), Monachos Eirinaios.
2019 05 08 (C-24/17), Österreichischer Gewerkschaftsbund.
2019 05 08 (E-396/17), Leitner.
2019 05 08 (E-631/17), Inspecteur van de Belastingdienst.
2019 05 08 (C-161/18), Villar Láiz.
2019 05 08 (E-194/18), Dodiv.
2019 05 08 (E-230/18), PI.
2019 05 08 (C-486/18), Praxair MRC.
2019 05 08 (E-494/17), Rossato.
2019 05 14 (C-55/18), CCOO and Deutsche Bank.
2019 05 16 (E-509/17), Plessers.
2019 06 12 (C-367/18), Aragón Carrasco and others.
2019 06 13 (E-664/17), Ellinika Nafpigeia.
2019 06 13 (C-22/18), TopFit and Biffi.
2019 06 13 (E-317/18), Correia Moreira.
2019 06 20 (E-72/18), Ustariz Aróstegui.
2019 06 20 (E-404/18), Hakelbracht.
2019 06 24 (C-619/18), Commission v Republic of Poland.
2019 06 26 (C-729/17), Commission v Hellenic Republic.
2019 07 04 (C-377/17), European Commission v. Federal Republic of Germany.
2019 07 04 (E-393/17), Kirschstein.
2019 07 10 (C-410/18), Aubriet.
2019 07 11 (C-716/17), A.
2019 07 29 (C-620/17), Hochtief Solutions Magyarországi Fióktelepe.
2019 07 29 (C-659/17), Azienda Napoletana Mobilità (ANM).
2019 09 05 (C-417/18), AW and Others (Appels au 112).
2019 09 10 (E-94/18), Chenchooliah.
2019 09 11 (E-397/18), Nobel Plastiques Ibérica.
2019 09 12 (C-64/18 and others), Maksimovic.
2019 09 18 (E-222/18), VIPA.
2019 09 18 (C-366/18), Ortiz Mesonero.
2019 09 19 (C-544/18), Daknevičiute.
2019 09 23 (E-63/18), Vitali.
2019 09 24 (C-507/17), Google (Portée territoriale du référencement).

- 2019 09 24 (C-136/17), GC and Others (Déréférencement de données sensibles).
- 2019 10 01 (E-673/17), Planet49.
- 2019 10 02 (E-93/18), Bajratari.
- 2019 10 03 (C-18/18), Gławischnig-Piesczek.
- 2019 10 03 (C-274/18), Schuch-Ghannadan.
- 2019 10 07 (E-171/18), Safeway.
- 2019 10 10 (E-703/17), Krah.
- 2019 10 15 (C-439/18 and 472/18), AEAT (Seniority in discontinuous fixity).
- 2019 10 24 (C-35/19), Belgian State (Indemnité pour personnes handicapées).
- 2019 10 24 (T-310/18), EPSU and Goudriaan v Commission.
- 2019 11 05 (C-192/18), Commission v Poland (judicial independence).
- 2019 11 07 (E-396/18), Cafaro.
- 2019 11 13 (E-641/17), College Pension Plan of British Columbia.
- 2019 11 19 (C-585/18, C-624/18 and C-625/18), A.K. (Indépendance de la chambre disciplinaire de la Cour Suprême).
- 2019 11 19 (C-609/17 and C-610/17), TSN.
- 2019 11 20 (C-706/18), Belgische Staat (Régime de décision implicite d'acceptation).
- 2019 11 27 (C-402/18), Tedeschi and Consorzio Stabile Istant Service.
- 2019 12 05 (C-398/18), Bocero Torrico.
- 2019 12 11 (E-708/18), Asociavia de Proprietari bloc M5A-ScaraA.
- 2019 12 12 (C-450/18), INSS (Mothers' Pension Supplement).
- 2019 12 18 (C-447/18), Generálny riaditeľ Sociálnej poisťovne Bratislava.
- 2019 12 19 (C-16/18), Dobersberger.
- 2019 12 19 (E-168/18), Pensions-Sicherungs-Verein.
- 2019 12 19 (C-465/18), Comune di Bernareggio.

2020

2020

- 2020 01 20 (C-274/14), Economic-Administrative Court.
- 2020 01 22 (C-32/19), Austrian Pension Insurance.
- 2020 01 22 (C-177/18), Baldonado Martín.
- 2020 01 30 (E-395/18), Tim.
- 2020 02 27 (C-298/18), Grafe and Pohle.
- 2020 02 27 (C-773/18 to C-775/18), Land Sachsen-Anhalt and judges.

- 2020 02 27 (C-836/18), Government Sub-delegation in Ciudad Real.
- 2020 03 19 (C-103/18 and 429/18), Sánchez Ruiz and Fernández Álvarez.
- 2020 03 26 (C-344/18), ISS Facility Services.
- 2020 04 02 (C-370/17 and C-37/18), CRPNPAC and Vueling.
- 2020 04 02 (C-670/18), Comune di Gesturi.
- 2020 04 02 (C-802/18), Caisse pour l'avenir des enfants (Enfant du conjoint d'un travailleur frontalier).
- 2020 04 02 (C-830/18), Landkreis Südliche Weinstraße.
- 2020 04 22 (E-692/19), Yodel Delivery Network.
- 2020 04 23 (E-507/18), Associazione Avvocatura per i diritti LGBTI.
- 2020 04 23 (C-710/18), Land Niedersachsen (Previous Activity Periods).
- 2020 04 30 (C-211/19), Készenléti Rendvrség.
- 2020 05 07 (C-96/19), Certification of days without driving.
- 2020 05 14 (C-17/19), Bouygues travaux publics and others.
- 2020 06 04 (C-588/18), FETICO and others.
- 2020 06 04 (C-610/18), AFMB and others.
- 2020 06 04 (E-828/18), Trendsetteuse.
- 2020 06 25 (E-762/18 and 37/19), Varhoven kasatsionen sad na Republika Bulgaria.
- 2020 07 16 (C-610/18), AFMB and others.
- 2020 07 16 (C-658/18), Governo della Repubblica italiana (Statute of Italian Justices of the Peace).
- 2020 09 09 (C-674/18 and 675/18), TMD Friction.
- 2020 09 23 (E-777/18), Vas Megyei Kormányhivatal (Cross-border healthcare).
- 2020 09 24 (C-223/19), NK (Pensions d'entreprise de personnel cadre).
- 2020 10 06 (E-181/19), Jobcenter Krefeld.
- 2020 10 08 (E-644/19), Universitatea "Lucian Blaga" Sibiu and others.
- 2020 10 14 (C-681/18), KG (Successive assignments by ETT).
- 2020 10 28 (C-637/19), BY (Preuve photographique).
- 2020 10 29 (E-243/19), Veselības ministrija.
- 2020 11 11 (C-300/19), Marclean Technologies.
- 2020 11 18 (E-463/19), Syndicat CFTC.
- 2020 11 25 (C-302/19), Italian family benefits.
- 2020 11 25 (C-799/19), NI and others.
- 2020 12 01 (C-815/18), Federatie Nederlandse Vakbeweging.
- 2020 12 08 (E-620/18), Hungary vs European Parliament.
- 2020 12 08 (E-626/18), Poland vs Parliament and Council.
- 2020 12 17 (E-218/19), Onofrei.

2020 12 17 (C-710/19), Jobseeker G.M.A.

2021

2021 01 21 (C-843/19), Early voluntary retirement.

2021 01 26 (C-16/19), Krakow Clinical Hospital.

2021 02 11 (C-407/19 and 471/19), Port works.

2021 02 11 (E-760/18), Agios Nikolaos.

2021 02 25 (C-129/20), Caisse pour l'avenir des enfants.

2021 02 25 (C-940/19), Dentists of France.

2021 03 03 (C-841/19), FOGASA.

2021 03 09 (E-344/19). Radiotelevizija Slovenija.

2021 03 09 (C-580/19), Stadt Offenbach am Main.

2021 03 17 (E-585/19), Academia de Studii Economice din Bucureşti.

2021 03 17 (C-652/19), Consulmarketing.

2021 03 23 (E-28/20), Airhelp.

2021 03 24 (C-870/19 and C-871/19), Prefettura Ufficio territoriale del governo di Firenze.

2021 04 15 (C-30/19), Braathens Regional Aviation.

2021 04 15 (C-511/19), Olympiako Athlitiko Kentro Athinon.

2021 05 12 (C-27/20), CAF (Family Benefits).

2021 05 12 (C-130/20), Maternity supplement.

2021 06 02 (C-103/19), SUSH and CGT of Health.

2021 06 03 (E-326/19), Università degli Studi Roma Tre.

2021 06 03 (E-624/19), Tesco Stores.

2021 06 03 (E-726/19), IMIDRA.

2021 06 03 (E-784/19), Team Power Europe.

2021 06 03 (C-914/19), Access to Notaries.

2021 06 03 (C-942/19), Aragonese Health Service.

2021 06 03 (C-280/20), Consulate General of Bulgaria.

2021 06 22 (E-439/19), CV-Online Latvia.

2021 06 24 (C-550/19), Public Works & Services & Acciona Agua.

2021 07 08 (C-71/20), VAS Shipping.

2021 07 08 (C-166/20), Lietuvos respublikos sveikatos apsaugos ministerija.

2021 07 08 (E-428/19), Rapidspeed.

2021 07 15 (C-152/20 and 218/20), SC Gruber Logistics.

2021 07 15 (C-325/20), Shopping Centres.

2021 07 15 (C-709/20), The Department for Communities in Northern Ireland.

2021 07 15 (C-742/19), Ministry of Defence.

2021 07 15 (E-795/19), Tartu Vangla.
2021 07 15 (C-804/18 and 341/19), Wave.
2021 09 02 (C-928/19), EPSU v Commission.
2021 09 02 (C-502/20), Car Expert.
2021 09 09 (C-107/19), Dopravní podnik hl. m. Prahy.
2021 09 09 (C- 906/19), Extraterritorial sanctions.
2021 10 06 (C-561/19), Catania Multiservizi.
2021 10 06 (C-598/19), CONACEE.
2021 10 06 (C-613/20), Eurowings.
2021 10 14 (C-244/20), INSS.
2021 10 21 (C-824/19), Visual impairment.
2021 10 28 (C-909/19), Unitatea Administrativ Teritorială v d.
2021 11 11 (E-214/20), Dublin City Council.
2021 11 11 (E-948/19), Manpower Lit.
2021 11 23 (C-564/19), IS Criminal Procedure.
2021 11 25 (E-233/20), Job Medium.
2021 12 09 (C- 217/20), Vacation Remuneration.

2022

2022 01 13 (C-282/19), Ufficio Scolastico Regionale per la Campania.
2022 01 13 (C514/20) DS & Koch Personaldienstleistungen GmbH.
2022 02 10 (C-219/20), Remuneration of posted workers.
2022 02 10 (C-485/20), HR Rail SA.
2022 02 22 (C-430/21), Effects of constitutional judgment.
2022 02 24 (C-262/20), Civil Protection.
2022 02 24 (C-389/20), Unemployment of domestic workers.
2022 03 03 (C-409/20), Government Sub-delegation in Pontevedra.
2022 03 03 (C-634/20), Basic medical training.
2022 03 08 (C-205/20), Bezirkshauptmannschaft Hartberg-Fürstenfeld.
2022 03 17 (C-232/20), Daimler.
2022 04 28 (C-86/21), Regional Health Management of Castilla y León.
2022 04 07 (C-236/20), Italian Justices of the Peace.
2022 04 22 (C-337/21), University of Barcelona.
2022 04 28 (C-237/20), Pre-pack procedure.
2022 05 05 (E-265/20), Universiteit Antwerpen.
2022 05 05 (E-405/20), BVAEB.
2022 05 05 (E-101/21), AA Director.
2022 05 12 (C-426/20), Luso Temp.
2022 05 19 (C-33/11), Ryanair.
2022 06 02 (C-587/20), HK/Danmark and HK/Privat.

- 2022 06 16 (C-328/20), Commission v Austria.
- 2022 06 16 (E-577/20), Psychotherapists.
- 2022 06 22 (E-534/20), Leistritz.
- 2022 06 28 (C-278/20), Commission v. Spain.
- 2022 06 30 (C-192/21), Community of Castilla y León.
- 2022 06 30 (C-625/20), INSS (Compatibility of permanent disability pensions).
- 2022 07 04 (C-568/20), H Limited.
- 2022 07 07 (E-13/21), Pricoforest.
- 2022 07 07 (C-213/21 and 214/21), Italy Emergenza Cooperativa Sociale.
- 2022 07 07 (C-257/21 and 258/21), Coca-Cola European Partners Deutschland.
- 2022 07 07 (C-261/21), F. Hoffmann-La Roche and others.
- 2022 07 07 (C-377/21), Zone de secours Hainaut-Centre.
- 2022 07 14 (C-436/20), ASSADE.
- 2022 08 01 (C-411/20), Family Benefits.
- 2022 09 15 (C-793/19 and 794/19), Spacenet.
- 2022 09 15 (C-22/21), Cousin of an EU citizen.
- 2022 09 22 (C-518/20 and 727/20), Fraport.
- 2022 09 22 (C-120/21), LB (Prescription of the right to leave).
- 2022 10 12 (E-344/20), SCRL (Clothing with Religious Significance).
- 2022 10 13 (C-714/20), Intervals in temporary employment contracts.
- 2022 10 18 (C-677/20), IG Metall and ver.di.
- 2022 10 20 (E-604/20), ROI Land Investments.
- 2022 10 20 (C-301/21), Curtea de Apel Alba Iulia and others.
- 2022 10 27 (E-129/21), Proximus.
- 2022 11 10 (C-163/21), Paccar.
- 2022 11 17 (E-304/21), Italian Ministry of the Interior.
- 2022 11 24 (C-289/21), Repeal of questioned rule.
- 2022 12 01 (C-564/21), Access to the administrative file.
- 2022 12 08 (E-731/21), Domestic partnership.
- 2022 12 15 (C-40/20 and 173/20), University researchers in Italy.
- 2022 12 15 (E-311/21), TimePartner.
- 2022 12 22 (E-392/21), Corrective Glasses.

2023

- 2023 01 12 (C-132/21), Budapesti Elektromos Művek Zrt.
- 2023 01 12 (C-154/21), Information on recipients of personal data.
- 2023 01 12 (C-356/21), Freelance Editor on Polish Television.
- 2023 01 19 (C-292/21), National Confederation of Driving Schools.

- 2023 02 02 (E-372/21), Seventh-day Adventist Church in Germany.
2023 02 09 (E-402/21), Turkish Citizen Residency.
2023 02 09 (E-453/21), X-FAB Dresden.
2023 02 16 (C-524 and 525/21), Romanian Wage Guarantee Fund.
2023 02 16 (E-710/21), IEF Service.
2023 03 02 (E-270/21), Opetushallitus.
2023 03 02 (C-410 and 661/21), DRV Intertrans.
2023 03 02 (E-477/21), Daily rest.
2023 03 02 (C-666/21), Åklagarmyndighete.
2023 03 02 (C-695/21), Recreatieprojecten Zeeland BV.
2023 03 30 (C-34/21), Minister des Hessischen Kultusministeriums.
2023 04 20 (C-650/21), Landespolizeidirektion.
2023 04 27 (C-192/22), Bayerische Motoren Werk.
2023 05 04 (C-300/21), Moral damages.
2023 05 11 (C-156 to 158/22), TAP Portugal.
2023 05 11 (E-155/22), Driving Time.
2023 06 15 (C-132/22), Ministero dell'Istruzione, dell'Università e della Ricerca.
2023 06 22 (C-427/21), ALB FILS Kliniken GmbH.
2023 06 22 (C-579/21), Panki.
2023 07 13 (E-765/21), Università di Padova.
2023 07 13 (C-134/22), Corporate liquidation.
2023 07 23 (E-404/22), Elliniko Dimosio.
2023 09 14 (E-113/22), Maternity supplement.
2023 10 05 (E-496/22), Brink's Cash Solutions.
2023 10 12 (C-57/22), Leave after readmission.
2023 10 19 (C-660/20), Lufthansa.
2023 11 09 (C-271 to 275/22), Keolis Agen.
2023 11 09 (C-477/22), Azienda regionale sarda trasporti.
2023 11 16 (C-422/22), Revocation of A1 certificate.
2023 11 16 (C-583 to 586/21), Transfer of Notary.
2023 12 07 (E-518/22), AP Assistenzprofis.
2023 12 14 (C-206/22), Sparkasse Südpfalz.
- 2024
- 2024 01 11 (E-231/22), Data processing by an official publication.
2024 01 18 (C-218/22), Comune di Copertino.
2024 01 18 (C-631/22), Ca na Negreta.
2024 02 20 (C-715/20), Unjustified dismissal.

- 2024 02 22 (C-59, 110 and 159/22), Ministry of the Presidency, Justice and Interior of the Community of Madrid.
- 2024 02 22 (E-125/23), Unedic.
- 2024 02 22 (C-589/22), Resorts Mallorca Hotels International.
- 2024 02 22 (C-649/22), Randstad Employment.
- 2024 03 14 (C-752/22), Long-term residence.
- 2024 04 11 (E-741/21), Juris.
- 2024 04 18 (C-765 and 772/22), Air Berlin.
- 2024 04 25 (E-420/22 & 528/22), NW (Classified Information).
- 2024 05 16 (E-706/22), Konzernbetriebsrat.
- 2024 05 16 (C-27/23), Hocinx.
- 2024 05 16 (C-405/23), Touristic Aviation Services.
- 2024 05 16 (C-673/22), Single-parent family.
- 2024 06 13 (C-331 and 332/22), DG of the Civil Service, Generalitat de Catalunya.
- 2024 06 20 (C-540/22), Posting of workers.
- 2024 06 20 (C-590/22), Misdirection.
- 2024 06 20 (C-367/23), Artemis.
- 2024 06 27 (E-41/23), Peigli.
- 2024 06 27 (C-284/23), Haus Jacobus.
- 2024 07 11 (C-196/23), Plamaro.
- 2024 07 29 (C-112 and 223/22), Long-term residence.
- 2024 07 29 (C-184 and 185/22), KfH Kuratorium für Dialyse und Nierentransplantation.
- 2024 09 12 (C-548/22), Italian Honorary Prosecutor.
- 2024 09 19 (C-439/23), Consiglio nazionale delle Ricerche.
- 2024 09 19 (C-501/23), Director of a Public Limited Company.
- 2024 09 26 (C-387/22), Nord Vest Pro Sani Pro.
- 2024 09 26 (C-792/22), Energotehnica.
- 2024 09 26 (C-432/23), Luxembourg Bar Association.
- 2024 10 04 (E-446/21), Meta (Facebook).
- 2024 10 04 (E-621/22), Dutch Tennis Federation.
- 2024 10 04 (C-633/22), Real Madrid Club de Fútbol.
- 2024 10 04 (C-650/22), FIFA.
- 2024 10 04 (C-4/23), Romanian Civil Registry.
- 2024 10 04 (C-200/23), Bulgarian Trade Register.
- 2024 10 04 (C-314/23), STAVLA.
- 2024 10 04 (C-507/23), Consumer Protection Agency.
- 2024 10 15 (E-144/23), Kubera.

- 2024 10 17 (E-322/23), Lufoni.
2024 10 17 (C-349/23), Zetschek (Compulsory retirement of German judges).
2024 10 17 (C-408/23), Anwaltsnotarin (Access to German Notaries).
2024 10 22 (C-603/23), Transfer of Portuguese Notary.
2024 10 24 (C-441/23), Omnitel Comunicaciones.
2024 11 14 (C-197/23), Composition of the Court.
2024 11 14 (C-643/23), Agenciart.
2024 11 21 (C-336/23), Data from public bodies.
2024 12 19 (C-65/23), Personal data in the employment contract.
2024 12 19 (C-295/23), Corporate Law Firm.
2024 12 19 (C-531/23), Loredas.
- 2025
- 2025 01 09 (E-394/23), Mousse and SNCF.
2025 01 23 (C-421/23), Fake A-1 ONSS Certificates.
2025 02 04 (E-158/23), Keren.
2025 02 13 (E-383/23), Ilva.
2025 02 13 (E-393/23), Heineken.
2025 02 25 (C-146 and 374/23), Judicial remuneration.
2025 02 27 (C-203/22), Dun & Bradstreet Austria.
2025 02 27 (E-517/23), DocMorris.
2025 02 27 (C-638/23), Austrian Data Protection Authority.
2025 02 27 (E-647/23), Aeon.
2025 02 27 (E-16/24), Sinalov.
2025 03 06 (C647/21 and C648/21), Judicial irremovability.
2025 03 06 (C575/23), Belgian National Orchestra (ONB).
2025 03 13 (C247/23), Deldits (Trans person).
2025 03 20 (C365/23), Arce (Basketball player).
2025 04 03 (C431/23), Wibra België.
2025 04 03 (C710/23), Data on corporate representative.
2025 04 03 (C807/23), Katharina Plavec (Vienna Bar Office).
2025 04 10 (C584/23), Cashier of Alcampo.
2025 04 10 (C607/21), Concept of living in charge.
2025 04 30 (C313/23, 316/23 and 332/23), Data on Judges and Relatives.

1950

1959

1959 02 04 (C-1/58), Stork & Cie.

CJEU judgment of 2 April 1959 (C-1/58), Stork & Cie.

ECLI:EU:C:1959:4.

- *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community.*
- Appeal for annulment.
- It is possible to challenge individual decisions arguing the illegality of the previous and general one on which they are based.

1960

1962

1962 05 18 (C-13/60), Geitling.

CJEU Judgment of 18 May 1962 (C-13/60), Geitling.

ECLI:EU:C:1962:15.

- *Joint organisation for the sale of coal “Geitling”, “Mausegatt” and “Präsident” v High Authority of the European Coal and Steel Community.*
- In competition between large firms (coal market) the influence of a sales organization does not depend so much on the mass of product that it controls as on what is controlled by competing organizations.

1963

1963 02 05 (C-26/62), Van Gend en Loos.

CJEU judgment of 5 February 1963 (C-26/62), Van Gend en Loos.

ECLI:EU:C:1963:1.

- *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Dutch Tax Administration.*
- Question referred by Tariefcommissie (Netherlands).
- Community law, which is autonomous from the legislation of the Member States, in certain cases creates obligations and rights for individuals.
- Rights arise from explicit recognition in Treaties, but also from the obligations established for other subjects or States.
- The prohibition of discrimination on grounds of nationality (Article 12 of the CTC) has direct effects on the legal relations between Member States and their individuals and gives rise to individual rights which the national courts must protect.

1964

1964 03 19 (E-75/63), Unger.

CJEU Judgment of 19 March 1964 (C-75/63), Unger.
ECLI:EU:C:1964:19.

- *Mrs. M.K.H. Unger, wife of R. Hoekstra, against Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten.*
- Question referred for a preliminary ruling by the President-in-Office of the Raad Van Beroep, the Netherlands court of last instance in matters relating to social security.
- (Access to public employment): in Articles 48 to 51 of the TEC there is no basis for assuming that the definition of the term “worker” is left to national legislation.
- That concept is governed not by national law but by Community law, because it is impossible to determine its content by reference to similar expressions that may appear in national legislation.
- The Community concept of “employed or similar” covers those who have been compulsorily affiliated to social security as “workers”, even if they subsequently cease their activity, receiving voluntary insurance which is paid on account of the possible resumption of that activity.

1964 07 15 (C-100/63), Van der Veen.

CJEU judgment of 15 July 1964 (C-100/63), Van der Veen.
ECLI:EU:C:1964:65.

- *J.G. van der Veen, widow J. Kalsbeek v Bestuur der Sociale Verzekeringsbank.*
- Request for a preliminary ruling: Centrale Raad van Beroep - Netherlands.
- Social Security coordination regulations. Protective character. They cannot generate the loss of rights obtained under the exclusive protection of national regulations.

1964 07 15 (C-6/64), Costa v. ENEL.

CJEU judgment of 15 July 1964 (C-6/64), Costa v ENEL.
ECLI:EU:C:1964:66.

- *Flaminio Costa v. ENEL.*
- Question referred for a preliminary ruling by the Giudice Conciliatore de Milán (Italy).
- Community law takes precedence over national rules.

1967

1967 12 05 (C-19/67), Van der Vecht.

CJEU judgment of 5 December 1967, Van der Vecht.

ECLI:EU:C:1967:49.

- *Bestuur der Sociale Verzekeringsbank v. J. H. van der Vecht.*
- Request for a preliminary ruling: Centrale Raad van Beroep - Netherlands.
- Social Security coordination regulations. Posting of workers.

1969

1969 12 11(C-29/69), Stauder.

CJEU judgment of 12 November 1969 (C-29/69), Stauder.

ECLI:EU:C:1969:57.

- *Erich Stauder vs. Stadt Ulm - Sozialamt.*
- Request for a preliminary ruling: Verwaltungsgericht Stuttgart (Germany).
- Provision of surplus subsidized butter to certain social groups: when an act is addressed to all States, the scope cannot depend on the wording of the different language versions.

1970

1970

1970 12 17 (C-11/70), mbH.

CJEU Judgment of 17 December 1970 (C-11/70), mbH.

ECLI:EU:C:1970:114.

- *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel.*
- Request for a preliminary ruling: Verwaltungsgericht Frankfurt am Main (Germany).
- For the purposes of the Export Regulations, the concept of “force majeure” is not limited to absolute impossibility, but also includes circumstances beyond the control of the importer or exporter, the consequences of which could only be averted by excessive sacrifice.

1971

1971 05 25 (C-80/70), Defrenne I.

CJEU Judgment of 25 May 1971 (C-80/70), Defrenne I.

ECLI:EU:C:1971:55.

- *Gabrielle Defrenne v. Belgian State*.
- Questions referred for a preliminary ruling by the Conseil d'État de Belgique.
- (Art. 119 TEC): the principle of equal pay between male and female workers in the same job does not come into play when examining a retirement pension under the compulsory Social Security regime since it does not constitute a benefit paid indirectly by the employer.

1973

1973 06 07 (C-82/72), Walder.

CJEU judgment of 7 June 1973, Walder.

ECLI:EU:C:1973:62.

- *C. J. Walder v Bestuur der Sociale Verzekeringsbank*.
- Request for a preliminary ruling: Centrale Raad van Beroep - Netherlands.
- Social Security coordination regulations. Relationship with bilateral agreements signed between two Member States (outdated doctrine).

1974

1974 02 12 (C-152/73), Sotgiu.

CJEU Judgment of 12 February 1974 (C-152/73), Sotgiu.

ECLI:EU:C:1974:13.

- *Giovanni Maria Sotgiu v. Deutsche Bundespost*.
- Request for a preliminary ruling from the Bundesarbeitsgericht of Germany.
- Interpretation of Article 48(4) of the EEC Treaty and Article 7(1) and (4) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community.
- Dispute between an Italian citizen employed as a worker by the Federal Post Office and that administration: the adoption of discriminatory measures in respect of remuneration or other working conditions after they have joined the administration is not justifiable.
- The nature of the legal relationship between the worker and the Administration is immaterial.
- Possible discrimination by taking into account the fact that a worker is domiciled in another Member State as a criterion for the allocation of a family separation allowance.

1974 04 04 (C-167/73), Commission v France.

CJEU judgment of 4 April 1974 (C-167/73), *Commission v. France*.
ECLI:EU:C:1974:35.

- *Commission of the European Communities v French Republic*.
- Appeal for breach of its obligations under the Treaty.
- (Non-discrimination on grounds of nationality): it follows from the general nature of the prohibition (now Article 45 TFEU) and the objective pursued by its abolition that they are prohibited even if they constitute only a minor obstacle as regards equality of access to employment and other working conditions.

1974 05 14 (C-4/73), Nold.

CJEU Judgment of 14 May 1974 (C4/73), *Nold*.
ECLI:EU:C:1974:51.

- *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*.
- Fundamental rights are part of the general principles that the Court must ensure.
- It is legitimate for fundamental economic freedoms (business, work, etc.) to be limited in EU law for reasons of public policy, provided that the essence of those freedoms is not undermined.

1974 06 21 (C-2/74) Reyners.

CJEU Judgment of 21 June 1974 (C-2/74), *Reyners*.
ECLI:EU:C:1974:68.

- *Jean Reyners vs. Etat belge*.
- Questions referred for a preliminary ruling by the Conseil d'Etat de Belgique.
- (Legal profession and freedom of movement): a citizen subject to conditions for admission to the profession of lawyer which do not apply to Belgian nationals in respect of an activity (advice, legal assistance, representation and defence of the parties before the courts) which is not related, even occasionally, to the exercise of public authority.

1974 12 04 (C-41/74), van Duyn.

CJEU judgment of 4 December 1974 (C-41/74), *van Duyn*.
ECLI:EU:C:1974:133.

- *Yvonne van Duyn vs. Home Office*.

- Request for a preliminary ruling from the High Court of Justice, Chancery Division (United Kingdom).
- Article 48 of the EEC Treaty and Article 3 of Directive 64/221/EEC (measures relating to posting and residence for reasons of public policy and the like): direct effect of Article 48 on the legal order of the Member States.
- Granting to individuals of rights that the national courts must protect. Provisions of a directive that are precise and unconditional and do not require any intervention on the part of the Member States have direct effect.
- The effectiveness of a directive suffers if it is prevented from being relied on and taken into account before the national courts.
- EU law allows a Member State which imposes justified limitations on grounds of public policy to take into account, as a matter relating to the personal conduct of the person concerned, the fact that he or she is a member of a socially dangerous association, even though it is neither prohibited nor imposed on nationals of that Member State who wish to engage in similar employment in the same association or organisation.

1974 12 12 (C-36/74), Walrave.

CJEU Judgment of 12 December 1974 (C-36/74), Walrave.
ECLI:EU:C:1974:140.

- *B.N.O. Walrave, L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo.*
- Questions referred for a preliminary ruling by the Arrondissementsrechtbank de Utrecht (Netherlands).
- The abolition of all discrimination on grounds of nationality with regard to employed activities also applies to conventions and regulations which do not emanate from the public authorities (e.g. on the requirement that “the coach must be of the same nationality as the runner”).

1975

1975 10 21 (C-24/75), Petroni.

CJEU Judgment of 21 October 1975, Petroni.
ECLI:EU:C:1975:129.

- *Teresa and Silvana Petroni v Office national des pensions pour travailleurs salariés (ONPTS), Brussels.*
- Request for a preliminary ruling: Tribunal du travail de Bruxelles v Belgium.

- Social Security coordination regulations. No accumulation of benefits. Protective nature of the Regulations that cannot generate the loss of rights obtained under the exclusive protection of national legislation.

1975 10 28 (C-36/75), Rutili.

CJEU Judgment of 28 October 1975 (C-36/75), Rutili.

ECLI:EU:C:1975:137.

- *Roland Rutili v. Minister of the Interior*.
- Request for a preliminary ruling: Tribunal administratif de Paris (France).
- (Freedom of movement): exceptions for reasons of public policy must be assessed in the light of all the concurrent circumstances.
- Such exceptions can only be based on the personal conduct of the person concerned.

1976

1976 04 08 (C-43/75), Defrenne II.

ECJ judgment of 8 April 1976 (C-43/75), Defrenne II.

ECLI:EU:C:1976:56.

- *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*.
- Request for a preliminary ruling: Cour du travail de Bruxelles - Belgium.
- (Art. 119 Treaty): the principle of equal pay may be invoked before national courts, which must ensure the protection of rights, in particular in the case of discrimination directly caused by legislative provisions or collective labour agreements, as well as in the case of unequal remuneration of female and male workers for the same work, when it is carried out in the same establishment or service, private or public.

1978

1978 03 08 (C-135/77), Robert Bosch.

ECJ Judgment of 8 March 1978 (C-135/77), Robert Bosch.

ECLI:EU:C:1978:75.

- *Robert Bosch GmbH v Hauptzollamt Hildesheim*.
- Request for a preliminary ruling from the Finanzgericht Hamburg (Germany).
- The binding effect of the judgments of the ECJ is imposed not only on the body promoting the question but also on any other judicial body of any Member State, an effect that is not limited to the operative part of

the judgment, but also to the legal basis that has led to it, since – in general – the operative part cannot be understood without taking into account the previous *ratio decidendi*.

1978 03 09 (106/77), Simmenthal.

ECJ Judgment of 9 March 1978 (C-106/77), *Simmenthal*.

ECLI:EU:C:1978:49.

- *Amministrazione delle Finanze dello Stato vs. SpA Simmenthal*.
- Request for a preliminary ruling: Pretura di Susa (Italy).
- The national court responsible for implementing EU law is required to ensure its full effectiveness by disapplying, on its own initiative, any provisions of national legislation, even if they are subsequent, without being obliged to request or wait for their repeal or internal purification.
- The national court must apply Community law in its entirety and protect the rights which it confers on individuals by disapplying any provision of national law which may be contrary to it, whether prior to or subsequent to the Community rule.
- The right-duty (to refer a question for a preliminary ruling) only arises when the national court has a significant doubt as to the interpretation of European law in relation to the dispute before it, since “the mere preferential application of European law over national law does not need confirmation from the Court of Justice when the rule is clear to the national court, being bound by the principle of primacy of Community Law”.
- (*Simmenthal* is a company that in 1973 imported meat from France to Italy and at the border they demanded the payment of health inspection fees that, however, they considered contrary to the free movement of goods).

1978 06 15 (C-149/77) Defrenne III.

ECJ Judgment of 15 June 1978 (C-149/77) *Defrenne III*.

EU:C:1978:130.

- *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*.
- Request for a preliminary ruling: Cour de cassation (Belgium).
- Article 119 of the EEC Treaty (non-discrimination in pay on the basis of gender) is a special rule whose application is linked to specific cases and has, within its scope, direct applicability.

1979

1979 03 28 (C-175/78), Saunders.

ECJ Judgment of 28 March 1979 (C-175/78), Saunders.

ECLI:EU:C:1979:88.

- *The Queen vs. Vera Ann Saunders.*
- Reference for a preliminary ruling from the Crown Court, Bristol.
- The provisions of the Treaty on freedom of movement for workers cannot be applied to situations purely internal to a Member State, that is to say, where there is no connection with any of the situations covered by Community law.

1979 04 05 (C-148/78), Ratti.

ECJ Judgment of 5 April 1979 (C-148/78), Ratti.

ECLI:EU:C:1979:110.

- *Criminal proceedings brought by the Public Prosecutor's Office against Tullio Ratti.*
- Question referred by Pretura di Milano – Italy.
- (Directive 73/172/solvents): the Member State may not penalise a person who, after the transposition period has expired, acts in accordance with the Directive.
- The State may not lay down more restrictive or detailed conditions than those laid down in the Directive, either in respect of manufacture or in respect of marketing.

1979 07 12 (C-237/78), Toia.

ECJ Judgment of 12 July 1979, Toia.

ECLI:EU:C:1979:197.

- *Caisse régionale d'assurance maladie de Lille (CRAM) against Diamante Toia, wife Palermo.*
- Request for a preliminary ruling: Cour d'appel de Douai - France.
- Social Security coordination regulations. Indirect discrimination on grounds of nationality.

1979 12 13 (E-44/79), Hauer.

ECJ Judgment of 13 December 1979 (C-44/79), Hauer.

ECLI:EU:C:1979:290.

- *Liselotte Hauer v. Land Rheinland-Pfalz.*

- Request for a preliminary ruling: Verwaltungsgericht Neustadt an der Weinstraße (Germany).
- Regulation 1162/76 (wine production) applies to planting applications pending when it enters into force and regardless of whether or not national legislation considers that we are on land suitable for such cultivation.

1980

1980

1980 06 26 (C-136/79), Panasonic.

ECJ judgment of 26 June 1980 (C-137/79), Panasonic.

ECLI:EU:C:1980:169.

- *National Panasonic (UK) Limited v Commission of the European Communities.*
- The Commission's action (inspecting on the spot or requesting information) must be proportionate and this is measured according to what is considered most appropriate for each case.

1980 07 03 (E-157/79), Regina/Pieck.

ECJ judgment of 3 July 1980 (C-157/79), Regina v Pieck.

ECLI:EU:C:1980:179.

- *The Queen vs. Stanislaus Pieck.*
- Questions referred for a preliminary ruling by the Pontypridd Magistrates' Court of Mid Glamorgan, Wales.
- The only restriction on the entry of workers provided for in Article 48 of the EEC Treaty as regards freedom of movement within the territory of the Member States consists of limitations justified on grounds of public policy, public security and public health.
- This restriction must be understood, not as a prerequisite for acquiring the right of entry and residence (even by stamping one's passport), but as the possibility of restricting, in particular and duly justified cases, the exercise of a right that derives directly from the Treaty.

1981

1981 03 31 (C-96/80), Jenkins.

ECJ Judgment of 31 March 1981 (C-96/80), Jenkins.

ECLI:EU:C:1981:80.

- *J.P. Jenkins v. Kingsgate (Clothing Productions LTD).*

- Request for a preliminary ruling: Employment Appeal Tribunal - United Kingdom.
- Equal pay for women and men (Article 119 of the EEC Treaty) applies directly to any form of discrimination that can be proven simply by means of the criteria of equal pay and equal employment.
- Different hourly pay for part-time and full-time work; It is for the national court to assess whether it is an indirect means of reducing the remuneration of part-time workers on the ground that they are predominantly women.

1981 05 14 (C-98/80), Romano.

ECJ Judgment of 14 May 1981, Romano.

ECLI:EU:C:1981:104.

- *Giuseppe Romano v Institut national d'assurance maladie-invalidité*.
- Request for a preliminary ruling: Tribunal du travail de Bruxelles v Belgium.
- Social Security coordination regulations. The decisions of the Administrative Commission have no binding legal value.

1982

1982 02 09 (C-12/81), Garland.

ECJ Judgment of 9 February 1982 (C-12/81), Garland.

ECLI:EU:C:1982:44.

- *Eileen Garland v British Rail Engineering Limited*.
- Request for a preliminary ruling: House of Lords (United Kingdom).
- (Art. 119 TEC, equal pay by gender): the special advantages that a company grants, in terms of transport, to its retired employees are protected by the requirement of equal treatment between men and women.
- The national court must prevent discrimination on grounds of gender in a matter such as the one referred to.

1982 03 23 (C-53/81), Levin.

ECJ Judgment of 23 March 1982 (C-53/81), Levin.

ECLI:EU:C:1982:105.

- *D.M. Levin v. Secretary of State to Justice*.
- Request for a preliminary ruling: Raad van State (Netherlands).
- (Freedom of movement): A British citizen, the wife of a third-country national, who was refused a residence permit by the Netherlands on the grounds that she was not pursuing a professional activity in the State.

- The concept of worker for EU law is independent of whether the activity is carried out to such a limited extent that it does not provide a level of income above a minimum subsistence threshold.

1982 03 23 (C-79/81), Baccini.

ECJ Judgment of 23 March 1982 (C-79/81), Baccini.

ECLI:EU:C:1982:106.

- *Margherita Baccini v Office national de l'emploi (ONEM)*.
- Request for a preliminary ruling from the Cour du travail de Mons, Belgium.
- (Compatibility of benefits and freedom of movement): if a migrant's access to unemployment benefit depends on his or her fitness for work and that he or she possesses it, it cannot be refused on the ground that he or she is receiving, in another Member State, an invalidity pension in accordance with Community legislation, aggregated and prorated.

1982 05 26 (C-149/79) Commission v Kingdom of Belgium.

ECS Judgment of 26 May 1982 (C-149/79) Commission v. Belgium.

ECLI:EU:C:1982:195.

- *Commission of the European Communities v Kingdom of Belgium*.
- Appeal for breach of its obligations under the Treaty.
- (Freedom of movement): vacancies for jobs in the railway sector relating to jobs for unskilled workers.
- EU law requires a distinction to be made within each administrative entity between jobs that participate in the exercise of public authority and jobs that do not participate in it, even though the Belgian Constitution provides that only Belgians can access civilian and military jobs.

1982 08 15 (C-245/81), Edeka.

ECJ Judgment of 15 August 1982 (C-245/81), Edeka.

ECLI:EU:C:1982:277.

- *Edeka Zentrale AG v. Federal Republic of Germany*.
- Request for a preliminary ruling: Hessischer Verwaltungsgerichtshof - Germany.
- The Community institutions have a margin of discretion when they have to choose the means necessary to carry out their policy, and economic operators cannot legitimately rely on the continuation of an existing situation which can be altered by decisions taken by those institutions in the context of their discretion.

1982 10 06 (C-283/81). Cilfit.

ECJ Judgment of 6 October 1982 (C-283/81). Cilfit.
EU:C:1982:335.

- *Sri CILFIT - and 54 other companies, against Ministero della sanità.*
- Corte suprema di cassazione (Italy).
- A court or tribunal against whose decisions there is no further appeal, when a question of Community law is raised before it, must comply with its obligation to refer that question to the Court of Justice, unless it has established that the question referred is not relevant, or that the Community provision in question has already been interpreted by the Court. or that the correct application of Community law is required with such evidence that it leaves no room for any reasonable doubt.

1982 10 28 (C-52/81), Faust.

ECJ Judgment of 20 October 1982 (C-52/81), Faust.
ECLI:EU:C:1982:369.

- *Offene Handelsgesellschaft in Firma Werner Faust v Commission of the European Communities.*
- Since EU law does not prevent different treatment of third countries, it does not prevent the resulting differences for economic operators.

1983

1983 10 26 (C-163/82), Commission v Italy.

ECJ judgment of 26 October 1983 (163/82), Commission v. Italy.
ECLI:EU:C:1983:295.

- *Commission of the European Communities v Italian Republic.*
- Non-compliance by the State.
- Maternal leave for childcare (up to one year), after maternity leave, which does not infringe Directive 76/207/EEC.
- Other leaves with female priority that do not violate it either.

1984

1984 04 19 (C-14/83), Von Colson and Kamann.

ECJ Judgment of 19 April 1984 (C-14/83), Von Colson and Kamann.
ECLI:EU:C:1984:153.

- *Sabine Von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen.*
- Request for a preliminary ruling: Arbeitsgericht Hamm (Germany).

- (Directive 76/207, gender equality at work): EU law does not require that discrimination in access to employment entails the recruitment of the discriminated candidate.
- If compensation is chosen as a form of sanction for the prohibition of discrimination, the compensation must go beyond something symbolic (e.g. the costs incurred by the candidacy), and must be appropriate to the damage suffered.

1984 07 12 (184/83), Hofmann.

ECJ judgment of 12 July 1984 (184/83), Hofmann.

ECLI:EU:C:1984:273.

- *Ulrich Hofmann vs. Barmer Ersatzkasse.*
- Request for a preliminary ruling: Landessozialgericht Hamburg - Germany.
- EU law does not preclude a State from granting the mother, at the end of the statutory period of protection, additional rest, the granting of which is favoured by the State through the payment of remuneration.
- Directive 76/207/EEC does not require that the father be allowed to grant such leave in the alternative, even if the parents agree.
- If the leave is linked to childbirth, the attribution of maternity leave to the mother exclusively is justified in order to promote the “special relationship between the mother and the child after childbirth”.

1985

1985 02 07 (C-19/83) Wendelboe.

ECJ Judgment of 7 February 1985 (C-19/83) Wendelboe.

ECLI:EU:C:1985:54.

- *Knud Wendelboe et al. v. Konkursboet L. J. Music ApS.*
- Decision from Vestre Landsret (Denmark) for a preliminary ruling.
- Directive 77/187/EEC does not require Member States to lay down rules transferring to the transferee the obligations relating to paid leave and compensation to workers who are not employees of the undertaking at the time of the transfer.

1985 02 07 (E-135/83) Abels.

ECJ Judgment of 7 February 1985 (C-135/83) Abels.

ECLI:EU:C:1985:55.

- *H.B.M. Abels v. Bestuur van de Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie.*

- Decision from Raad van Beroep Zwolle (Netherlands).
- The guarantee of Directive 77/187 on business subrogation covers the obligations arising for the transferor of an employment contract or employment relationship arising before the date of the transfer, without prejudice to the exceptions provided for in relation to social security.

1985 02 07 (C-179/83) FNV.

ECJ Judgment of 7 February 1985 (C-179/83) FNV.
ECLI:EU:C:1985:57.

- *Industriebond FNV and Federatie Nederlandse Vakbeweging (FNV) v Netherlands State.*
- Decision from Arrondissementsrechtbank's-Gravenhage (Netherlands).
- Unless provided for by national law, the business succession provided for in Directive 77/187 does not operate in respect of a production unit belonging to a bankrupt undertaking and is part of the bankruptcy estate, but does operate in the event of suspension of payments.

1985 02 07 (E-186/83) Botzen.

ECJ Judgment of 7 February 1985 (C-186/83) Arie Botzen.
ECLI:EU:C:1985:58.

- *Arie Botzen et al. v. Rotterdamsche Droogdok Maatschappij BV.*
- Preliminary ruling from Kantongerecht, Rotterdam (Netherlands).
- What is decisive in determining whether the employment relationship is transferred is the worker's assignment to the reference production unit and not, for example, that he or she uses the material means included in it.

1985 07 11 (C-105/84) Danmols Invent.

ECJ Judgment of 11 July 1985 (C-105/84). Foreningen af Arbejdsledere i Danmark/Danmols Inventar.
ECLI:EU:C:1985:331.

- *Foreningen af Arbejdsledere i Danmark contra Société en faillite A/S Danmols Inventar.*
- Request for a preliminary ruling: Vestre Landsret (Denmark).
- EU law does not provide for the assumption of obligations by the transferee when, after the transfer of the company, there are people who voluntarily refuse to continue their activity on behalf of the transferee.

1986

1986 01 15 (C-41/84), Pinna.

ECJ Judgment of 15 January 1986, Pinna.

ECLI:EU:C:1986:1.

- *Pietro Pinna vs. Caisse d'allocations familiales de la Savoie.*
- Request for a preliminary ruling: Cour de cassation - France.
- Social Security coordination regulations. Discrimination on grounds of nationality. Family allowance. Article 73(2) of Regulation No 1408/71.

1986 02 25 (C-254/84), De Jong.

ECJ judgment of 25 February 1986, De Jong.

ECLI:EU:C:1986:78.

- *G. J. J. De Jong v. Direction of the Sociale Verzekeringsbank.*
- Request for a preliminary ruling: Raad van Beroep Amsterdam - Netherlands.
- Social Security coordination regulations. Protective nature cannot generate the loss of rights obtained under the exclusive protection of national law.

1986 02 26 (C-151/84), Roberts.

ECJ Judgment of 26 February 1986 (C-151/84), Roberts.

ECLI:EU:C:1986:83.

- *Joan Roberts and Tate v. Lyle Industries Limited.*
- Request for a preliminary ruling: Court of Appeal (England) - United Kingdom.
- (Directive 76/207/EEC) – under EU law, a provision of a collective agreement setting the same age for the dismissal of male and female employees in the context of collective redundancies, entailing the granting of an early retirement pension, where the normal age for access to retirement is different for men and women, does not constitute discrimination on grounds of sex prohibited by Community law.

1986 02 26 (C-152/84), Marshall I.

ECJ Judgment of 26 February 1986 (C-152/84), Marshall I.

ECLI:EU:C:1986:84.

- *M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching).*
- Question referred by the United Kingdom Court of Appeal.

- (Directive 76/207/EEC) – a policy involving the dismissal of a woman solely on reaching the age (different for men) entitlement to a State pension constitutes discrimination on grounds of sex.
- The prohibition in Directive 76/207 may be invoked against a State authority acting in its capacity as an employer, in order to exclude the application of any contrary rule.

1986 03 18 (C-24/85), Spijkers.

ECJ Judgment of 18 March 1986 (C-24/85), Spijkers.

ECLI:EU:C:1986:127.

- *Jozef Maria Antonius Spijkers against Gebroeders Benedik Abattoir CV and Alfred Benedik in Zonen BV.*
- Request for a preliminary ruling: Hoge Raad (Netherlands).
- In order to determine whether there is business subrogation (Directive 77/187/EEC), in the light of all the facts, it is necessary to examine whether an autonomous economic unit (a slaughterhouse, in the case) has been transferred.
- To this end, it is necessary to observe in particular whether the new entrepreneur actually continues his operation or takes over it, with the same or similar economic activities.

1986 04 15 (C-237/84), Commission v Belgium.

ECJ Judgment of 15 April 1986 (C-237/84), Commission v. Belgium.

ECLI:EU:C:1986:149.

- *Commission of the European Communities v Kingdom of Belgium.*
- Procedure for non-compliance.
- Directive 77/187/EEC (transfer of undertakings): failure to comply with the failure to transpose it properly within the deadline.

1986 05 07 (C-131/85), Gül.

ECJ Judgment of 7 May 1986 (C-131/85), Gül.

ECLI:EU:C:1986:200.

- *Emir Gül v. Regierungspräsident Düsseldorf.*
- Reference for a preliminary ruling from the Verwaltungsgericht Gelsenkirchen (Germany).
- The power of the Member States to restrict the free movement of persons for reasons of public health is not intended to leave the public health sector, as an economic sector and from the point of view of access to employment, outside the scope of the principles of free movement.

- The purpose of Article 45(3) TFEU is to allow a State to limit free movement in access to employment because there is “a danger” to public policy, public security or public health.

1986 05 13 (170/84), Bilka.

ECJ Judgment of 13 May 1986 (170/84), Bilka.

ECLI:EU:C:1986:204.

- *Bilka - Kaufhaus GmbH v. Karin Weber von Hartz.*
- Request for a preliminary ruling: Bundesarbeitsgericht (Germany).
- A department store company which excludes its part-time employees from the occupational pension scheme infringes Article 119 of the EEC Treaty where that measure affects a much higher number of women than men, unless the undertaking proves that the measure is based on objectively justified factors unrelated to any discrimination on grounds of sex.
- It is not required of companies to take account of family responsibilities in order to set up a pension scheme.

1986 06 03 (C-307/84), Commission v France.

ECJ judgment of 3 June 1986 (C-307/84), Commission v. France.

ECLI:EU:C:1986:222.

- *Commission of the European Communities v French Republic.*
- Appeal for breach of its obligations under the Treaty.
- (Free movement): Jobs as a nurse or stomatologist in public hospitals cannot be considered excluded from free movement.
- The criterion that makes it possible to determine whether it is a job in the public administration is functional.

1986 06 03 (C-139/85), Kempf.

ECJ judgment of 3 June 1986 (C-139/85), Kempf.

ECLI:EU:C:1986:223.

- *R. H. Kempf v. Staatssecretaris van Justitie.*
- Request for a preliminary ruling: Raad van State (Netherlands).
- (Freedom of movement): German working in the Netherlands as a part-time music teacher, compatible with a public benefit. Subsequently, he received another disability benefit from the Social Security, and other welfare benefits.
- He is refused the residence permit applied for on the ground that he is not considered a “privileged Community national” within the meaning

of the Netherlands legislation on aliens. It is irrelevant, for the purposes of the attribution of the status of worker, that the income must be supplemented with public funds.

1986 07 01 (C-237/85), Rummler.

ECJ Judgment of 1 July 1986 (C-237/85), Rummler.

ECLI:EU:C:1986:277.

- *Gisela Rummler v. Dato-Druck GmbH*.
- Request for a preliminary ruling: Arbeitsgericht Oldenburg (Germany).
- (Directive 75/117/EEC — non-discrimination in pay): does not preclude a system of occupational classification from using, in order to determine the level of pay, the criterion of effort or muscle load or the degree of heaviness of the work, where, having regard to the nature of the activities, the work to be performed actually requires a certain display of physical strength, provided that, by taking into account other criteria, it succeeds in excluding, as a whole, any discrimination on grounds of sex.
- The fact that it is based on values corresponding to the average production capacity of workers of only one sex, to determine the extent to which a job requires effort, causes a burden or is physically heavy, constitutes a form of discrimination on grounds of sex.
- In order for a system of occupational classification to be non-discriminatory, it must consider criteria in which workers of both sexes may have special aptitudes.

1986 07 03 (E-66/85), Lawrie-Blum.

ECJ judgment of 3 July 1986 (C-66/85), Lawrie-Blum.

ECLI:EU:C:1986:284.

- *Deborah Lawrie-Blum v. Land Baden-Württemberg*.
- Request for a preliminary ruling: Bundesverwaltungsgericht (Germany).
- Free movement of workers: benefits trainee teachers who carry out a preparatory service of teacher training during which they carry out teaching activity and receive remuneration.
- For the purposes of restricting access to the Public Administration (Article 48 of the EEC Treaty and Regulation 1612/68), the legal nature of the employment relationship does not matter.
- The preparatory service of training for the teaching profession cannot be considered as employment in the public service.

1986 07 10 (C-235/84), Commission v Italy.

ECJ judgment of 10 July 1986 (C-235/84), Commission v. Italy.
ECLI:EU:C:1986:303.

- *Commission of the European Communities v Italian Republic.*
- Procedure for non-compliance.
- Directive 77/187/EEC (transfer of undertakings): failure to comply with the failure to transpose it properly within the deadline.

1986 07 10 (C-60/85), Luijten.

ECJ Judgment of 10 July 1986, Luijten.
ECLI:EU:C:1986:307.

- *M. E. S. Luijten v Raad van Arbeid.*
- Request for a preliminary ruling: Raad van Beroep 's-Hertogenbosch - Netherlands.
- Social Security coordination regulations. Differential complement in family benefits for migrant workers.

1987

1987 06 16 (C-225/85), Commission v Italy.

ECJ judgment of 16 June 1987 (C-225/85), Commission v. Italy.
ECLI:EU:C:1987:284.

- *Commission of the European Communities v Italian Republic.*
- Appeal for breach of its obligations under the Treaty.
- The tasks carried out by all the researchers of the Consiglio nazionale delle ricerche (National Research Council, CNI) do not prove that they are responsible for the exercise of the prerogatives of public authority or are responsible for safeguarding the general interests of the State.
- Only the functions of management or advice of the State on scientific and technical matters could be classified as public administration jobs.

1987 06 17 (C-424 and 425/85), Africa.

ECJ Judgment of 17 June 1987 (C-424 and 425/85), Africa.
ECLI:EU:C:1987:296.

- *Coöperatieve Melkproducentenbedrijven Noord-Nederland BA ("Frico") and Others v Voedselvoorzienings In- en Verkoopbureau.*
- Requests for a preliminary ruling: College van Beroep voor het Bedrijfsleven (Netherlands).

- Each common organization of markets (in the case: butter) has its own characteristics; The stockpiling of that product has a particular role and requires measures that are not comparable to any of those applied to other products.

1987 10 22 (E-314/85), Photo-Frost.

ECJ Judgment of 22 October 1987 (C-314/85), Photo-Frost.

ECLI:EU:C:1987:452.

- *Photo-Frost, established in Ammersbek against Hauptzollamt of Luebeck-*.
- Request for a preliminary ruling from the Finanzgericht Hamburg - Germany.
- The powers conferred on the Court of Justice are intended to ensure a uniform application of Community law, a requirement of uniformity which is particularly imperative when it comes to the validity of a Community act.
- Differences between the national courts of the Member States as regards the validity of Community acts may jeopardise the very unity of the Community legal order and undermine the fundamental requirement of legal certainty.
- The necessary coherence of the system of judicial protection established by the Treaty requires the same conclusion. It is the Court of Justice that is best placed to rule on the validity of Community acts.

1987 12 17 (C-287/86), Ny Mølle Kro.

ECJ judgment of 17 December 1987 (C-287/86), Ny Mølle Kro.

ECLI:EU:C:1987:573.

- *Landsorganisationen i Danmark for Tjenerforbundet i Danmark contra Ny Mølle Kro.*
- Request for a preliminary ruling: Arbejdsretten (Denmark).
- Directive 77/187 (transfer of an undertaking) applies when the owner recovers the leased undertaking as a result of the lessee's defaults.
- To determine whether an economic unit is transferred, elements such as its temporary closure or the absence of personnel must be assessed, although they are not decisive.
- The transferee is not obliged to maintain conventional conditions for those who were not in the company on the date of the transfer.

1988

1988 02 02 (C-24/86), Blaizot.

Judgment of the Court of Justice of 2 February 1988 (C-24/86), Blaizot.
ECLI:EU:C:1988:43.

- *Vincent Blaizot v. University of Liège and others.*
- Request for a preliminary ruling: Tribunal de première instance de Liège (Belgium).
- University studies in veterinary medicine fall within the concept of vocational training, and it therefore constitutes discrimination on grounds of nationality to charge an additional fee to students from another Member State.

1988 02 10 (C-324/86) Tellerup.

ECJ Judgment of 10 February 1988. C-324/86. Tellerup.
ECLI:EU:C:1988:72.

- *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S.*
- Request for a preliminary ruling: Højesteret (Denmark).
- There is a transfer of a company when at the end of an industrial (restaurant) lease the owner transfers it to a third party, who continues the activity with the same staff.
- The worker's right to the continuity of his or her employment relationship in the event of a transfer of company is inalienable.

1988 05 05 (C-144/87 and 145/87), Berg.

ECJ judgment of 5 May 1988 (C-144/87 and 145/87), Berg.
ECLI:EU:C:1988:236.

- *Harry Berg and Johannes Theodorus Maria Busschers v. Ivo Martin Besselsen.*
- Requests for a preliminary ruling: Hoge Raad (Netherlands).
- According to Directive 77/187 (transfer of companies), after the change of employer, the transferor's liability for the obligations arising from said subrogation is extinguished (even if the employees contest the subrogation).
- By improving EU law, States can establish the joint and several liability of the transferor and the transferee after the transfer.

1988 10 05 (C-196/87), Udo Steymann.

ECJ judgment of 5 October 1988 (C-196/87), Udo Steymann.

ECLI:EU:C:1988:475.

- *Udo Steymann v. Staatssecretaris van Justitie.*
- Request for a preliminary ruling: Raad van State (Netherlands).
- Economic activities are the tasks carried out within a religious (or similar) community to the extent that the community's services can be considered indirect consideration for real activities.
- In the case: the subject performs plumbing work and participates in the commercial work carried out by the congregation. It attends to their material needs.

1989

1989 05 30 (C-33/88), Allué and Coonan.

ECJ Judgment of 30 May 1989 (C-33/88), Allué and Coonan.

ECLI:EU:C:1989:222.

- *Pilar Allué and Carmel Mary Coonan against Università degli studi di Venezia.*
- Question referred for a preliminary ruling by the Pretura unificata di Venezia, sezione lavoro (Italy).
- The work of a foreign language lecturer in a university is not a job in the public administration within the meaning of Article 48.4 of the EEC Treaty.
- EU law precludes the application of a provision of national law which imposes a limit on the duration of the employment relationship between universities and foreign language lecturers, where such a limit does not exist, in principle, as regards other workers (job stability).

1989 05 31 (C-344/87), Bettray.

ECJ Judgment of 31 May 1989 (C-344/87).

ECLI:EU:C:1989:226.

- *Bettray v. Staatssecretaris van Justitie.*
- Request for a preliminary ruling from the Raad van State of the Netherlands.
- (Freedom of movement; 48 TEC and Regulation 1612/68): a national of one State who carries out an activity in the field of social employment in another (as a means of re-education or reintegration) cannot be recognised, on that basis alone, as a worker within the meaning of Community law.

- In the case: a German citizen, as a drug addict, works in a company under the Dutch legislation on social employment.

1989 07 13 (C-5/88), Wachauf.

ECJ Judgment of 13 July 1989 (C-5/88), Wachauf.

ECLI:EU:C:1989:321.

- *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft.*
- Request for a preliminary ruling: Verwaltungsgericht Frankfurt am Main (Germany).
- The fundamental rights recognised by the ECJ do not constitute absolute prerogatives, but must be taken into consideration in the light of their function within society. Consequently, restrictions on the exercise of those rights may be imposed, in particular in the context of a common organisation of the market (in the case of the leasing of an agricultural holding).
- Definition of the term “holding” and consequences of the end of a rural lease on the continuity of the exploitation of the milk quota. Prohibition of discrimination in Article 40(3) of the Treaty and discrimination between producers. Respect for the right to property.

1989 07 13 (C-171/88), Rinner-Kühn.

ECJ judgment of 13 July 1989 (C-171/88), Rinner-Kühn.

ECLI:EU:C:1989:328.

- *Ingrid Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG.*
- Request for a preliminary ruling: Arbeitsgericht Oldenburg (Germany).
- (Directive 75/117/EEC): EU law precludes the exclusion from continued payment of wages in the event of illness of workers whose ordinary working hours do not exceed ten hours per week or forty-five hours per month, where that provision affects a much higher number of women than men, unless the Member State proves that the scheme in question is justified by objective factors, unrelated to any discrimination on grounds of sex.
- In the case: hourly cleaner.

1989 10 17 (C-109/88), Danfoss.

ECJ Judgment of 17 October 1989 (C-109/88), Danfoss.

ECLI:EU:C:1989:383.

- *Handels- og Kontorfunktionærernes Forbund I Danmark against Dansk Arbejdsgiverforening, on behalf of Danfoss.*

- Questions referred for a preliminary ruling by the Faglige Voldgiftsret (Labour Arbitration Tribunal) (Denmark).
- If a company applies an opaque remuneration system, the employer must prove that it is not discriminatory if it is shown that the average remuneration is lower for women.
- Where flexibility or vocational training have an impact on remuneration, the employer may justify this by reference to adaptability to working time or to the impact of that training on the activity carried out.

1989 12 13 (C-102/88), Ruzius-Wilbrink.

ECJ Judgment of 13 December 1989 (C-102/88), Ruzius-Wilbrink.
ECLI:EU:C:1989:639.

- *M. L. Ruzius-Wilbrink v Bestuur van de Bedrijfsvereniging voor Overheidsdiensten (Directorate of the Professional Association of Public Services)*.
- Request for a preliminary ruling: Raad van Beroep Groningen - Netherlands.
- (Directive 79/7 on gender equality in social security): in the context of national legislation guaranteeing a minimum social income to insured persons affected by temporary incapacity for work, a provision introducing an exception to this principle in respect of insured persons who have previously worked part-time and limiting the amount of the benefit to the salary previously received is not permissible. when that group of insured persons comprises a much higher number of women than men, unless justified by objective factors.

1989 12 14 (C-168/88), Dammer.

ECJ judgment of 14 December 1989, Dammer.
ECLI:EU:C:1989:652.

- *Theo Dammer against VZW Securex Kinderbijslagfonds and Rijksdienst voor Kinderbijslag der Werknemers*.
- Request for a preliminary ruling: Arbeidsrechtbank Antwerpen - Belgium.
- Social Security coordination regulations. Family benefits. Protective nature cannot generate the loss of rights obtained under the exclusive protection of national law.

1990

1990

1990 03 27 (C-113/89), Rush Portuguesa.

ECJ Judgment of 27 March 1990 (C-113/89), Rush Portuguesa.

ECLI:EU:C:1990:142.

- *Rush Portuguesa Lda v. Office national d'immigration.*
- Request for a preliminary ruling: Tribunal administratif de Versailles (Tribunal administratif de Versailles, France).
- A company established in Portugal can travel with its own staff, for the duration of the works, to France.
- In this case, the French authorities cannot impose conditions relating to the recruitment of labour on site or the obtaining of a work permit.

1990 05 03 (C-2/89), Van Heijningen Kits.

ECJ Judgment of 3 May 1990, Kits Van Heijningen.

ECLI:EU:C:1990:183.

- *Bestuur van de Sociale Verzekeringsbank vs. M. G. J. Kits van Heijningen.*
- Request for a preliminary ruling: Centrale Raad van Beroep - Netherlands.
- Social Security coordination regulations. Part-time migrant worker. Determination of the applicable national law, mandatory nature.

1990 05 17 (C-262/88) Barber.

ECJ Judgment of 17 May 1990 (C-262/88) Barber.

ECLI:EU:C:1990:2009.

- *Douglas Harvey Barber v. Guard Royal Exchange Assurance Group.*
- Request for a preliminary ruling: Court of appeal (England) - United Kingdom.
- (Art. 119 CE): non-discrimination in pay is directly applicable to occupational Social Security schemes, their various benefits and severance pay.
- A professional regime with different ages of access to the retirement pension for men and women is discriminatory, including that under equal circumstances men have the right to access a deferred pension and women to an immediate pension.
- This doctrine cannot be invoked with effects prior to the judgment, except for ongoing claims.

1990 06 27 (C-33/89), Kowalska.

ECS Judgment of 27 June 1990 (C-33/89), Kowalska.

ECLI:EU:C:1990:265.

- *Maria Kowalska v. Freie und Hansestadt Hamburg.*
- Request for a preliminary ruling: Arbeitsgericht Hamburg - Germany.
- Indirect discrimination; prohibition of discrimination in transitional allowance for part-time workers if the majority are women; obligation to apply the same regime, in proportion to their working hours.

1990 07 12 (C-188/89), Foster.

ECJ Judgment of 12 July 1990 (C-188/89), Foster.

ECLI:EU:C:1990:313).

- *Foster, G.A.H.M. Fulford-Brown, J. Morgan, M. Roby, E.M. Salloway and P. Sullivan v. British Gas plc, a company incorporated under an English company.*
- Question referred for a preliminary ruling by the House of Lords.
- Where individuals may rely on a directive (in its unconditional and sufficiently precise provisions) against the State, they may do so irrespective of the capacity in which the latter, employer or public authority acts.
- It must be stated whether an entity (House of Lords), whatever its legal form, has been entrusted, by virtue of an act of the public authority, with the performance, under the control of the latter, of a service in the public interest and has, for that purpose, powers that are exorbitant in comparison with the rules applicable in relations between individuals.

1990 11 08 (C-177/88) Dekker.

ECJ Judgment of 8 November 1990 (C-177/88) Dekker.

ECLI:EU:C:1990:383.

- *Elisabeth Johanna Pacifica Dekker vs. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus.*
- Request for a preliminary ruling: Hoge Raad (Netherlands).
- (Directive 76/207/EEC, non-discrimination in employment): EU law is infringed if the employer refuses to conclude an employment contract with a candidate whom he had considered suitable to pursue the activity in question, when this refusal to recruit is based on the possible consequences, detrimental to the employer, that would follow from the recruitment of a pregnant woman.

- Discrimination on the basis of pregnancy is direct discrimination on the basis of sex that does not admit objective and reasonable justification based on business costs.

1990 11 08 (C-179/88) Handels.

ECJ judgment of 8 November 1990 (C-179/88), Handels.

ECLI:EU:C:1990:384.

- *Handels- og Kontorfunktionærernes Forbund i Danmark contra Dansk Arbejdsgiverforening.*
- Request for a preliminary ruling: Højesteret - Denmark.
- (Directive 76/207/EEC, non-discrimination in employment): if women are dismissed due to illness under the same conditions as men, there is no discrimination.
- EU law does not preclude dismissals resulting from absences due to illness caused by pregnancy or childbirth.
- Member States have the power to determine, by means of the duration of maternity leave, what they consider to be a reasonable time to link a certain pathology to pregnancy or childbirth.

1990 11 13 (C-106/89), Marleasing.

ECJ Judgment of 13 November 1990 (C-106/89), Marleasing.

ECLI:EU:C:1990:395.

- *Marleasing SA v. La Comercial Internacional de Alimentacion SA.*
- Question referred for a preliminary ruling by the Court of First Instance and Instruction No. 1 of Oviedo (Asturias).
- (Directive 68/151/EEC, freedom of establishment): the national court must not admit additional cases of corporate invalidity.
- In that regard, the national court is required to interpret its national law in the light of the letter and purpose of that directive in order to prevent a public limited liability company from being declared invalid on grounds other than those listed in Article 11 thereof.

1991

1991 02 07 (C-184/89), Nimz.

ECJ Judgment of 7 February 1991 (C-184/89), Nimz.

ECLI:EU:C:1991:50.

- *Helga Nimz v. Freie und Hansestadt Hamburg.*
- Reference for a preliminary ruling: Arbeitsgericht Hamburg - Germany.

- A conventional rule that harms part-time workers if the majority are women; Immediate non-application of the discriminatory provision.
- In the case: those who work 75% or more of the ordinary working day compute the time worked in full, while only half counts for those who work between 50 and 75%.

1991 02 07 (C-227/89), Rönfeldt.

ECJ judgment of 7 February 1991, Rönfeldt.

ECLI:EU:C:1991:52.

- *Ludwig Rönfeldt v. Bundesversicherungsanstalt für Angestellte.*
- Request for a preliminary ruling: Sozialgericht Stuttgart - Germany.
- Social Security coordination regulations. Preferential application of the bilateral Social Security agreement signed between Member States if it is more favourable.

1991 02 26 (C-292/89) Antonissen.

ECJ Judgment of 26 February 1991 (C-292/89), Antonissen.

ECLI:EU:C:1991:80.

- *The Queen v. Immigration Appeal Tribunal, ex parte: Gustaff Desiderius Antonissen.*
- Question referred for a preliminary ruling by the High Court of Justice, Queen's Bench Division (United Kingdom).
- The temporary limitation on the stay for the purpose of seeking employment (six months) cannot justify the expulsion of an EU citizen if he or she demonstrates that he or she is still actively seeking employment and that he or she has a real chance of being recruited.

1991 03 13 (C-377/89), Cotter and Others.

ECJ judgment of 13 March 1991 (C-377/89), Cotter and Others.

ECLI:EU:C:1991:116.

- *Ann Cotter and Norah McDermott v. Minister for Social Welfare and Attorney General.*
- Request for a preliminary ruling: Supreme Court (Ireland).
- Full obligation to observe the principle of equal treatment by States; obligation to apply the same regime for women and men even if this means a double payment in some families.
- In the case: receipt of an increase in Social Security benefits for a dependent spouse or children without having to prove economic dependence.

1991 04 23 (C-41/90) Macroton.

ECJ Judgment of 23 April 1991 (C-41/90), Macrotron.

ECLI:EU:C:1991:161.

- *Klaus Höfner and Fritz Elser v Macrotron GmbH.*
- Question from Oberlandesgericht München (Germany).
- The public monopoly of employment services collides with free competition if it affects managerial staff and the public office is not in a position to meet demand, and the activity of recruitment companies is also impeded.
- “Economic activity” is any activity dedicated to offering goods or services in a given market, even in the public interest and not for profit, unless it involves the exercise of the prerogatives of the public authority.

1991 06 18 (C-260/89), ERT.

ECJ Judgment of 18 June 1991 (C-260/89), ERT.

ECLI:EU:C:1991:254.

- *EllinikiRadiophoniaTileorassiAE and Panellinia OmospondiaSillogon Prossopikou v. Dimotiki Etairia Plirophorissis, Sotirios Kouvelas, Nicolaos Avdellas and others.*
- Question referred for a preliminary ruling by Monomeles Protodikeio Thessalonidis (Greece).
- EU law does not preclude a television monopoly, for reasons of public interest, but its organisation must respect Community freedoms.
- EU law opposes a monopoly on sports broadcasting rights.

1991 06 20 (C-356/89), Newton.

ECJ judgment of 20 June 1991, Newton.

ECLI:EU:C:1991:265.

- *Roger Stanton Newton v. Chief Adjudication Officer.*
- Request for a preliminary ruling: Social Security Commissioner - United Kingdom.
- Social Security coordination regulations. It is not necessary to be insured prior to the Social Security legislation of the State in which you intend to enjoy the non-contributory benefit.

1991 07 25 (C-288/89), Stichting Collectieve Antennevoorziening Gouda/Commissariaat voor de Media.

ECJ Judgment of 25 July 1991 (C-288/89), Stichting Collectieve Antennevoorziening Gouda/Commissariaat voor de Media.

ECLI:EU:C:1991:323.

- *Stichting Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media*.
- Request for a preliminary ruling: Raad van State - Netherlands.
- Establishment of restrictions on the freedom to provide services: for its validity it is necessary that the same result cannot be achieved through other means (in the case: transmission of cable television programmes, broadcast from other States, containing advertising messages).

1991 07 25 (C-362/89), D'Urso and Others.

ECJ Judgment of 25 July 1991 (C-362/89), D'Urso and others.

ECLI:EU:C:1991:326.

- *Giuseppe d'Urso and Adriana Ventadori and Others v. Ercole Marelli Elettromeccanica Generale SpA and Others*.
- Request for a preliminary ruling: Pretura di Milano (Italy).
- Directive 77/187 implies that all employment contracts existing on the date of transfer are transferred to the transferee.
- Subrogation operates as long as the transferred production unit continues its activity, even if it comes from a company in difficulty.

1991 07 25 (C-76/90), Säger/Dennemeyer.

ECJ judgment of 25 July 1991 (C-76/90), Säger v Dennemeyer.

ECLI:EU:C:1991:331.

- *Manfred Säger v. Dennemeyer & Co. Ltd.*
- Request for a preliminary ruling: Oberlandesgericht München (Germany).
- Any type of rule that prevents the activities of a borrower established in another State must be annulled, even if it applies indistinctly to nationals and non-nationals (in the case: Industrial Property Agents).

1991 10 04 (C-196/90), by Paep.

ECJ judgment of 4 October 1991, De Paep.

ECLI:EU:C:1991:381.

- *Fonds voor Arbeidsongevallen against Madeleine De Paep*.
- Request for a preliminary ruling: Hof van Cassatie - Belgium.
- Social Security coordination regulations. Determination of the applicable national law, mandatory nature.

1991 11 19 (C-6/1990 and C-9/90), Francovich.

ECJ Judgment of 19 November 1991 (C-6/1990 and C-9/90), Francovich.
ECLI:EU:C:1991:428.

- *Andrea Francovich and Danila Bonifaci and others v Italian Republic.*
- The question referred for a preliminary ruling by Pretura di Vicenza and Pretura di Bassano del Grappa (Italy).
- (Directive 80/987/EEC, insolvency): the provisions on the protection of employees in the event of the insolvency of the employer cannot be relied on before the national courts in the absence of enforcement measures taken within the prescribed period.
- The Member State is obliged to make good the damage that results to individuals from the failure to adapt, otherwise it would undermine the effectiveness of the Directive and undermine the protection of rights.
- The principle of State liability for damage caused to individuals by breaches of Community law attributable to it is inherent in the Treaty system.

1992

1992 01 16 (C-57/90), Commission v France.

ECJ judgment of 16 January 1992 (C-57/90), Commission v. France.
ECLI:EU:C:1992:10.

- *Commission of the European Communities v French Republic.*
- (Regulation 1408/71): provisions for supplementary pension schemes adopted by the authorities with professional or inter-professional bodies, trade unions or undertakings, or by collective agreements are excluded from the term “legislation” of Community coordination.

1992 01 28 (C-204/90), Bachmann.

ECJ judgment of 28 January 1992, (C-204/90), Bachmann.
ECLI:EU:C: 1992:35.

- *Hanns-Martin Bachmann v. Belgian State.*
- Request for a preliminary ruling: Cour de cassation (Belgium).
- (Freedom to provide services and freedom of movement): EU law goes against personal income tax regulations that only allow old-age, disability and death insurance premiums to be considered a deductible expense if they are paid to entities established in the State itself.
- The lack of Community harmonisation measures, the effectiveness of tax control or fiscal coherence do not justify the limitation.

1992 02 26 (C-3/90), Bernini.

ECJ Judgment of 26 February 1992 (C3/90), Bernini.

ECLI:EU:C:1992:89.

- *M. J. E. Bernini v. Minister van Onderwijs en Wetenschappen.*
- Request for a preliminary ruling: College van Beroep Studiefinanciering (Netherlands).
- A migrant worker who voluntarily leaves his job in order to devote himself fully to his studies in the country of which he is a national after a certain period of time retains his status as a worker provided that there is a link between his previous professional activity and the studies in question.
- The financing of education for the worker's children constitutes a social advantage in respect of which freedom of movement operates and there is no additional requirement of residence.

1992 02 26 (C-357/89), Raulin.

ECJ Judgment of 26 February 1992 (C-357/89).

ECLI:EU:C:1992:87.

- *V. J. M. Raulin contra Minister van Onderwijs en Wetenschappen.*
- Request for a preliminary ruling from the College van Beroep Studiefinanciering (Netherlands).
- (Freedom of movement, Regulation 1612/68): it is not possible to require a student who is a national of another Member State who is entitled to reside in the host State to have a residence permit in order to benefit from the scheme for the financing of study expenses.

1992 05 10 (C-29/91), Redmond Stichting.

ECJ judgment of 10 May 1992 (C-29/91), Redmond Stichting.

ECLI:EU:C:1992:220.

- *Dr. Sophie Redmond Stichting v. Hendrikus Bartol et al.*
- Request for a preliminary ruling: Kantonrecht Groningen - Netherlands.
- There is a transfer of a company in the case of a non-profit entity (assistance to drug addicts) that ceases to receive public subsidies if they are directed to another entity that maintains the activity, provided that the transferred entity retains its identity.
- In order to assess the preservation of identity, it is necessary to assess all the concurrent factual circumstances, starting with the performance of the same or similar functions.

- The fact that the transfer is the result of unilateral decisions of the public authorities does not preclude the application of the Directive.

1992 06 04 1992 (C-360/90), Bötel.

ECJ judgment of 4 June 1992 (C-360/90), Bötel.

ECLI:EU:C:1992:246.

- *Arbeiterwohlfahrt der Stadt Berlin e.V. v. Monika Boetel.*
- Question referred by the Landesarbeitsgericht Berlin (Germany).
- Indirect discrimination; compensation to members of the Works Council; part-time workers who are mostly women.
- In the case: the members of the Committee receive training useful for their task and are paid for the time invested up to the limit of the individual schedule.

1992 07 08 (E-102/91), Knoch.

ECJ judgment of 8 July 1992, Knoch.

ECLI:EU:C:1992:303.

- *Doris Knoch against Bundesanstalt für Arbeit.*
- Request for a preliminary ruling: Bundessozialgericht - Germany.
- Social Security coordination regulations. The decisions of the Administrative Commission have no binding legal value.

1992 11 12 (C-209/91), Rask and Christensen.

ECJ judgment of 12 November 1992 (C-209/91), Rask and Christensen.

ECLI:EU:C:1992:436.

- *Anne Watson Rask and Kirsten Christensen v. Iss Kantineservice A/S.*
- Request for a preliminary ruling: Søg og Handelsretten (Denmark).
- Directive 77/187/EEC (transfer of undertaking) applies to cases in which a factory (Philips) outsources the management of a certain service (canteen) for its employees and which it had been providing directly.
- The assignee must respect the structure and date of payment of the salary, maintaining the conditions provided for in the original agreement until its expiration or entry into force of another.

1992 12 16 (C-132/91), Katsikas and Others.

ECJ Judgment of 16 December 1992 (C-132/91), Katsikas and others.

ECLI:EU:C:1992:517.

- *Grigorios Katsikas v. Angelos Konstantinidis and Uwe Skreb and Günter Schroll v. PCO Stauereibetrieb Paetz & Co. Nachfolger GmbH*.
- Requests for a preliminary ruling: Arbeitsgericht Bamberg and Arbeitsgericht Hamburg (Germany).
- Directive 77/187 does not prevent a worker affected by the transfer from refusing the change of employer, but neither does it require the transferor to be obliged to keep him or her in his or her workforce.
- It is up to national law to clarify the fate of the employment contract in such cases.

1993

1993 07 13 (C-125/92), Mulox.

ECJ Judgment of 13 July 1993 (C-125/92), Mulox.

ECLI:EU:C:1993:306.

- *Mulox IBC Ltd v Hendrick Geels*.
- Question referred for a preliminary ruling by the Cour d'appel de Chambéry (Court of Appeal, France).
- Free movement of workers: the usual place of work when carrying out activities in several States is the one where the worker mainly fulfils his obligations.
- Such a criterion applies when the functions are carried out from an office in which the worker has established his residence, to which he returned after each professional trip.

1993 08 02 (C-271/91), Marshall.

ECJ Judgment of 2 August 1993 (C-271/91), Marshall.

ECLI:EU:C:1993:335.

- *M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority*.
- Request for a preliminary ruling: House of Lords - United Kingdom.
- (Directive 76/207/EEC): EU law precludes compensation for damage suffered by a person as a result of discriminatory dismissal from being limited by a ceiling set a priori, as well as by the absence of interest intended to compensate for the loss suffered by the beneficiary of the compensation, due to the passage of time until the actual payment of the capital granted.
- A person harmed by a discriminatory dismissal may argue with a State authority acting as an employer to exclude a national provision im-

sing limits on the amount of compensation that may be obtained by way of compensation.

1993 08 03 (C-158/91), Levy.

ECJ Judgment of 2 August 1993 (C-158/91), Levy.

ECLI:EU:C:1993:332.

- *Ministère public y Direction du travail et de l'emploi v. Jean-Claude Levy.*
- Question referred for a preliminary ruling by Tribunal de police de Metz (France).
- Conflict of law between ILO Convention 89 (prohibiting night work for women) and Article 5 of Council Directive 76/207/EEC: The national court must ensure full compliance with the provision of the Directive by disapplying any contrary provision of national law, unless the application of that provision is necessary to ensure compliance by the Member State concerned with obligations arising from an agreement concluded with third countries before the entry into force of the EEC Treaty.

1993 10 06 (C-109/91), Ten Oever.

ECJ Judgment of 6 October 1993 (C-109/91), Ten Oever.

ECLI:EU:C: 1993:833.

- *Gerardus Cornelis Ten Oever contra Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbe-drijf.*
- Request for a preliminary ruling: Kantongerecht Utrecht (Netherlands).
- Non-discrimination in pay on the basis of gender (Article 119 of the EEC Treaty) is applicable to pensions in favour of the survivor derived from the supplementary pension scheme, as this pension is linked to the employment contract of the deceased.
- Equal treatment in matters of company pensions is required only in respect of periods of employment after 17 May 1990 (Barber judgment).

1993 10 27 (C-338/91), Steenhorst-Neerings.

ECJ Judgment of 27 October 1993 (C-338/91), Steenhorst-Neerings.

ECLI:EU:C:1993:857.

- *H. Steenhorst-Neerings v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen.*
- The question referred by the Raad van Beroep te 's-Hertogenbosch (Netherlands).
- Progressive application of the principle of equality; retroactivity of an application for incapacity for work.

- EU law does not prevent anyone (woman or man) from being deprived of the TD allowance if they receive a widow's or widower's pension.

1993 11 09 (C-132/92), Roberts.

ECJ Judgment of 9 November 1993 (C-132/92), Roberts.

ECLI:EU:C:1993:868.

- *Birds Eye Walls Ltd v. Friedel M. Roberts.*
- Request for a preliminary ruling: Court of Appeal (England) - United Kingdom.
- Calculation of the amount of a transitional pension in the event of early retirement; possibility of taking into account the pension of the general regime that will be received later, different for women and men.

1993 12 14 (E-110/91), Moroni.

ECJ Judgment of 14 December 1993 (C-110/91), Moroni.

ECLI:EU:C:1993:926.

- *Michael Moroni v. Collo GmbH.*
- Request for a preliminary ruling: Arbeitsgericht Bonn (Germany).
- It is contrary to the principle of equal treatment (Article 119 TEC) to regulate a supplementary occupational pension plan that implies that a worker can only access a pension at an older age than a woman in the same circumstances, because different retirement ages have been set according to sex.

1993 12 16 (C-334/92), Wagner Miret.

ECJ judgment of 16 December 1993 (C-334/92), Wagner Miret).

ECLI:EU:C:1993:945.

- *Teodoro Wagner Miret v. Wage Guarantee Fund.*
- Request for a preliminary ruling from the High Court of Justice of Catalonia.
- Senior management staff cannot be excluded from the scope of Council Directive 80/987/EEC, as amended by Directive 87/164/EEC, since they are classified as employees under national law and are not listed in Section I of the Annex to the Directive.
- States are not obliged to protect all workers (e.g. senior managers) through the same guarantee institution.
- The deficient transposition does not confer the right to claim against FOGASA; but it is against the State, by way of damages.

1993 12 22 (C-152/91), Neath.

ECJ Judgment of 22 December 1993 (C-152/91), Neath.

ECLI:EU:C:1993:949.

- *David Neath v. Hugh Steeper Ltd.*
- Request for a preliminary ruling: Industrial Tribunal, Leeds - United Kingdom.
- In accordance with the Barber doctrine (ECJ Judgment of 17 May 1990), the temporal limitation of the application of the principle of equal treatment must also be applied to the calculation of the value of the mobilisation of consolidated rights.
- On the other hand, the use of actuarial factors according to sex in the capitalisation method of defined benefit occupational pension plans does not fall within the scope of Article 119 of the EEC Treaty.

1994

1994 02 23 (C-419/92), Scholz.

ECJ judgment of 23 February 1994 (C-419/92), Scholz.

ECLI:EU:C:1994:62.

- *Ingetraut Sholz vs. Opera Universitaria di Cagliari and Cinzia Porcedda.*
- Question referred for a preliminary ruling by the Tribunale amministrativo regionale per la Sardegna (Regional Court of Sardinia) (Italy).
- (Professional experience valued for access to employment:) Article 48 of the EEC Treaty prohibits not only overt discrimination based on nationality, but also any form of covert discrimination (indirect and unjustified) which, by applying other differentiation criteria, leads in fact to the same result.
- A body may not make distinctions in relation to Community nationals on the basis of whether the activities have been carried out in the public administration of the same State or in that of another Member State.

1994 03 24 (C-71/93), Van Poucke.

ECJ Judgment of 24 March 1994 (C-71/93), Van Poucke.

ECLI:EU:C:1994:120.

- *Guido Van Poucke against Rijksinstituut voor de Sociale Verzekeringen der Zelfstandigen y Algemene Sociale Kas voor Zelfstandigen.*
- Question referred for a preliminary ruling by the Arbeidshof te Gent (Belgium).
- Civil servants are considered to be employees. In public administration jobs, no distinction can be made between those held by civil servants and those occupied by other agents.
- Thus, a career military officer in active service in Belgium falls within the personal scope of Regulation 1408/71 (Social security for migrants).

1994 04 14 (C-392/92), Schmidt.

ECJ Judgment of 14 April 1994 (C-392/92), Schmidt.

ECLI:EU:C:1994:134.

- *Christel Schmidt vs. Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen.*
- Request for a preliminary ruling: Landesarbeitsgericht Schleswig-Holstein (Germany).
- Directive 77/187/EEC (transfer of undertaking) applies when an employer entrusts to a third party the cleaning tasks that it had been undertaking directly, even if they were carried out by a single person.

1994 04 26 (C-228/92), Roquette Frères SA.

ECJ Judgment of 26 April 1994 (C-228/92), Roquette Frères SA.

ECLI:EU:C:1994:168.

- *Roquette Frères SA v Hauptzollamt Geldern.*
- Request for a preliminary ruling from Finanzgericht Düsseldorf - Germany.
- A judgment of the Court of Justice declaring the invalidity of a Community act on a preliminary ruling has, in principle, retroactive effect, as does a judgment annulling it.
- It is for the Court, when it makes use of the possibility of limiting the retroactive effect of a declaration of invalidity of a Community regulation, to determine whether an exception to that limitation of the temporal effect conferred on its judgment may be provided for in favour of the party which brought the action before the national court against the

national act implementing the regulation, or whether, on the contrary, a declaration of invalidity that only has effects in the future constitutes an appropriate remedy.

1994 05 04 (C-421/92), Habermann-Beltermann.

ECJ judgment of 5 May 1994 (C-421/92), Habermann-Beltermann.
ECLI:EU:C:1994:187.

- *Gabriele Habermann-Beltermann v. Arbeiterwohlfahrt, Bezirksverband Ndb./Opf. e.V.*
- Request for a preliminary ruling: Arbeitsgericht Regensburg, Landshut - Germany.
- (Directive 76/207/EEC, non-discrimination in employment on the basis of gender): EU law precludes an employment contract, of indefinite duration, for activity to be carried out at night, concluded without the worker's and employer's knowledge of the pregnancy, from being declared null and void due to the legal prohibition of night work for pregnant women.
- EU law also precludes the annulment of the contract on the grounds that the employer made a mistake about the essential qualities of the worker at the time the contract was concluded.

1994 06 08 (C-382/92), Commission v United Kingdom.

ECJ Judgment of 8 June 1994. C-382/92. Commission v. United Kingdom.
ECLI:EU:C:1994:233.

- *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.*
- Appeal for non-compliance.
- Directive 77/187/EEC (transfer of undertakings): failure to fulfil obligations by failing to provide for the appointment of workers' representatives where the employer does not agree to the appointment, excluding non-profit-making undertakings from the scope of application, failing to oblige the transferor or transferee providing for the adoption of measures in respect of their employees to consult the representatives of their employees in good time with the representatives of their employees in order to reach an opportunity to reach an agreement with the representatives of their employees in order to reach an opportunity to take advantage of the measures in respect of their employees. to an agreement and by not establishing effective sanctions in the event that the employer fails to inform and consult the workers' representatives.

1994 06 29 (C-60/93), Aldewereld.

ECJ Judgment of 29 June 1994, Aldewereld.

ECLI:EU:C:1994:271.

- *R. L. Aldewereld v. Staatssecretaris van Financiën.*
- Request for a preliminary ruling: Hoge Raad - Netherlands.
- Social Security coordination regulations. Worker posted to a third country, subjective scope of application of the Regulations.

1994 07 14 (E-32/93), Webb.

SJTCE of 14 July 1994 (C-32/93), Webb.

ECLI:EU:C:1994:300.

- *Carole Louise Webb v EMO Air Cargo (UK) Ltd.*
- Request for a preliminary ruling: House of Lords - United Kingdom.
- (Directive 76/207/EEC, non-discrimination in employment on grounds of gender): EU law precludes the dismissal of a worker who has been hired for an indefinite period with the aim of initially replacing another worker during the latter's maternity leave and who cannot carry out such a replacement because she is pregnant shortly after her hiring.

1994 07 14 (C91/92), Faccini Dori.

ECJ Judgment of 14 July 1994 (C91/92), Faccini Dori.

ECLI:EU:C:1994:292.

- *Paola Faccini Dori v. Recreb Srl.*
- Question referred by Giudice Conciliatore Di Firenze (Italy).
- Consumer protection in the case of contracts negotiated outside commercial establishments.
- Unilateral termination of the contract under an EEC Directive in the absence of national law: impossibility of invoking it in disputes between individuals.
- State liability in the absence of measures transposing the Directive: it is for the national court to ensure, in accordance with national law on liability, the right of persons who have suffered damage to obtain compensation.

1994 08 09 (C-43/93), Vander Elst.

ECJ Judgment of 9 August 1994 (C-43/93), Vander Elst.

ECLI:EU:C:1994:310.

- *Raymond Vander Elst v. Office des migrations internationales.*

- Request for a preliminary ruling: Tribunal administratif de Châlons-sur-Marne (Administrative Court, Châlons-sur-Marne) (France).
- EU law precludes a state from obliging companies posting workers to its territory to obtain, for those workers, a work permit issued by a national immigration agency and to pay the corresponding costs, under penalty of an administrative fine.

1994 09 28 (C-200/91), Coloroll Pension Trustees.

ECJ Judgment of 28 September 1994 (C-200/91); Coloroll Pension Trustees ECLI:EU:C:1994:348.

- *Coloroll Pension Trustees Ltd v James Richard Russell and Others.*
- Request for a preliminary ruling: High Court of Justice, Chancery Division (United Kingdom).
- The principle of equal treatment of pay may be invoked by successors against the trustees of an occupational pension plan in relation to survivors' pensions on the death of an employee.

1994 09 28 (C-7/93), Beune.

ECJ Judgment of 28 September 1994 (C-7/93), Beune.
ECLI:EU:C:1994:350.

- *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G.A. Beune.*
- Request for a preliminary ruling: Centrale Raad van Beroep - Netherlands.
- A pension scheme for civil servants, of legal origin but in the management of which the workers' representatives participate and which is linked to the employment held by the civil servant, falls within the scope of Article 119 of the EEC Treaty.
- A provision that lays down different rules for calculating the pension for a married man than for a married woman, to the detriment of the former, is contrary to the principle of equality.

1994 09 28 (C-57/93), Vroege.

ECJ Judgment of 28 September 1994 (C-57/93) Vroege.
ECLI:EU:C:1994:352.

- *Anna Adriaantje Vroege v. NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV.*
- Request for a preliminary ruling: Kantongerecht Utrecht - Netherlands.
- The right to participate in an occupational pension scheme falls within the scope of Article 119 of the EEC Treaty and the prohibition of discrimination contained therein, and that right is not affected by the time

limitation established by the Barber judgment or by Protocol No 2 to the Maastricht Treaty.

1994 09 28 (C-128/93), Fisscher.

ECJ Judgment of 28 September 1994, (C-128/93), Fisscher.

ECLI:EU:C: 1994:353.

- *Geertruida Catharina Fisscher v. Voorhuis Hengelo BV, and another.*
- Request for a preliminary ruling: Kantongerecht Utrecht (Netherlands).
- The administrators of a pension scheme other than the sponsoring employer are also bound by the principle of equal treatment in Article 119 of the EEC Treaty. The members and successors have an action against them as executors of the employer's commitments.

1994 12 15 (C-399/92 and others), Helmig and Others.

ECJ Judgment of 15 December 1994 (C-399/92 and others), Helmig and Others.

ECLI:EU:C:1994:415.

- *Stadt Lengerich v. Angelika Helmig, Waltraud Schmidt v. Deutsche Angestellten-Krankenkasse, Elke Herzog v. Arbeiter-Samariter-Bund Landverband Hamburg e.V., Dagmar Lange v. Bundesknappschaft Bochum, Angelika Kussfeld v. Firma Detlef Bogdol GmbH and Ursula Ludewig v. Kreis Segeberg.*
- Requests for a preliminary ruling: Landesarbeitsgericht Hamm, Arbeitsgericht Hamburg, Arbeitsgericht Bochum, Arbeitsgericht Elmshorn and Arbeitsgericht Neumünster - Germany.
- EU law does not preclude a collective agreement from providing that the overtime allowance is only paid from the time the normal or ordinary working hours of those who work full-time are exceeded.

1995

1995 02 15 (E-415/93), Bosman.

ECJ Judgment of 15 February 1995 (C-415/93), Bosman.

ECLI:EU:C:1995:463.

- *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman.*
- Request for a preliminary ruling: Cour d'appel de Liège (Belgium).

- (Freedom of movement): EU law precludes the application of sporting regulations according to which a footballer who is a national of a Member State may, at the end of the contract binding him or her with a club, be employed by a different club of a different State only if compensation for transfer, training or promotion is paid to the former.
- EU law also precludes the limit on players from other Member States who can line up in competitive matches.

1995 05 31 (C-400/93), Royal Copenhagen.

ECJ Judgment of 31 May 1995 (C-400/93), Royal Copenhagen.

ECLI:EU:C:1995:155.

- *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, on behalf of Royal Copenhagen A/S.*
- Request for a preliminary ruling: Faglige Voldgiftsret - Denmark.
- Application of equal pay to piecework.
- The mere verification that the majority female group obtains greater income from such a work system does not imply that there is discrimination, but it does generate an indication that the company must counteract.
- Comparison between groups should avoid casual or circumstantial results, ensuring the breadth of the group and the comparability of situations.

1995 06 15 (C-422/93, C-423/93, C-424/93), Zabala Erasun.

ECJ Judgment of 15 June 1995, (C-422/93, C-423/93, C-424/93), Zabala Erasun.

ECLI:EU:C:1995:805.

- *Teresa Zabala Erasun, Elvira Encabo Terrazos and Francisco Casquerro Carrillo v. National Employment Institute.*
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of the Autonomous Community of the Basque Country.
- EU law does not prevent the court from finding, in accordance with its national law, that there has been an acquiescence to the form of order sought by the appellants and that this implies, where appropriate, the termination of the main proceedings.
- If the search entails the termination of the litigation, the ECJ lacks jurisdiction to rule on the questions referred for a preliminary ruling.
- (Applications for unemployment benefits, first denied, but accepted by subsequent search by the Managing Entity).

1995 06 29 (C-454/93), Joop Van Gestel.

ECJ judgment of 29 June 1995, Joop Van Gestel.

ECLI:EU:C:1995:205.

- *Rijksdienst voor Arbeidsvoorziening contra Joop van Gestel.*
- Request for a preliminary ruling: Arbeidshof Brussel - Belgium.
- Social Security coordination regulations. Migrant workers. Determination of applicable law. Designation of the competent State in accordance with Article 17 of Regulation (EEC) No 1408/71. Residence and employment in a Member State other than the competent State. Agreements between institutions.

1995 07 11 (C-116/94), Meyers.

ECJ Judgment of 11 July 1995 (C-116/94), Meyers.

ECLI:EU:C:1995:247.

- *Jennifer Meyers v. Adjudication Officer.*
- Question referred for a preliminary ruling by the Social Security Commissioner, London (United Kingdom).
- Application of the principle of equal treatment to conditions of access to employment; family credit benefit.

1995 09 19 (C-48/94), Rygaard.

ECJ judgment of 19 September 1995 (C-48/94), Rygaard.

ECLI:EU:C:1995:290.

- *Ledernes Hovedorganisation, on behalf of Ole Rygaard v Dansk Arbejdsgiverforening, on behalf of Strø Mølle Akustik A/S.*
- Request for a preliminary ruling: Sø- og Handelsretten (Denmark).
- There is no transfer of undertaking (Directive 77/187) because a contractor continues, until it is fully completed and with the agreement of the principal, a work begun by another undertaking and takes over two apprentices and an employee who had already worked on the site and the material that was on site.

1995 10 17 (C-450/93), Kalanke.

ECJ Judgment of 17 October 1995 (C-450/93), Kalanke.

ECLI:EU:C:1995:322.

- *Eckhard Kalanke v. Freie Hansestadt Bremen.*
- Request for a preliminary ruling: Bundesarbeitsgericht - Germany.
- (Directive 76/207/EEC, gender equality at work): EU law precludes legislation which, in the case of candidates of the opposite sex applying

for a promotion with the same qualifications, automatically gives preference to female candidates when women are under-represented in the sector, which is considered concurrent if they do not fill at least half of the posts in each of the grades of the staff category the same is true at all levels of function provided for in the organizational chart.

- National legislation that guarantees the absolute and unconditional preference of women in appointment or promotion goes beyond an incentive measure and goes beyond the limits of positive action.
- (Mr. Kalanke and Mrs. Glissman are in the running for the position of Head of the Parks and Gardens Service of the City of Bremen; they have similar qualifications, although the merits of the former seem somewhat superior.).

1995 11 09 (C-475/93), Thévenon.

ECJ Judgment of 9 November 1995, Thévenon.

ECLI:EU:C:1995:371.

- *Jean-Louis Thévenon and Stadt Speyer - Sozialamt v Landesversicherungsanstalt Rheinland-Pfalz.*
- Request for a preliminary ruling: Sozialgericht Speyer - Germany.
- Social Security coordination regulations. Preferential application of the bilateral Social Security agreement signed between Member States if it is more favourable and expectations of law have been generated.

1995 11 09 (C-479/93), Francovich.

ECJ Judgment of 9 November 1995 (C-479/93), Francovich.

ECLI:EU:C:1995:372.

- *Andrea Francovich vs. Italian Republic.*
- Request for a preliminary ruling from the Pretura circondariales di Vicenza (Italy).
- (Directive 80/987/EEC., business insolvency): EU law only protects workers who provide their services for employers who can be subject to bankruptcy proceedings.

1995 11 22 (C-443/93), Vougioukas.

ECJ Judgment of 22 November 1995 (C-443/93), Vougioukas.

ECLI:EU:C:1995:394.

- *Ioannis Vougioukas and Idryma Koinonikon Asfalisseon (IKA).*
- Question referred for a preliminary ruling by El Elegktiko Synedrio.

- Articles 48 and 51 of the EC Treaty must be interpreted as precluding the period of employment of a person subject to a special regime for civil servants or similar staff, such as doctors holding the IKA, from being taken into account for the purposes of acquiring the right to a pension.
- Periods completed in public hospitals in another Member State shall be taken into account, where national legislation permits periods of employment completed in the national territory in similar establishments to be taken into account.

1995 12 07 (C-449/93), Rockfon.

ECJ Judgment of 7 December 1995 (C-449/93), Rockfon.
ECLI:EU:C:1995:420.

- *Rockfon A/S vs. Specialarbejderforbundet i Danmark.*
- Request for a preliminary ruling: Østre Landsret - Denmark.
- Collective redundancies - Article 1 of Directive 75/129/EEC - Concept of workplace: this is a concept of Community law.
- Different language versions; initial proposal for a Directive; it is not necessary for it to have a management with the power to carry out collective redundancies independently.
- Company that is part of a group of companies.

1995 12 07 (C-472/93), Spano.

ECJ Judgment of 7 December 1995 (C-472/93), Spain.
ECLI:EU:C:1995:421.

- *Luigi Spano and Others v. Fiat Geotech SpA and Fiat Hitachi Excavators SpA.*
- Request for a preliminary ruling: Pretura circondariale di Lecce (Italy).
- EU law on the transfer of undertakings (Directive 77/187) applies to undertakings declared in difficulty under national rules.

1995 12 14 (C-444/93), Megner and Scheffel.

ECJ judgment of 14 December 1995 (C-444/93), Megner and Scheffel.
ECLI:EU:C:1995:442.

- *Ursula Megner and Hildegard Scheffel v. Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz.*
- Request for a preliminary ruling: Sozialgericht Speyer (Germany).
- (Directive 79/7/EEC, non-discrimination in Social Security): on the consideration of “minor jobs”.

- The two applicants, cleaning workers whose hours were 10 hours per week, and whose monthly remuneration did not exceed one seventh of the monthly reference base, are considered to be active population for the purposes of their inclusion in the German social protection legislation.

1996

1996 02 13 (C-342/93), Gillespie and Others.

ECJ Judgment of 13 February 1996 (C-342/93), Gillespie and Others.
ECLI:EU:C:1996:46.

- *Joan Gillespie and Others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board.*
- Reference for a preliminary ruling: Court of Appeal (Northern Ireland) - United Kingdom.
- Directive 75/117/EEC does not impose an obligation to maintain full pay during maternity leave, nor does it lay down specific criteria for determining the amount of benefits to be paid during that period, provided that that amount is not set at an amount which jeopardizes the objective of maternity leave.
- However, in so far as the calculation of those benefits is based on the salary received by the female worker before the start of maternity leave, their amount must include, from its entry into force, salary increases which have taken place between the beginning of the period covered by the reference wages and the end of maternity leave.

1996 03 05 (C-46/93 and C-48/93), Brasserie du Pêcheur and Factortame.

ECJ judgment of 5 March 1996 (C-46/93 and C-48/93), Brasserie du pêcheur and Factortame.
ECLI:EU:C:1996:79.

- *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others.*
- Question referred by Bundesgerichtshof - Germany and High Court of Justice, Queen's Bench Division, Divisional Court - United Kingdom.
- Infringement of EU law attributable to the national legislature: obligation to make good the damage caused to individuals if there is a direct causal link between this breach and the damage suffered by individuals.

- National legislation could not be less favourable or make reparation very difficult. It is not admissible to limit, in a general way, compensable damage only to damage caused to certain specially protected individual assets, excluding loss of profit.
- Compensation cannot be limited only to damage suffered after the delivery of a judgment of the Court of Justice finding the alleged failure to fulfil obligations.

1996 03 07 (C-171/94), Merckx and Neuhuys.

ECJ judgment of 7 March 1996 (C-171/94), Merckx and Neuhuys.
ECLI:EU:C:1996:87.

- *Albert Merckx and Patrick Neuhuys v. Ford Motors Company Belgium SA.*
- Requests for a preliminary ruling: Cour du travail de Bruxelles (Belgium).
- There is a transfer of an undertaking (Directive 77/187) when a car dealership ceases and its activity is taken over by a third party who benefits from the previous commercial promotion and takes over part of the staff, even if no elements of the assets are transferred.
- All the data of the case must be assessed: material elements (buildings and movable property), value of the intangible elements, assumption or not of the majority of the workers, transfer of clientele, analogy of the activities carried out, etc.
- If there is a significant decrease in remuneration in the new company, the termination of the contract requested by the worker is attributable to the employer.

1996 03 07 (C-192/94), El Corte Inglés.

Judgment of 7 March 1996 (C-192/94), El Corte Inglés.
ECLI:EU:C:1996:88.

- *El Corte Inglés vs. Cristina Blázquez Rivero.*
- Question referred for a preliminary ruling by the Court of First Instance No. 1 of Seville.
- (Directive 87/102/EEC, consumer credit): the invocability of Directives against State bodies cannot be applied to relations between individuals.
- A directive cannot be relied on between individuals either on its own or in conjunction with a provision of the Treaty which merely assigns an objective to the Community.

- The failure to transpose cannot justify the direct reliance between individuals on clear, precise and unconditional provisions of directives on consumer protection. If there is no room for a conforming interpretation, the State must compensate for the damage caused provided that the objective of the Directive is to attribute rights to individuals; the content of these rights can be determined on the basis of the provisions of the Directive; and there is a causal link between the breach of the State's obligation and the damage suffered.

1996 04 30 (C-13/94), P. v. S. and Cornwall County Council.

ECJ judgment of 30 April 1996 (C-13/94), P. v S. and Cornwall County Council.

ECLI:EU:C:1996:170.

- *P v. S and Cornwall County Council.*
- Question referred for a preliminary ruling by the Industrial Court of Truro (United Kingdom).
- (Directive 76/207/EEC, gender equality at work): EU law is against the dismissal of a transsexual person for a reason related to their change of sex.

1996 05 02 (C-206/94), Paletta.

ECJ Judgment of 2 May 1996, Paletta.

ECLI:EU:C:1996:182.

- *Brennet AG v. Vittorio Paletta.*
- Request for a preliminary ruling: Bundesarbeitsgericht - Germany.
- Social Security coordination regulations. Recognition of an incapacity for work. Unless there is proven fraud, the validity and accuracy of foreign documents accrediting the assimilable conditions must be admitted.

1996 05 23 (C-237/94), O'Flynn.

ECJ Judgment of 23 May 1996 (C-237/94), O'Flynn.

ECLI:EU:C:1996:206.

- *John O'Flynn v. Adjudication Officer.*
- Question referred for a preliminary ruling by the Social Security Commissioner.
- (Freedom of movement): Article 48 of the EEC Treaty prohibits not only overt discrimination based on nationality, but also any form of disguised discrimination which, by applying other criteria of differen-

tiation, in fact leads to the same result, where it entails the risk of harming, in particular, migrant workers (in the case: amount of funeral expenses), unless the discrimination is objectively justified and proportionate to the objective pursued.

1996 07 02 (C-290/94), Commission v Greece.

ECJ judgment of 2 July 1996 (C-290/94), Commission v. Greece.
ECLI:EU:C:1996:265.

- *Commission of the European Communities v Hellenic Republic.*
- Appeal for breach of its obligations under the Treaty.
- Greece is in breach of the principles of free movement of workers and equal treatment in access to employment, in the public water, gas and electricity distribution sectors, in operational public health services and in the sectors of public education, urban and regional public transport, civil research and postal services, telecommunications and radio and television, as well as in the Athens opera and municipal orchestras.

1996 07 02 (C-473/93), Commission v Luxembourg.

ECJ judgment of 2 July 1996 (C-473/93), Commission v. Luxembourg.
ECLI:EU:C:1996:263.

- *Commission of the European Communities v Grand Duchy of Luxembourg.*
- Appeal for breach of its obligations under the Treaty.
- (Free movement of workers): Luxembourg nationality cannot be required for jobs in the public sectors of research, education, health, land transport, post and telecommunications, water, gas and electricity distribution.
- The application of a functional criterion requires taking into account the nature of the tasks and responsibilities of the job.

1996 09 12 (C-251/94), Lafuente Nieto.

ECJ Judgment of 12 September 1996 (C-251/94), Lafuente Nieto.
ECLI:EU:C:1996:319.

- *Eduardo Lafuente Nieto v. National Social Security Institute (INSS) and General Treasury of Social Security (TGSS).*
- Request for a preliminary ruling: High Court of Justice of the Autonomous Community of the Basque Country.
- Social Security coordination regulations. Calculation of the regulatory base of a Spanish disability pension for a migrant worker.

1996 09 26 (C-79/95), Commission v Spain.

ECJ judgment of 26 September 1996 (C-79/95), Commission v Kingdom of Spain.

ECLI:EU:C:1996:360.

- *Commission of the European Communities v Kingdom of Spain.*
- Failure to fulfil obligations.
- Non-compliance due to failure to transpose a number of Directives within the deadline: 89/654/EEC (minimum health and safety requirements), 89/655/EEC (work equipment), 89/656/EEC (personal protective equipment), 90/269/EEC (manual handling of loads), 90/270/EEC (display screens) and 90/394/EEC (carcinogens).

1996 10 15 (C-298/94), Henke.

ECJ Judgment of 15 October 1996 (C-298/94), Henke.

ECLI:EU:C:1996:382.

- *Annette Henke vs. Gemeinde Schierke and Verwaltungsgemeinschaft Brocken.*
- Request for a preliminary ruling: Arbeitsgericht Halberstadt (Germany).
- The concept of “transfer of an undertaking, business or part of a business” (Directive 77/187/EEC) does not apply to a transfer of administrative powers from a municipality to a group of municipalities.
- EU law on the transfer of a business does not apply to activities that involve the exercise of a prerogative of public authority (even if they include aspects of an economic nature that are ancillary).

1996 10 24 (C-435/93), Dietz.

ECJ judgment of 24 October 1996, (C-435/93), Dietz.

ECLI:EU:C: 1996:395.

- *Francina Johanna Maria Dietz vs. Stichting Thuiszorg Rotterdam.*
- Request for a preliminary ruling: Kantongerecht Rotterdam - Netherlands.
- The right to participate in a compulsory occupational pension scheme falls within the scope of Article 119 of the EEC Treaty.

1996 11 14 (C-305/94), Rotsart de Hertaing.

ECJ judgment of 14 November 1996 (C-305/94), Rotsart de Hertaing.

CLI:EU:C:1996:435.

- *Claude Rotsart de Hertaing v J. Benoidt SA, in liquidation and IGC Housing Service SA.*

- Request for a preliminary ruling: Tribunal du travail de Bruxelles (Belgium).
- Directive 77/187/EEC requires that employment contracts existing on the date of transfer of an undertaking must be assumed by the transferee, irrespective of the agreements reached between the undertakings or the refusal of the new employer.
- The change of employer necessarily takes place on the date of the business transfer, without the transferor or transferee being able to alter it.

1996 12 12 (C-74/95 and C-129/95) Criminal proceedings against X.

ECJ Judgment of 12 December 1996 (C-74/95 and C-129/95), Criminal proceedings against X.

ECLI:EU:C:1996:491.

- *Question referred for a preliminary ruling by: Procura della Repubblica presso la Pretura circondariale di Torino.*
- Scope of Directive 90/270/EEC (equipment with display screens): concept of worker; eye and sight recognition; concept of workstation; content of business obligations.

1997

1997 01 09 (C-383/95), Rutten.

ECJ judgment of 9 January 1997, C-383/95, Rutten.

ECLI:EU:C:1997:7.

- *Petrus Wilhelmus Rutten v. Cross Medical Ltd.*
- Question referred by Hoge Raad (Netherlands).
- Jurisdiction: if a worker carries out activities in several States, the usual place of work is the place where he has established the effective centre of his work activities (office in the place of residence and to which he returns after each business trip).

1997 02 20 (C-88/95), Martínez Losada.

ECJ Judgment of 20 February 1997, Martínez Losada.

ECLI:EU:C:1997:69.

- *Bernardina Martínez Losada, Manuel Fernández Balado and José Paredes against the National Employment Institute (INEM) and the National Social Security Institute (INSS).*
- Request for a preliminary ruling: Juzgado de lo Social n. 2 de Santiago de Compostela - Spain.
- Social Security coordination regulations. The Spanish regulations on unemployment benefit for people over 52 years of age (now 55), refer

to the contingency of unemployment and cannot be subject to the coordination rules of the chapter on old age.

1997 03 11 (C-13/95), Süzen.

ECJ Judgment of 11 March 1997 (C-13/95), Süzen.

ECLI:EU:C:1997:141.

- *Ayşe Süzen contra Zehnacker Gebäudereinigung GmbH Krankenhaus-service.*
- Request for a preliminary ruling: Arbeitsgericht Bonn (Germany).
- Directive 77/187/EEC (transfer) does not apply if a (educational) undertaking terminates the cleaning contract and awards the tasks to a third party, without there being a significant transfer of productive infrastructure, or the assumption of an essential part (quantitative and qualitative) of the workforce.

1997 03 13 (C-197/96), Commission v France.

ECJ judgment of 13 March 1997 (C-197/96), Commission v. France.

ECLI:EU:C:1997:155.

- *Commission of the European Communities v French Republic.*
- Appeal for failure to fulfil obligations.
- Prohibition of female night work in industry: if France denounces ILO Convention No. 89 but maintains the internal regulation that developed it, it is in breach of EU law.
- The provisions of a directive must be implemented with unquestionable mandatory force and with the required specificity, precision and clarity, in order to satisfy the requirement of legal certainty, which requires that, in the event that the directive is intended to create rights in favour of individuals, the beneficiaries must be able to know all their rights.

1997 04 17 (C-336/95), Burdalo Trevejo and others.

ECJ judgment of 17 April 1997 (C-336/95), Burdalo Trevejo and others v. FOGASA.

ECLI:EU:C:1997:204.

- *Pedro Burdalo Trevejo et al. v. Wage Guarantee Fund.*
- Request for a preliminary ruling: Labour Court No. 16 of Barcelona.
- The provisions of the Directive cannot be relied on in relation to a transfer of an undertaking which took place when it had not yet begun to produce legal effects in Spain.

1997 04 22 (C-180/95), Draempaehl.

ECJ Judgment of 22 April 1997 (C-180/95), Draempaehl.
 ECLI:EU:C:1997:208.

- *Nils Draehmpaehl v. Urania Immobilienservice OHG*.
- Reference for a preliminary ruling: Arbeitsgericht Hamburg - Germany.
- (Directive 76/207/EEC) – EU law precludes legislation that makes compensation for damages arising from discrimination on grounds of sex in connection with recruitment subject to the requirement of culpable conduct.
- EU law precludes legislation which, unlike other national rules of civil law and labour law, establishes a priori an overall maximum limit of six months' salary on the sum of the compensation that can be claimed by candidates who have been discriminated against on grounds of sex in connection with a recruitment. when there are several candidates claiming compensation.

1997 07 10 (C-373/95), Maso.

ECJ judgment of 10 July 1997 (C-373/95, Maso and others).
 ECLI:EU:C:1997:353.

- *Federica Maso and others and Graziano Gazzetta and others v. Istituto nazionale della previdenza sociale (INPS) and Repubblica italiana*.
- Request for a preliminary ruling: Pretura circondariale di Venezia (Italy).
- Compensation for damage due to late transposition of Directive 80/987/EEC (insolvency) may take into account the limits set for the guarantee institution.
- The “time of the entrepreneur’s insolvency” is the date of the application for commencement of bankruptcy proceedings or the finding of the definitive closure of the undertaking, in the event of insufficient assets.
- The period of the “last three months of the employment contract” to which the guarantee could be limited must refer to calendar months, since the use of the calendar calculation could have detrimental consequences for the beneficiaries (unless the insolvency occurs on the last day of the month).
- It should be allowed to cumulate the amounts guaranteed by the Directive with a benefit intended to meet the needs of a worker made redun-

dant during the three months following the termination of the employment relationship.

1997 10 02 (C-1/95), Gerster.

ECJ Judgment of 2 October 1997 (C-1/95), Gerster.

ECLI:EU:C:1997:452.

- *Hellen Gerster vs. Freistaat Bayern.*
- Request for a preliminary ruling from the Bayerisches Verwaltungsgericht Ansbach (Germany).
- (Equal pay and Social Security directives): Application of the reference regulations in public employment, for the purposes of calculating time of service and seniority.

1997 10 02 (C-100/95), Kording.

ECJ judgment of 2 October 1997 (C-100/95), Kording.

ECLI:EU:C:1997:453.

- *Brigitte Kording v. Senator für Finanzen.*
- Question referred by the Finanzgericht Bremen (Germany).
- EU law precludes national legislation which provides that, in the case of part-time activity with working hours of no less than half the usual working day, the period of performance of professional duties required to be exempted from the examination for access to the profession of tax adviser is to be extended in the corresponding proportion. when such provisions affect a much greater number of women than men, unless such legislation is justified by objective criteria and unrelated to any discrimination on grounds of sex.

1997 10 09 (C-31/96, C-32/96 and C-33/96), Naranjo Arjona.

ECJ Judgment of 9 October 1997, Naranjo Arjona.

ECLI:EU:C:1997:475.

- *Antonio Naranjo Arjona v. National Social Security Institute (INSS), Francisco Vicente Mateos v. National Social Security Institute (INSS) and General Treasury of Social Security (TGSS) and National Social Security Institute (INSS) v. Laura García Lázaro.*
- Request for a preliminary ruling: High Court of Justice of the Community of Extremadura, Cáceres.
- Social Security coordination regulations. Calculation of the regulatory base of a Spanish disability pension for a migrant worker.

1997 11 04 (C-20/96), Snares.

ECJ judgment of 4 November 1997, Snares.

ECLI:EU:C:1997:518.

- *Kelvin Albert Snares v. Adjudication Officer.*
- Request for a preliminary ruling: Social Security Commissioner - United Kingdom.
- Social Security coordination regulations. Export of special non-contributory benefits. Assimilation of conditions to be carried out in the State of residence.

1997 11 11 (C-409/95), Hellmut Marschall.

ECJ Judgment of 11 November 1997 (C-409/95), Hellmut Marschall.

ECLI:EU:C:1997:533.

- *Hellmut Marshall v. Land Nordrhein-Westfalen.*
- Question referred by the Verwaltungsgericht Gelsenkirchen (Germany).
- Equal treatment of men and women in access to employment: the preference of women in cases of equal skills is compatible with EU law.
- A rule of positive action (in favour of women) is compatible with EU law if it guarantees male candidates that they will be objectively assessed, with female preference declining when the male candidate is better valued.

1997 11 13 (C-248/96), Grahame and Hollanders.

ECJ judgment of 13 November 1997 (C-248/96), Grahame and Hollanders.

ECLI:EU:C:1997:543.

- *R.O.J. Grahame, L.M. Hollanders v. Bestuur van de Nieuwe Algemene Bedrijfsvereniging.*
- Question referred for a preliminary ruling by the Arrondissementsrechtbank te Amsterdam (Netherlands).
- (Regulation 1408/71): those who perform military service (compulsory or voluntary; even in former colonies such as New Guinea) fall within the scope of special provisions regulating insurance against “incapacity for work” (they are periods of work or similar).
- For the purposes of the application of temporary incapacity insurance, the relationship of a person who fulfils an obligation imposed by law or which derives from a commitment other than that resulting from an employment contract and which has been entered into with the compe-

tent authorities for the defence of the country or the protection of public order and the security of the population is not considered to be employment.

1997 11 27 (C-57/96), Meints.

ECJ judgment of 27 November 1997, Meints.

ECLI:EU:C:1997:564.

- *H. Meints v. Minister van Landbouw, Natuurbeheer en Visserij.*
- Request for a preliminary ruling: Raad van State - Netherlands.
- Social Security coordination regulations. Indirect discrimination on grounds of nationality.

1997 12 02 (C-336/94), Dafeki.

ECJ Judgment of 2 December 1997, Dafeki.

ECLI:EU:C:1997:579.

- *Eftalia Dafeki v. Landesversicherungsanstalt Württemberg.*
- Request for a preliminary ruling: Sozialgericht Hamburg - Germany.
- Social Security coordination regulations. Unless there is proven fraud, the validity and accuracy of foreign documents accrediting the assimilable conditions must be admitted.

1997 12 04 (C-253/96), Kampelmann.

ECJ Judgment of 4 December 1997 (C-253/96), Kampelmann.

EU:C:1997:585.

- *Kampelmann and Others v Landschaftsverband Westfalen-Lippe and Others.*
- Request for a preliminary ruling: Landesarbeitsgericht Hamm - Germany.
- (Directive 91/533/EEC, information on contract): information to the worker on the essential elements of the employment contract entails a rebuttable presumption of truthfulness.
- EU law precludes the obligation of the company to communicate from being limited to the name of the activity to be carried out.

1997 12 09 (C-265/95), Commission v France.

ECJ judgment of 9 December 1997 (C-265/95), Commission v. France.

ECLI:EU:C:1997:595.

- *Commission of the European Communities v French Republic.*
- Appeal for non-compliance.

- (Free movement of goods): France has failed to comply with EU law by failing to take all necessary and proportionate measures to ensure that certain actions by individuals do not impede the free movement of fruit and vegetables.

1997 12 18 (C-129/96), Inter-Environnement Wallone.

ECJ Judgment of 18 December 1997 (C-129/96), Inter-Environnement Wallone.

ECLI:EU:C:1997:628.

- *Inter-Environnement Wallonie ASBL vs. Région wallonne.*
- Question referred for a preliminary ruling by the Conseil d'Etat de Belgique.
- Environment (waste disposal, concept).
- Obligations of the Member States during the period of transposition: obligation not to adopt measures which could jeopardise the result prescribed by the Directive. The assessment of whether this is the case is carried out by the judicial body. Criteria for its determination.

1997 12 18 (C-309/96), Annibaldi.

ECJ Judgment of 18 December 1997 (C-309/96), Annibaldi.

ECLI:EU:C:1997:631.

- *Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio.*
- Question referred by Pretura circondariale di Roma.
- Agriculture - Natural and archaeological park - Economic activity - Protection of fundamental rights - Lack of jurisdiction of the Court.

1998

1998 01 15 (C-15/96), Schöning-Kougebetopoulou.

ECJ Judgment of 15 January 1998 (C-15/96), Schöning-Kougebetopoulou.

ECLI:EU:C:1998:3.

- *Kalliope Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg.*
- Question referred by the Arbeitsgericht Hamburg (Arbeitsgericht Hamburg) (Germany).
- The national court is required, without requesting or waiting for the prior elimination of a clause created by means of collective bargaining

or any other procedure, to apply to the members of the group affected by such discrimination the same regime as applies to other workers.

- The activities of specialist doctors are not included within the scope of Article 48.4 of the Treaty (exceptions to freedom of movement).

1998 02 07 (C-249/96), Grant.

ECJ Judgment of 7 February 1998 (C-249/96), Grant.

ECLI:EU:C:1998:63.

- *Lisa Jacqueline Grant v. South-West Trains Ltd.*
- Request for a preliminary ruling: Industrial Tribunal, Southampton - United Kingdom.
- (Directives 75/117 and 76/207, gender equality in employment): non-discrimination in pay on grounds of gender is unrelated to the fact that an employer refuses a reduction in the price of transport in favour of a person of the same sex, with whom a worker has a stable relationship, when such a reduction is granted in favour of the worker's spouse or the person of the opposite sex with whom he or she lives.

1998 03 05 (C-160/96), Molenaar.

ECJ Judgment of 5 March 1998, Molenaar.

ECLI:EU:C:1998:84.

- *Manfred Molenaar and Barbara Fath-Molenaar v. Allgemeine Ortskrankenkasse Baden-Württemberg.*
- Request for a preliminary ruling: Sozialgericht Karlsruhe - Germany.
- Social Security coordination regulations. Coordination of German long-term care benefits as sickness benefits.

1998 03 12 (C-319/94), Dethier Équipement.

ECJ Judgment of 12 March 1998 (C-319/94), Dethier Équipement.

ECLI:EU:C:1998:99.

- *Jules Dethier Équipement SA v. Jules Dassy and Sovam SPRL.*
- Request for a preliminary ruling: Cour du travail de Liège (Belgium).
- Directive 77/187/EEC (transfer of an undertaking) applies in the case of a transfer of an undertaking in a state of judicial liquidation when the activity continues.
- Under EU law, both the transferor and the transferee have the power to dismiss for economic, technical or organisational reasons.
- Workers unlawfully dismissed by the transferor shortly before the transfer of the undertaking and who have not been taken over by the

transferee may invoke against the transferee the illegality of such dismissal.

1998 04 28 (C-120/95), Decker.

ECJ judgment of 28 April 1998, Decker.

ECLI:EU:C:1998:167.

- *Nicolas Decker v. Caisse de maladie des employés privés.*
- Request for a preliminary ruling: Conseil arbitral des assurances sociales - Grand Duchy of Luxembourg.
- Social Security coordination regulations. Health care, reimbursement of expenses. Freedom to provide health services.

1998 04 28 (C-158/96), Kohll.

ECJ Judgment of 28 April 1998, Kohll.

ECLI:EU:C:1998:171.

- *Raymond Kohll vs. Union des caisses de maladie.*
- Request for a preliminary ruling: Cour de cassation - Grand Duchy of Luxembourg.
- Social Security coordination regulations. Health care, reimbursement of expenses. Free movement of goods.

1998 05 07 (C-113/96), Gómez Rodríguez.

ECJ judgment of 7 May 1998, Gómez Rodríguez.

ECLI:EU:C:1998:203.

- *Manuela Gómez Rodríguez and Gregorio Gómez Rodríguez v. Landesversicherungsanstalt Rheinprovinz.*
- Request for a preliminary ruling: Bundessozialgericht - Germany.
- Social Security coordination regulations. Preferential application of the bilateral Social Security agreement signed between Member States if it is more favourable and expectations of law have been generated.

1998 05 12 (C-85/96), Martínez Sala.

ECJ Judgment of 12 May 1998 (C-85/96), Martínez Sala.

ECLI:EU:C:1998:217.

- *María Martínez Sala against Freistaat Bayern.*
- Request for a preliminary ruling from the Bayerisches Landessozialgericht (Germany).
- (Free movement and Council Regulation 1408/71): EU law precludes a Member State from requiring nationals of other Member States

authorised to reside in its territory to present a residence permit duly issued by the national administration in order to receive child-rearing benefit, whereas its own nationals are only required to have their domicile or place of habitual residence in that Member State.

- Even if the employment relationship ends, certain effects are produced from this perspective of free movement and equal treatment.
- In the case: A Spaniard residing in Germany (1968), where she works as an employee (1976 to 1986; 1989), after which she receives social assistance benefits. It is questioned whether in 1993 she retained the status of worker for the purposes of the reference regulations (free movement and Social Security).

1998 05 28 (C-298/97), Commission v Spain.

ECJ judgment of 28 May 1998 (C-298/97), Commission v. Spain.
ECLI:EU:C:1998:270.

- *Commission v. Kingdom of Spain.*
- Action for failure to fulfil obligations brought by the Commission.
- (Directive 91/157/EEC, batteries and accumulators): a Member State cannot fulfil its obligation to draw up an overall programme with a view to achieving certain objectives set out in the Directive, by means of partial substantive action or piecemeal legislation.

1998 06 15 (C-101/87), Bork.

ECJ judgment of 15 June 1988 (C-101/87), Bork.
ECLI:EU:C:1988:308.

- *P. Bork International A/S, in receivership, and Others against Foreningen af Arbejdsledere i Danmark, acting as trustee of Birger E. Petersen, and Jens E. Olsen, and Others v Junckers Industrier A/S.*
- Request for a preliminary ruling: Højesteret (Denmark).
- A transfer (Directive 77/187) exists when a business lease contract is terminated, the owner takes over the company in order to sell it and the new owner continues its operation (after a short period of interruption), taking over half of the workforce, provided that the company retains its identity.

1998 06 17 (C-243/95), Hill and Stapleton.

ECJ Judgment of 17 June 1998 (C-243/95), Hill and Stapleton.
ECLI:EU:C:1996:434.

- *Kathleen Hill and Ann Stapleton v. The Revenue Commissioners, Department of Finance.*

- Request for a preliminary ruling: Labour Court, Dublin – Ireland.
- Different pay scales; service criterion for time actually worked; indirect discrimination.
- In the case: timeshare workers who access a full-time job are assigned a grade of the remuneration scale corresponding to full-time staff who work full-time less than the remuneration scale corresponding to staff who work on a shared day that they previously had, because the employer applies the service criterion calculated in terms of time actually worked.

1998 06 17 (T-135/96) UEAPME.

Judgment of 17 June 1998 (T-135/96), UEAPME v Council.
ECLI:EU:T:1998:128.

- *Union Européenne de l'artisanat et des petites et moyennes entreprises (UEAPME) v. Council of the European Union.*
- Appeal against the ATPI (Fourth Chamber) of 18 March 1997. (C-316/98).
- Representativeness of the social partners: annulment of a directive due to the exclusion of a representative subject at the negotiation stage; interpretation of the agreement on social policy; Statute of the European social partners in the consultation and negotiation phases.

1998 06 18 (C-35/96) Commission v Italy.

ECJ judgment of 18 June 1998 (C-35/96), Commission v. Italy.
ECLI:EU:C:1998:303.

- *Commission of the European Communities v Italian Republic.*
- Appeal for failure to fulfil obligations.
- Concept of “company”; collusive practice.
- Failure of the State to adopt and maintain in force a law obliging the Consiglio Nazionale degli Spedizioneri Doganali (National Council of Customs Agents), by conferring the corresponding decision-making power, to adopt a decision of association of undertakings consisting of fixing a compulsory tariff for all customs agents.

1998 07 14 (C-125/97), Regeling.

ECJ Judgment of 14 July 1998 (C-125/97), Regeling.
ECLI:EU:C:1998:358.

- *A.G.R. Regeling contra Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid.*

- Request for a preliminary ruling: Arrondissementsrechtbank Alkmaar - Netherlands.
- Directive 80/987/EEC (insolvency) means that, where an employee is simultaneously entitled to claims accrued before and after the reference period, the payments made by the employer during the latter tranche must be charged, as a matter of priority, against the earlier claims.

1998 09 24 (C-35/97), Commission v France.

ECJ judgment of 24 September 1998 (C-35/97), Commission v. France.
ECLI:EU:C:1998:431.

- *Commission of the European Communities and the French Republic.*
- The Commission's action against France for a declaration that, by excluding frontier workers from the allocation of supplementary retirement points when their activity has ceased early after the age of 55, it infringed Article 48 of the EC Treaty and Article 7 of Regulation EEC/1612/68.
- The term "legislation" in Regulation EEC/1408/71 shall be excluded from the provisions of supplementary pension schemes adopted by the authorities with professional or inter-professional bodies, trade unions or undertakings, or by collective agreements.

1998 10 25 (C-364/97) Commission v Ireland.

ECJ judgment of 27 October 1998 (C-364/97), Commission v Ireland.
ECLI:EU:C:1998:512.

- *Commission of the European Communities v Ireland.*
- Failure to fulfil obligations.
- Directive 93/103/EC (safety and health at work on board fishing vessels): non-compliance due to failure to transpose within the deadline.

1998 10 27 (C-411/96), Boyle and Others.

ECJ judgment of 27 October 1998 (C-411/96), Boyle and others.
ECLI:EU:C:1998:506.

- *Margaret Boyle and others v. Equal Opportunities Commission.*
- Request for a preliminary ruling: Industrial Tribunal, Manchester - United Kingdom.
- EU law does not preclude the payment of a higher remuneration than the benefit provided for by national legislation on maternity leave from being made subject to the condition that the worker undertakes to return to work after childbirth for at least one month, failing which she

will have to repay the difference between the amount of remuneration paid to her during the leave maternity and that of said benefit.

- EU law precludes a contractual clause that prevents a woman from taking temporary incapacity due to illness during maternity leave unless she decides to return to work and thus end the maternity leave definitively.

1998 10 29 (C-114/97), Commission v. Spain.

ECJ judgment of 29 October 1998 (C-114/97), Commission v Kingdom of Spain ECLI:EU:C:114/97.

- *Commission of the European Communities v. Kingdom of Spain.*
- Appeal for breach of its obligations under the Treaty.
- (Art. 48(4) of the Treaty; freedom of movement): private security companies are not part of the public administration and, moreover, Member States cannot exclude an entire sector of activity from the free movement of workers.

1998 11 12 (C-399/96), Europièces.

ECJ Judgment of 12 November 1998 (C-399/96), Europièces.
ECLI:EU:C:1998:532.

- *Europièces SA v. Wilfried Sanders and Automotive Industries Holding Company SA.*
- Request for a preliminary ruling: Cour du travail de Bruxelles (Belgium).
- A transfer of business (Directive 77/187) occurs when a company in voluntary liquidation transfers all or part of its assets to another company that gives orders to the employee, with the consent of the former.
- If the transferee imposes significant alterations in the working conditions, the employer must be charged with the termination of the contract requested by the worker for this reason.

1998 11 19 (C-66/96), Høj Pedersen and Others.

ECJ judgment of 19 November 1998 (C-66/96), Høj Pedersen and others.
ECLI:EU:C:1998:549.

- *Handels- og Kontorfunktionærernes Forbund i Danmark on behalf of Berit Høj Pedersen v. Fællesforeningen for Danmarks Brugsforeninger and Dansk Tandlægeforening and Kristelig Funktionær-Organisation v. Dansk Handel & Service.*
- Request for a preliminary ruling: Sø- og Handelsretten - Denmark.
- (Art. 119 TEC and Directive 75/117): EU law precludes a pregnant woman who is pregnant and in a situation of TD for this reason, not

receiving her full salary (but a subsidy) when in the case of TD the worker is, in principle, entitled to receive her entire salary from her employer.

- (Directive 76/207): EU law precludes that when an employer considers that he cannot give work to a pregnant woman (who is not in IT) he can force her to stop working without paying her full salary.

1998 12 10 (C-127/96), Hernández Vidal.

ECJ Judgment of 10 December 1998 (C-127/96), Hernández Vidal.
ECLI:EU:C:1998:594.

- *Francisco Hernández Vidal SA v. Prudencia Gómez Pérez, María Gómez Pérez and Contratas y Limpiezas SL.*
- Request for a preliminary ruling: High Court of Justice of Murcia.
- A transfer of an undertaking (Directive 77/187) occurs when a (confectionery) factory terminates the cleaning contract and decides to carry out those tasks itself, provided that the operation is accompanied by the transfer of an economic entity between the two undertakings.

1998 12 10 (C-173/96), Sánchez Hidalgo.

ECJ Judgment of 10 December 1998 (C-173/96), Sánchez Hidalgo.
ECLI:EU:C:1998:595.

- *Francisca Sánchez Hidalgo and others v. Asociación de Servicios Aser and Sociedad Cooperativa Minerva.*
- Request for a preliminary ruling: High Court of Justice of Castilla-La Mancha.
- There is a transfer of a company (Directive 77/187) when the home help contract (Guadalajara City Council) changes ownership as long as the operation is accompanied by the transfer of an economic entity.
- The economic entity is an organized set of people and elements that allows the exercise of an economic activity that pursues its own objective.
- The similarity of services provided successively by the old and the new contractor is not sufficient to establish that there is a transfer of the undertaking.

1998 12 17 (C 2/97) Società italiana petroli SpA (IP) v Borsana Srl.

ECJ judgment of 17 December 1998 (C-2/97), Società italiana petroli SpA (IP) v. Borsana Srl. ECLI:EU:C:1998:613.

- *Società italiana petroli SpA (IP)/Borsana Srl.*
- Question referred for a preliminary ruling by the Court of Genoa, Italy.

- Directives 89/655/EEC (work equipment) and 90/394/EEC (carcinogens): time limit granted to employers by Italian law to adapt work equipment and the protection of workers against risks related to exposure to carcinogens.

1998 12 17 (C-153/97), Grajera.

ECJ Judgment of 17 December 1998, Grajera.

ECLI:EU:C:1998:615.

- *Aristóteles Grajera Rodríguez v. National Social Security Institute (INSS) and General Social Security Treasury (TGSS).*
- Request for a preliminary ruling: Tribunal Supremo - Spain.
- Social Security coordination regulations. Calculation of the regulatory base of the Spanish retirement pension of a migrant worker.

1999

1999 02 09 (C-167/97), Seymour-Smith and Pérez.

ECJ Judgment of 9 February 1999.

ECLI:EU:C:1999:60.

- *Regina v. Secretary of State for Employment, former party Nicole Seymour-Smith and Laura Perez.*
- Request for a preliminary ruling: House of Lords - United Kingdom.
- The principle of equal pay applies to compensation for unfair dismissal.
- In order to determine whether a measure affects men and women differently, it should be checked whether the available statistical data show that a significantly lower percentage of female workers than male workers meet the requirement imposed by that measure; In such a case, indirect discrimination operates and the burden of proof is shifted to the person defending the measure.

1999 05 11 (C-309/97), Wiener Gebietskrankenkasse.

ECJ Judgment of 11 May 1999 (C-309/97), Wiener Gebietskrankenkasse.

ECLI:EU:C:1999:241.

- *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse contra Wiener Gebietskrankenkasse.*
- Request for a preliminary ruling: Oberlandesgericht Wien - Austria.
- (Directive 75/117/EEC): Equal pay for gender is not the case when workers with different professional qualifications carry out the same activity for a long period.

1999 06 08 (C-337/97), C.P.M. Meeusen.

ECJ Judgment of 8 June 1999 (C-337/97), C.P.M. Meeusen.

ECLI:EU:C:1999:284.

- *C.P.M. Meeusen vs. Hoofddirectie van de Informatie Beheer Groep.*
- Question referred for a preliminary ruling by the Commissie van Beroep Studiefinanciering (Netherlands).
- The fact that a person is united in marriage to the director and sole owner of the share capital of the company for which he or she carries out his or her activity does not prevent him or her from being considered a “worker”.

1999 07 08 (C-234/97), Fernández de Bobadilla.

ECJ Judgment of 8 July 1999 (C-234/97), Fernández de Bobadilla.

ECLI:EU:C:1999:367.

- *Teresa Fernández de Bobadilla v. Museo Nacional del Prado, Works Council of the Museo Nacional del Prado and the Public Prosecutor's Office.*
- Question referred for a preliminary ruling by the Labour Court No. 4 of Madrid.
- (Art. 39 TEC, Freedom of movement) EU law is compatible with the collective agreement that reserves the exercise of a certain (non-regulated) profession to persons who hold a diploma issued by an educational institution in that Member State or any other diploma issued abroad and recognized.
- It is necessary to check the extent to which the knowledge and qualifications attested by the diploma obtained by the person concerned are equivalent to those required by the legislation of the host Member State.

1999 09 09 (C-281/97), Krüger.

ECJ judgment of 9 September 1999 (C-281/97), Krüger.

ECLI:EU:C:1999:396.

- *Andrea Krüger vs. Kreiskrankenhaus Ebersberg.*
- Question referred by the Arbeitsgericht München (Germany).
- (Art. 119 of the EEC Code, equal pay by gender): there is indirect discrimination if those who work less than fifteen hours a week and receive less than a certain amount (without the obligation to provide social insurance), being that group mostly women, are excluded by the collective agreement from the granting of a special annual bonus.

1999 09 16 (C-218/98), Abdoulaye and Others.

ECJ Judgment of 16 September 1999 (C-218/98), Abdoulaye and Others.
ECLI:EU:C:1999:424.

- *Oumar Dabo Abdoulaye and Others v Régie nationale des usines Renault SA.*
- Question referred for a preliminary ruling by the Conseil de prud'hommes du Havre (Conseil de prud'hommes du Havre) (Conseil de prud'hommes du Havre) (Conseil de prud'hommes du Havre) (Conseil de prud'hommes du Havre) (Conseil de prud'hommes du Havre).
- (Art. 119 TEC, equal pay by gender): EU law does not preclude the payment of a lump sum allowance reserved only for female workers who start their maternity leave, provided that such allowance is intended to compensate for the occupational disadvantages that the interruption of work entails for them.

1999 09 21 (E-67/96), Albany.

ECJ Judgment of 21 September 1999 (C-67/96), Albany.
ECLI:EU:C:1999:430.

- *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie.*
- Request for a preliminary ruling: Kantongerecht Arnhem (Netherlands).
- Compulsory affiliation to a sectoral pension fund by stipulation established in a collective agreement; compatibility with competition rules.

1999 09 21 (C-115/97 to C-117/97), Brentjens'.

ECJ Judgment of 21 September 1999 (C-115/97 to C-117/97), Brentjens'.
ECLI:EU:C:1999:434.

- *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen.*
- Request for a preliminary ruling: Kantongerecht Arnhem (Netherlands).
- Compulsory affiliation to a sectoral pension fund by stipulation established in a collective agreement; compatibility with competition rules.

1999 09 21 (C-219/97), Drijvende.

ECJ Judgment of 21 September 1999 C-219/97, Drijvende Bokken.
ECLI:EU:C:1999:437.

- *Maatschappij Drijvende Bokken BV vs. Stichting Pensioenfonds voor de Vervoer- in Havenbedrijven.*

- Request for a preliminary ruling: Hoge Raad (Netherlands).
- Compulsory affiliation to a sectoral pension fund by stipulation established in a collective agreement; compatibility with competition rules.

1999 09 21 (C-362/98) Commission v Italy.

ECJ judgment of 21 September 1999 (C-362/98), Commission v. Republic of Italy.

ECLI: EU:C:1999:441.

- *Commission of the European Communities v Republic of Italy.*
- Failure to fulfil obligations.
- Directive 93/103/EC (safety and health on fishing vessels): non-compliance due to failure to transpose within the deadline.

1999 10 21 (C-333/97), Lewen.

ECJ Judgment of 21 October 1999 (C-333/97), Lewen.

ECLI:EU:C:1999:512.

- *Susanne Lewen vs. Lothar Denda.*
- Request for a preliminary ruling: Arbeitsgericht Gelsenkirchen - Germany.
- EU law precludes excluding women on parental leave from the payment of a Christmas bonus, without taking into account the work done during the year, or the periods of maternity leave, when the purpose of the bonus is to compensate for the work done during that year.
- EU law precludes the denial of payment of such a bonus to a woman on parental leave, where the grant of that bonus is subject only to the condition that the worker is in active employment at the time it is granted.
- EU law precludes such a bonus from being reduced proportionately on account of maternity leave, but does not prevent time not worked due to parental leave from being taken into account.

1999 10 28 (C-187/98), Commission v. Greece.

ECJ judgment of 28 October 1999 (C-187/98), Commission v. Greece.

ECLI:EU:C:1999:535.

- *Commission of the European Communities v Hellenic Republic.*
- Appeal for failure of State to fulfil obligations.
- (art. 119 TEC, equal pay): failure by the State to eliminate discriminatory requirements retroactively.

1999 11 23 (C-369/96), Arblade.

ECJ Judgment of 23 November 1999 (C-369/96 and C-376/96), Arblade.
ECLI:EU:C:1999:575.

- *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96).*
- Question referred for a preliminary ruling by the Tribunal correctionnel de Huy (Belgium).
- EU law does not prohibit a state from forcing those who work there as displaced persons to pay the minimum wage.
- EU law prohibits a state from forcing companies that temporarily post labour to pay social contributions.
- In the case of temporary postings, the receiving State may require the company to comply with certain documentary requirements, but without ignoring the virtuality of those completed under the law of the State of origin.

1999 12 02 (E-234/98), Allen.

ECJ Judgment of 2 December 1999 (C-234/98), Allen and others.
ECLI:EU:C:1999:594.

- *G. C. Allen and Others v. Amalgamated Construction Co. Ltd.*
- Request for a preliminary ruling: Industrial Tribunal, Leeds (United Kingdom).
- It is possible to succession companies between companies in the same group even if they have the same owners, the same management, the same facilities and work on the same site.
- A transfer of an undertaking (Directive 77/187) occurs when a company entrusts another company in the same group with mining drilling tasks and transfers to it relevant infrastructure for this purpose.

1999 12 16 (C-47/99), Commission v Luxembourg.

ECJ Judgment of 18 May 2000 (C-47/99).
ECLI:EU:C:1999:629.

- *Commission of the European Communities v Grand Duchy of Luxembourg.*
- Failure of the State.
- (Directive 94/33/EC on the protection of young people at work): Luxembourg has missed the transposition deadline.

2000

2000

2000 01 11 (C-285/98), Kreil.

ECJ Judgment of 11 January 2000 (C-285/98), Kreil.

ECLI:EU:C:2000:2.

- *Tanja Kreil v Bundesrepublik Deutschland*.
- Question referred for a preliminary ruling by the Verwaltungsgericht Hannover (Germany).
- EU law precludes the application of national provisions that generally exclude women from military employment involving the use of weapons (authorising their use in medical units and military music).
- In the case: electronics specialist requests voluntary enlistment in the maintenance service (electromechanics of weapons) of the Army.

2000 02 03 (E-207/98), Mahlburg.

ECJ Judgment of 3 February 2000 (C-207/98), Mahlburg.

ECLI:EU:C:2000:64.

- *Silke-Karin Mahlburg vs. Land Mecklenburg-Vorpommern*.
- Request for a preliminary ruling: Landesarbeitsgericht Mecklenburg-Vorpommern - Germany.
- (Directive 76/207/EEC) EU law precludes the refusal to recruit a pregnant woman for a job for an indefinite period on the ground that a legal prohibition on work linked to that state prevents, during the period of her pregnancy, her from occupying that job from the outset.

2000 02 10 (C-234/96 and C-235/96), Vick.

ECJ Judgment of 10 February 2000 (C-234/96 and C-235/96), Vick.

ECLI:EU:C:2000:73.

- *Deutsche Telekom AG v. Agnes Vick (C-234/96) and Ute Conze (C-235/96)*.
- Request for a preliminary ruling: Landesarbeitsgericht Hamburg - Germany.
- EU law does not preclude national provisions which set out a principle of equality under which all part-time workers have the right to participate retroactively in an occupational pension scheme and to receive a pension on the basis of that scheme.

2000 02 10 (C-202/97), FTS.

ECJ Judgment of 10 February 2000, FTS.

ECLI:EU:C:2000:75.

- *Fitzwilliam Executive Search Ltd against Bestuur van het Landelijk instituut sociale verzekeringen.*
- Request for a preliminary ruling: Arrondissementsrechtbank Amsterdam - Netherlands.
- Social Security coordination regulations. Posting of workers.

2000 03 28 (C-158/97), Badeck.

ECJ judgment of 28 March 2000 (C-158/97), Badeck.

ECLI:EU:C:2000:163.

- *Georg Badeck and Others, with the intervention of: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen.*
- Request for a preliminary ruling: Staatsgerichtshof des Landes Hessen (Germany).
- (Directive 76/207/EEC, non-discrimination in employment on the basis of gender): EU law does not preclude preference in sectors of the public service where women are under-represented, in the case of equal qualifications, provided that the applications are assessed objectively.
- Nor does it oppose legislation that states that the binding objectives of the plan for the promotion of women for temporary positions in the scientific sector or for scientific assistants must provide for a minimum percentage of female staff equivalent to the proportion that women represent among graduates, doctorates or students in the respective specialty.
- Nor does it oppose the rule which, in so far as it seeks to eliminate the under-representation of women, reserves for them at least half of the training places in those professions requiring specialised training in which women are under-represented and in respect of which the State does not exercise a monopoly on training (private training being open to men). unless, despite the adoption of appropriate measures to publicize among women the existence of available places in vocational training, female applications are insufficient.
- Nor does it object to ensuring that, in the case of equal qualifications between candidates of different sexes, qualified women are invited to introductory interviews in sectors in which they are under-represented.

- Nor does it oppose legislation on the composition of workers' representative bodies and management and control bodies, which establishes the objective of ensuring that women's participation in these bodies is at least equal.

2000 03 30 (C-178/97), Banks.

ECJ judgment of 30 March 2000, Banks.

ECLI:EU:C:2000:169.

- *Barry Banks et al. v. Théâtre royal de la Monnaie.*
- Request for a preliminary ruling: Tribunal du travail de Bruxelles v Belgium.
- Social Security coordination regulations. Posting of self-employed workers.

2000 03 30 (C-236/98), Jämställdhetsombudsmannen.

ECJ judgment of 30 March 2000 (C-236/98), Jämställdhetsombudsmannen.

ECLI:EU:C:2000:173.

- *Jämställdhetsombudsmannen against Örebro läns landsting.*
- Request for a preliminary ruling: Arbetsdomstolen - Sweden.
- EU law requires that when calculating the comparative salary (between men and women) the supplement for arduous hours is not counted.
- If a difference in pay is observed between the two groups under comparison and the available statistical data show that in the disadvantaged group there is a much higher proportion of women than men, the employer must justify this difference by objective factors unrelated to any discrimination on grounds of sex.

2000 04 11 (C-51/96), Deliège.

ECJ Judgment of 11 April 2000 (C-51/96), Deliège.

ECLI:EU:C:2000:199.

- *Christelle Deliège v. Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97).*
- Request for a preliminary ruling: Tribunal de première instance de Namur v Belgium.
- A rule requiring a professional sportsman to be in possession of a federation authorisation or to have been selected to be able to participate in a high-level sporting competition in which national teams do not face

each other, in so far as it arises from a necessity inherent in the organisation of such a competition, does not constitute, in itself, a restriction on the freedom to provide services.

2000 04 13 (C-292/97), Karlsson and Others.

ECJ Judgment of 13 April 2000 (C-292/97), Karlsson and Others.
ECLI:EU:C:2000:202.

- *Kjell Karisson and others.*
- Question referred by Regeringsrätten - Sweden.
- Additional levy on milk - Milk quota system in Sweden - Initial allocation of milk quotas - National scheme - Interpretation of Regulation (EEC) No 3950/92 - Principle of equal treatment.

2000 05 18 (C-45/99), Commission v. France.

ECJ Judgment of 18 May 2000 (C-45/99).
ECLI:EU:C:2000:273.

- *Commission of the European Communities v French Republic.*
- Appeal for failure to fulfil obligations.
- (Directive 94/33/EC on protection of young people at work): France has missed the transposition deadline.

2000 05 25 (C-50/99), Podesta.

ECJ Judgment of 25 May 2000 C-50/99), Jean Marie Podesta v CRICA and others.
ECLI:EU:C:2000:288.

- *Jean Marie Podesta v. CRICA and others.*
- Request for a preliminary ruling: Tribunal de grande instance, Paris (France).
- The essential criterion for determining whether a pension scheme is subject to the principle of equal treatment in Article 119 of the EC Treaty is that the pension is paid by reason of the employment relationship maintained with the employer by the insured person.

2000 06 06 (C-281/98), Angonese.

ECJ judgment of 6 June 2000 (C-281/98), Angonese.
ECLI:EU:C:2000:96.

- *Roman Angonese v. Cassa di Risparmio di Bolzano SpA.*
- Question referred by the Pretore di Bolzano (Italy).

- The prohibition of discrimination on grounds of nationality has been extended to private companies.
- It is contrary to Article 48 of the EC Treaty for an employer to make a candidate's access to a recruitment procedure subject to the obligation to prove his or her language skills exclusively by means of a single diploma, such as a certificate, issued in a single province of a Member State.

2000 07 06 (E-407/98) Abrahamson.

ECJ Judgment of 6 July 2000 (C-407/98) Abrahamson.

ECLI:EU:C:2000:367.

- *Katarina Abrahamsson and Leif Anderson vs. Elisabet Fogelqvist*.
- Request for a preliminary ruling: Överklagandenämnden för Högskolan (Sweden).
- (Directive 76/207/EEC, gender equality at work): EU law does not preclude a person of the under-represented sex from having preference over a competitor of the opposite sex, provided that the candidates have equivalent or appreciably equivalent merits and the applications are the subject of an objective assessment that takes into account the particular personal situations of all the candidates.
- It is contrary to EU law to have a regulation that automatically grants preference to candidates of the under-represented sex, provided that they are sufficiently qualified, with the only requirement that the difference between the merits of the candidates of each of the sexes is not so considerable as to violate the requirement of objectivity in the provision of posts.
- (A female candidate, who is sufficiently qualified but has lower merits than the male candidate, was selected for a post of professor of hydrosphere sciences at the University of Gothenburg (Sweden).

2000 07 06 (E-11/99) Margit Dietrich.

ECJ judgment of 6 July 2000 (C-11/99), Margit Dietrich.

ECLI:EU:C:2000:368.

- *Margrit Dietrich vs. Westdeutscher Rundfunk*.
- Question referred by the Arbeitsgericht Siegen (Germany).
- Directive 90/270/EEC (display screen equipment): concept of “graphic display” (includes screens showing film recordings in analogue or digital format) and “machine driving station” (not intended for the production of images for television programmes).

2000 07 06 (C-73/99), Movrin.

ECJ Judgment of 6 July 2000, Movrin.

ECLI:EU:C:2000:369.

- *Viktor Movrin v. Landesversicherungsanstalt Westfalen.*
- Request for a preliminary ruling: Sozialgericht Münster - Germany.
- Social Security coordination regulations. Subjective scope of the principle of equality of the Regulations.

2000 09 12 (C-180/98 to C-184/98), Pavlov.

STJ 12-9-00 (C-180/98 to C-184/98), Pavlov.

ECLI:EU:C:2000:428.

- *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten.*
- Request for a preliminary ruling: Kantongerecht Nijmegen (Netherlands).
- Compulsory affiliation to a professional pension fund by agreement of the representative organisation of certain liberal professionals; compatibility with competition rules.

2000 09 14 (C-343/98), Collino.

ECJ Judgment of 14 September 2000 (C-343/98), Collino.

ECLI:EU:C:2000:441.

- *Renato Collino and Luisella Chiappero against Telecom Italia SpA.*
- Reference for a preliminary ruling: Pretura di Pinerolo (Italy).
- Directive 77/187/EEC (transfer of undertaking) applies when a public entity (telecommunications) is transferred to a company governed by private law (administrative concession), but on condition that the persons concerned were originally bound by employment contracts.
- EU law does not prevent changes in working conditions by the transferor as long as it is outside the transfer.

2000 09 21 (C-222/98), van der Woude.

ECJ judgment of 21 September 2000 (C-222/98), van der Woude.

ECLI:EU:C:2000:475.

- *Hendrik van der Woude v. Stichting Beatrixoord.*
- Request for a preliminary ruling: Kantongerecht Groningen (Netherlands).
- Collective agreement that imposes on the company the obligation to contribute to health insurance (with the Companies designated by the agreement itself): compatibility with competition rules.

2000 09 21 (C-124/99), Borowitz.

ECJ Judgment of 21 September 2000, Borowitz.

ECLI:EU:C:2000:485.

- *Carl Borowitz v. Landesversicherungsanstalt Westfalen.*
- Request for a preliminary ruling: Sozialgericht Münster - Germany.
- *Social Security coordination regulations. Non-discrimination on grounds of nationality.*

2000 09 26 (C-175/99), Mayeur.

ECJ Judgment of 26 September 2000 (C-175/99), Mayeur.

ECLI:EU:C:2000:505.

- *Didier Mayeur v. Association Promotion de l'information messine (APIM).*
- Request for a preliminary ruling: Conseil de prud'hommes de Metz (Conseil de prud'hommes, Metz) (Conseil de prud'hommes, Metz, France).
- There is a transfer of a company (Directive 77/187/EC) when a City Council assumes the advertising and information activities, carried out by a private non-profit association, provided that the transferred entity retains its identity.

2000 09 26 (C-443/98), Unilever.

ECJ Judgment of 26 September 2000 (C-443/98), Unilever.

ECLI:EU:C:2000:496.

- *Unilever Italia SpA vs. Central FoodSpA.*
- Request for a preliminary ruling: Pretore di Milano (Italy).
- Technical standards and regulations - Obligations to notify and defer the obligation. It is for the national court, in civil proceedings between individuals concerning contractual rights and obligations, to disapply a national technical regulation adopted during the period of postponement of adoption provided for in Article 9 of Council Directive 83/189/EEC of 28 March 1983.

2000 10 03 (C-303/98) SIMAP.

ECJ Judgment of 3 October 2000.

ECLI:EU:C:2000:528.

- *Union of Public Assistance Doctors (SIMAP) against the Ministry of Health and Consumer Affairs of the Generalitat Valenciana.*

- Preliminary ruling submitted by the High Court of Justice of the Valencian Community.
- Primary Care Doctors are working time, while in the localized on-call only the one actually provided is counted.
- Cyclical activity at night does not mean that we are dealing with night workers.
- Certain aspects of Directive 93/104 (working time) on shifts or night shifts can be directly applied.

2000 11 09 (C-75/99), Telen.

ECJ Judgment of 9 November 2000, Telen.

ECLI:EU:C:2000:608.

- *Edmund Thelen v. Bundesanstalt für Arbeit.*
- Request for a preliminary ruling: Bundessozialgericht - Germany.
- Social Security coordination regulations. Preferential application of the bilateral Social Security agreement signed between Member States if it is more favourable and expectations of law have been generated.

2000 12 07 (C-79/99), Schnorbus.

ECJ Judgment of 7 December 2000 (C-79/99), Schnorbus.

ECLI:EU:C:2000:676.

- *Julia Schnorbus v. Land Hessen.*
- Request for a preliminary ruling: Verwaltungsgericht Frankfurt am Main (Germany).
- The regulation on dates of admission to preparatory legal internships which are a prerequisite for access to employment in the civil service fall within the scope of Directive 76/207/EEC (gender equality in employment).
- It is not discriminatory in such a case to compensate for the delay arising from the performance of compulsory military or civilian service.

2001

2001 01 25 (C-172/99), Liikenne.

ECJ Judgment of 25 January 2001 (C-172/99), Liikenne.

ECLI:EU:C:2001:59.

- *Oy Liikenne Ab against Pekka Liskojärvi and Pentti Juntunen.*
- Request for a preliminary ruling: Korkein oikeus (Finland).
- The resumption, by an undertaking, of the operation of regular local bus lines (hitherto operated by another undertaking) following a proce-

dures for the award of a public contract may be a transfer of an undertaking (Directive 77/187/EEC).

- The entry into play of this subrogatory figure requires that there has been a transfer of significant material elements (the concession of the line not being sufficient).

2001 02 08 (C-350/99), Lange.

ECJ Judgment 8 February 2001 (C-350/99), Lange.

ECLI:EU: C:2001:84.

- *Wolfgang Lange v. Georg Schünemann GmbH*.
- Reference for a preliminary ruling in Arbeitsgericht Bremen - Germany.
- (Directive 91/533/EEC, contract information): EU law contains an illustrative list of the matters to be reported; any other essential and customary (e.g. overtime) must be included.
- EU law does not require the non-application of essential elements omitted (or defaced) in the document delivered to the worker.
- Failure to comply with the duties to provide information does not prevent the general rules on the distribution of evidence in the proceedings from being applied.

2001 03 08 (C-215/99), Jauch.

ECJ judgment of 8 March 2001, Jauch.

ECLI:EU:C:2001:139.

- *Friedrich Jauch v Pensionsversicherungsanstalt der Arbeiter*.
- Request for a preliminary ruling: Landesgericht Feldkirch - Austria.
- Social Security coordination regulations. Identification of special non-contributory benefits.

2001 03 15 (E-165/98), Mazzoleni and ISA.

ECJ Judgment of 15 March 2001 C-165/98 - Mazzoleni and ISA.

ECLI:EU:C:2001:162.

- *Criminal proceedings brought against André Mazzoleni and Inter Surveillance Assistance SARL, civilly liable, with the intervention of: Eric Guillaume and Others*.
- Request for a preliminary ruling: Tribunal correctionnel d'Arlon (Belgium).
- (Freedom of movement): EU law does not preclude the law which imposes an obligation on an undertaking posting employees to its terri-

tory to pay its workers the minimum remuneration laid down by the national rules of that State.

- However, this may be disproportionate in the case of an undertaking established in a border region which is required to carry out, on a part-time basis and for short periods, part of its work outside the State in which the undertaking is established.

2001 03 29 (C-62/99), Bofrost.

ECJ Judgment of 29 March 2001 (C-62/99), Bofrost.

ECLI:EU:C:2001:188.

- *Betriebsrat der bofrost* Josef H. Boquoi Deutschland West GmbH & Co. KG v. Bofrost* Josef H. Boquoi Deutschland West GmbH & Co. KG.*
- Request for a preliminary ruling: Landesarbeitsgericht Düsseldorf (Germany).
- (Directive 94/45/EC; European Works Council (EEC): EU law imposes an obligation on a company belonging to a group to provide information to internal representative bodies, even if it is not yet clear that the address to which the workers are going is that of a company that exercises control within a group of companies.
- Where data on the structure or organisation of a group of undertakings forms part of the information essential for initiating negotiations with the aim of setting up an EWC, it shall be the responsibility of any undertaking in that group to provide the data at its disposal or which it may obtain to the internal workers' representative bodies that so request.
- Information (number of employees, structure of companies) when it is not yet determined where the central management is located, within a group in which no one company exerts influence over the rest.

2001 05 31 (C-122/99 and C-125/99), D. and Sweden v Council.

ECJ judgment of 31 May 2001 (C-122/99 and C-125/99), D. and Sweden v Council.

ECLI:EU:C:2001:304.

- *D and Kingdom of Sweden v Council of the European Union.*
- Appeal against the judgment of the Court of First Instance of 28 January 1999 in Case T-264/97 D v Council.
- Refusal of a European civil servant to be entitled to a child allowance under the Staff Regulations of Officials of the European Communities

on the ground that his same-sex partner to whom he was not married could not be taken into account; The situation of a married person is not considered comparable to a person who is married through a civil partnership.

2001 06 26 (E-381/99), Brunnhofer.

ECJ judgment of 26 June 2001 (C-381/99), Brunnhofer.

ECLI:EU:C:2001:358.

- *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG.*
- Request for a preliminary ruling: Oberlandesgericht Wien - Austria.
- (Directive 75/117/EEC on non-discrimination in pay on grounds of gender): equal pay must be ensured not only on the basis of an overall assessment of the bonuses granted to workers, but also in the light of each element of pay considered in isolation.
- Belonging to the same professional category does not guarantee that the same functions will be performed.
- It is for the worker who considers himself to be the victim of discrimination to prove that he receives a lower remuneration than that paid by the employer to his co-worker of the opposite sex and that, in fact, he performs the same work or work of equal value, comparable to that performed by his reference colleague; The employer will then have the possibility not only to deny that the requirements for the application of the principle of equal pay for male and female workers are met, but also to invoke objective reasons unrelated to any discrimination.

2001 06 26 (E-173/99), BECTU.

ECJ Judgment of 26 June 2001 (C-173/99), BECTU.

ECLI:EU:C:2001:356.

- *The Queen and Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU).*
- Question referred for a preliminary ruling by the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office).
- Paid annual leave : principle of European Union social law. Enjoyment: no exceptions may be established for its enjoyment between an indefinite term contract or for a fixed duration.
- Duration: the duration of four weeks as a minimum provision, and national legislation does not allow the acquisition of the right to condition the acquisition of the right to a minimum uninterrupted period of employment.

- Purpose: the worker must normally be able to enjoy effective rest, in order to effectively protect his safety and health.

2001 06 28 (C-118/00), Larsy.

ECJ Judgment of 28 June 2001, Larsy.

ECLI:EU:C:2001:368.

- *Gervais Larsy v Institut national d'assurances sociales pour travailleurs indépendants (INASTI)*.
- Request for a preliminary ruling: Cour du travail de Mons - Belgium.
- Social Security coordination regulations. Compensation for damages of the defaulting State.

2001 07 03 (C-241/99), IGC.

ECJ Order of 3 July 2001 (C-241/99), CIG.

ECLI:EU:C:2001:371.

- *Galician Inter-Union Confederation (CIG) v Galician Health Service (Sergas)*.
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of Galicia.
- (Directives 89/391/EEC and 93/104/EC, Safety and health at work): EU law on working time is applicable to medical and nursing staff working in primary care or other out-of-hospital emergency services.
- On-call duty must be considered working time in its entirety and, where appropriate, overtime for the purposes of working day limits.
- In this type of activity, whenever there are compensatory rest periods, the way in which they are distributed can be changed, by means of a regulation or collective agreement.

2001 10 04 (C-438/99), Jiménez Melgar.

ECJ Judgment of 4 October 2001 (C-438/99), Jiménez Melgar.

ECLI:EU:C:2001:509.

- *María Luisa Jiménez Melgar v. Los Barrios City Council*.
- Request for a preliminary ruling: Juzgado de lo Social Único de Algeciras.
- Failure to renew a contract when it has reached its scheduled expiry cannot be regarded as a dismissal prohibited by Directive 85/92/EEC, but if the failure to renew a fixed-term employment contract is due to the worker's pregnancy, it constitutes direct discrimination on grounds of sex. contrary to Directive 76/207/EEC.

2001 10 04 (E-109/00), Tele Danmark.

ECJ Judgment of 4 October 2001 (C-109/00), Tele Danmark.

ECLI:EU:C:2001:513.

- *Tele Danmark A/S vs. Handels- og Kontorfunktionærernes Forbund i Danmark (HK)*.
- Request for a preliminary ruling: Højesteret - Denmark.
- (Directive 76/207/EEC, equal treatment for men and women; Directive 92/85/EEC on the occupational health of pregnant women): they oppose the dismissal of a worker on the grounds of pregnancy, even if she has not informed the employer of the pregnancy, has been hired for a certain period of time and a significant part of it will not be able to carry it out as a result of pregnancy.

2001 10 09 (C-377/98), Netherlands v Parliament and Council.

ECJ judgment of 9 October 2001 (C-377/98), Netherlands v Parliament and Council.

ECLI:EU:C:2001:523.

- *Kingdom of the Netherlands v. European Parliament and Council of the European Union*.
- Action for annulment of Directive 98/44/EC on the legal protection of biotechnological inventions.
- The scope for transposition of a directive is not discretionary; It specifies that the commercial exploitation of an invention cannot be considered contrary to public policy or morality merely because it is prohibited by a legal or regulatory provision.
- The freedom of interpretation and flexibility in transposing the Directives into domestic law is not discretionary, but is conditioned by the duty to incorporate the full content of the rule to be transposed, as well as the spirit and purpose of that rule.

2001 10 09 (C-379/99), Menauer.

ECJ Judgment of 9 October 2001 (C-379/99), Menauer.

ECLI:EU:C: 2001:527.

- *Pensionskasse für die Angestellten der Barmer Ersatzkasse VVaG vs. Hans Menauer*.
- Request for a preliminary ruling: Bundesarbeitsgericht - Germany.
- Fiduciary managers of a supplementary pension scheme are also bound by the principle of equal treatment in Article 119 TEC. The members

and successors have an action against them as executors of the employer's commitments.

2001 10 18 (C441/99), Gharehveran.

ECJ judgment of 18 October 2001 (C441/99), Gharehveran.

ECLI:EU:C:2001:551.

- *Riksskatteverket vs. Soghra Gharehveran*.
- Request for a preliminary ruling: Högsta domstolen - Sweden.
- Directive 80/987 (insolvency) allows an employee (without a shareholding) of an undertaking owned by his spouse to invoke the right to payment of his or her salary claim against the State, even though national legislation excludes close relatives of someone who owns at least one fifth of the company, but who does not own, by themselves, no participation in the capital of said company.

2001 10 25 (C-49/98), Finalarte and others

ECJ Judgment of 25 October 2001 (C-49/98), Finalarte and others.

ECLI:EU:C:2001:564.

- *Finalarte Sociedade de Construção Civil Lda* (C-49/98), *Portugaia Construções Lda* (C-70/98) and *Engil Sociedade de Construção Civil SA* (C-71/98) against *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* and *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft v Amilcar Oliveira Rocha* (C-50/98), *Tudor Stone Ltd* (C-52/98), *Tecnamb-Tecnologia do Ambiente Lda* (C-53/98), *Turiprata Construções Civil Lda* (C-54/98), *Duarte dos Santos Sousa* (C-68/98) and *Santos & Kewitz Construções Lda* (C-69/98).
- Requests for a preliminary ruling: Arbeitsgericht Wiesbaden (Germany).
- EU law does not preclude the receiving State of posted workers from imposing their leave under more advantageous conditions than those provided for by the rule of their State from which they come.
- EU law does preclude a similar measure from being imposed on undertakings in a sector of activity where that obligation does not apply to undertakings in that sector established in that sector.

2001 11 15 (C-49/00), Commission v Italy.

ECJ judgment of 15 November 2001 (C-49/00), Commission v. Italy.

ECLI:EU:C:2001:611.

- *Commission of the European Communities v Italian Republic*.
- Action for failure to fulfil obligations (Framework Directive).

- It is a clear breach of the Framework Directive not to establish the obligation of the employer to assess all the risks to the safety and health of workers in the workplace.
- Or allow the employer to decide whether or not to use external protection or prevention services when the company's internal powers are insufficient.
- Or not defining the capacity and skills that should be required of the persons responsible for protection and prevention activities.
- Employers are obliged to assess all the risks to the safety and health of workers.
- The risks to be assessed are constantly evolving, in particular as a result of the progressive development of working conditions and scientific research into occupational hazards.

2001 11 29 (C-366/99), Griesmar.

ECJ Judgment of 29 November 2001 (C-366/99), Griesmar.

ECLI:EU:C:2001:648.

- *Joseph Griesmar v. Ministre de l'Economie, des Finances et de l'Industrie y Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation.*
- Request for a preliminary ruling: Conseil d'Etat (France).
- Pensions recognised in a retirement scheme for public servants: fall within the scope of Article 119 of the EEC Treaty (in accordance with the characteristics of the legislation in question, they were not in the nature of a social security benefit but of deferred remuneration payable by the employer).
- Article 119 of the EC Treaty is opposed by a provision on pensions which establishes women who have been mothers, excluding men, as exclusive beneficiaries of a certain bonus aimed at compensating for childcare.

2001 12 06 (C-353/99), Hautala.

ECJ Judgment of 6 December 2001 (C-353/99), Hautala.

ECLI:EU:C:2001:661.

- *Council of the European Union v. Heidi Hautala.*
- Appeal against the judgment of the Court of First Instance of the European Communities.
- The citizens of the European Union must be given the widest and fullest possible access to the documents of the Community institutions.

This entails the obligation to allow partial access when the public interest is at stake in respect of certain points.

2001 12 13 (C-206/00), Mouflin.

ECJ Judgment of 13 December 2001 (C-206/00), Mouflin.

ECLI:EU:C:2001:695.

- *Henri Mouflin v. Recteur de l'académie de Reims*.
- Request for a preliminary ruling: Tribunal administratif de Châlons-en-Champagne - France.
- (Art. 119 TEC, equal pay): equal treatment of pay includes retirement pensions for civil servants.
- EU law precludes a rule that grants the right to receive a retirement pension immediately only to female civil servants whose spouse suffers from an incapacity or incurable illness that prevents him or her from pursuing a profession, excluding from that right officials who are in the same situation.

2002

2002 01 15 (C-55/00), Gottardo.

ECJ Judgment of 15 January 2002, Gottardo.

ECLI:EU:C:2002:16.

- *Elide Gottardo v. Istituto nazionale della previdenza sociale (INPS)*.
- Request for a preliminary ruling: Tribunale ordinario di Roma - Italy.
- Social Security coordination regulations. Application to any EU national of bilateral agreements concluded between a Member State, of which he is not a national, and a third State.

2002 01 24 (C-164/99), Portugaia Construções.

ECJ Judgment of 24 January 2002 (C-164/99), Portugaia Construções.

ECLI:EU:C:2002:40.

- *Portugaia Construções Lda*.
- Request for a preliminary ruling: Amtsgericht Tauberbischofsheim (Germany).
- (Posting of workers): The fact that a national employer may, by concluding an enterprise collective agreement, pay a lower minimum wage than that laid down in a collective agreement declared to be of general application, while an employer established in another Member State cannot do the same, constitutes an unjustified restriction of the freedom to provide services.

2002 01 24 (C-51/00), Temco.

ECJ Judgment of 24 January 2002 (C-51/00), Temco.

ECLI:EU:C:2002:48.

- *Temco Service Industries SA v Samir Imzilyen and others.*
- Request for a preliminary ruling: Cour du travail de Bruxelles (Belgium).
- EU law does not preclude an employee from continuing with the transferring company if he or she so wishes.
- There is a transfer of enterprise when a client terminates the cleaning contract (which the successful bidder had subcontracted) and entrusts the services to a new one, without transfer of infrastructure (tangible or intangible), but the new employer assumes, by virtue of a collective bargaining agreement, an essential part of the personnel that the subcontractor dedicated to the task.

2002 02 05 (C-277/99), Kaske.

ECJ judgment of 5 February 2002, Kaske.

ECLI:EU:C:2002:74.

- *Doris Kaske against Landesgeschäftsstelle des Arbeitsmarktservice Wien.*
- Request for a preliminary ruling: Verwaltungsgerichtshof - Austria.
- Social Security coordination regulations. Preferential application of the bilateral Social Security agreement signed between Member States if it is more favourable and expectations of law have been generated.

2002 02 27 (E-37/00), Weber.

ECJ Judgment of 27 February 2002 (C-37/00), Weber.

ECLI:EU:C:2002:122.

- *Herbert Weber v. Universal Ogden Services Ltd.*
- Question referred by Hoge Raad (Netherlands).
- Jurisdictional jurisdiction and freedom of movement: Concept of habitual place of work when the worker carries out his work in several States.
- Relevance of the place where the worker has spent most of his working time, unless the subject of the dispute had a closer connection with another of the workplaces.

2002 03 19 (C-393/99 and C-394/99), Hervein and Hervillier.

ECJ judgment of 19 March 2002, Hervein and Hervillier.

ECLI:EU:C:2002:182.

- *Institut national d'assurances sociales pour travailleurs indépendants (Inasti) against Claude Hervein and Hervillier SA (C-393/99) and Guy Lorthiois and Comtexbel SA (C-394/99).*
- Request for a preliminary ruling: Tribunal du travail de Tournai - Belgium.
- Social Security coordination regulations. Applicable national Social Security Law.

2002 03 19 (C-476/99), Lommers.

ECJ Judgment of 19 March 2002 (C-476/99), Lommers.

ECLI:EU:C:2002:183.

- *H. Lommers v. Minister van Landbouw, Natuurbeheer en Visserij.*
- Request for a preliminary ruling: Centrale Raad van Beroep - Netherlands.
- (Directive 76/207/EEC, non-discrimination in employment on the basis of gender): EU law does not preclude a Ministry where women are a minority in the workforce, in a context of a manifest insufficiency of adequate and affordable childcare, from reserving for female civil servants the childcare places it subsidises and making available to its staff in limited numbers, while civil servants can only have access to them in cases of need that are the responsibility of the employer.
- This is the case provided that the exception established in favour of civil servants is interpreted as allowing access to the childcare system under the same conditions as civil servants who assume custody of their children.

2002 06 04 (C-164/00), Beckmann.

ECJ judgment of 4 June 2002 (C-164/00), Beckmann.

ECLI:EU:C:2002:330.

- *Katia Beckmann v. Dynamco Whichloe Macfarlane Ltd.*
- Reference for a preliminary ruling: High Court of Justice (England and Wales), Queen's Bench Division (United Kingdom).
- The company's early retirement benefits are transferred to the new employer in the event of a transfer (Directive 77/187/EC).

2002 09 12 (E-351/00), Niemi.

ECJ Judgment of 12 September 2002, (C-351/00), Niemi.

ECLI:EU:C: 2002:480.

- *Pirkko Niemi*.
- Request for a preliminary ruling: Vakuutusoiikeus - Finland.
- The essential criterion for determining whether a pension scheme is subject to the principle of equal treatment in Article 119 of the EC Treaty is that the pension is paid by reason of the employment relationship maintained with the employer by the insured person, since it is determined by remuneration. Under the protection of this precept there is a professional regime of public service with certain characteristics.

2002 09 17 (C-320/00), Lawrence and Others.

ECJ Judgment of 17 September 2002 (C-320/00), Lawrence and Others.

ECLI:EU:C:2002:498.

- *G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd*.
- Question referred for a preliminary ruling by the Court of Appeal (England and Wales) (Civil Division).
- Same work or equal value; possibility of application to workers who do not work for the same employer provided that it is the same cause that is responsible for the inequality.
- If the differences observed in the conditions of remuneration of workers of different sexes who perform the same work or work of equal value are not attributable to a single cause, the principle of equal remuneration does not apply.

2002 10 03 (E-136/00), Danner.

ECJ Judgment of 3 October 2002 (C-136/00), Danner.

ECLI:EU:C:2002:558.

- *Rolf Dieter Danner v. Government of Finland*.
- Request for a preliminary ruling: Kuopion hallinto-oikeus (Finland).
- It is contrary to EU law to have a tax rule which limits or excludes the deduction from income tax of voluntary old-age insurance contributions paid to insurance undertakings established in another Member State, but recognises such deductions if the undertaking is established in the Member State itself, if the taxable nature of pensions paid on such contributions is not excluded.

2002 10 24 (C-455/00) Commission v Italy.

ECJ judgment of 24 October 2002 (C-455/00), *Commission v Italian Republic*.

ECLI:EU:C:2002:612.

- *Commission of the European Communities v Italian Republic*.
- Appeal for non-compliance.
- Directive 90/270/EEC (equipment with display screens): failure of the State to delimit the conditions under which workers must be provided with special corrective devices and carry out specific ophthalmological examinations.

2002 11 09 (T-13/99), Pfizer.

ECJ judgment of 11 September 2002 (T-13/99), *Pfizer* (“*Virginiamycin*”).

ECLI:EU:T:2002:209.

- *Pfizer Animal Health SA v. Council of the European Union*.
- Action for annulment of Council Regulation (EC) No 2821/98 on additives in feedingstuffs in certain antibiotics.
- The precautionary principle is applied in the environment and in common agricultural policy issues for the protection of human health.
- The requirements of this policy must be integrated into the definition and implementation of the Community’s other policies.
- The precautionary principle allows measures to be taken if there are scientific doubts about the existence of risks to human health or their scope.
- The impossibility of carrying out a full scientific assessment of the risks cannot prevent, without rendering the precautionary principle meaningless, from the competent public authority from adopting preventive measures, where these are essential in view of the level of risk to human health.

2002 12 12 (C-442/00), Rodríguez Caballero.

ECJ Judgment of 12 December 2002 (C-442/00), *Rodríguez Caballero*.

ECLI:EU:C:2002:752.

- *Ángel Rodríguez Caballero v. Wage Guarantee Fund (Fogasa)*.
- Request for a preliminary ruling: Tribunal Superior de Justicia de Castilla-La Mancha.
- For the purposes of EU corporate insolvency law, processing wages should be considered as claims in favour of employees.

- Ensuring payment only of claims relating to processing wages where they have been recognised by a court decision cannot be regarded as a necessary measure to prevent abuses within the meaning of Article 10 of the Directive.
- Where discrimination contrary to Community law is found, and as long as no measures are taken to restore equal treatment, respect for the principle of equality can be ensured only by granting the persons in the category concerned the same advantages as those enjoyed by persons in the category benefited.
- The national court must disapply the national law that excludes from the guarantee the claims corresponding to processing wages agreed in judicial conciliation.

2003

2003 02 27 (C-320/01), Busch.

ECJ Judgment of 27 February 2003 (C-320/01), Busch.

ECLI:EU:C: 2003:114.

- *Wiebke Busch v. Klinikum Neustadt GmbH & Co. Betriebs-KG*.
- Request for a preliminary ruling: Arbeitsgericht Lübeck (Germany).
- (Directive 76/207/EEC, non-discrimination in employment on grounds of gender): EU law precludes a worker who, with the consent of her employer, wishes to return to her job before the end of her parental leave for child-rearing, from being obliged to inform the employer of her pregnancy where, due to certain legal prohibitions on work, may not exercise some of its functions.
- EU law precludes an employer from being able, under national law, to challenge the consent he has given for early reinstatement in the above case.

2003 04 10 (C-65/01), Commission v. Republic of Italy.

ECJ judgment of 10 April 2003 (C-65/01), Commission v Republic of Italy.

ECLI:EU:C: 2003:221.

- *Commission of the European Communities v Republic of Italy*.
- Appeal for failure to fulfil obligations.
- Directive 89/655/EEC, as amended by Directive 95/63/EC (work equipment): failure to transpose within the deadline with regard to acoustic warning, avoidance of accidental starting, safety stop, etc.

2003 04 10 (C-437/00), Pugliese.

ECJ Judgment of 10 April 2003 (C-437/00), Pugliese.

ECLI:EU:C: 2003:219.

- *Giulia Pugliese vs. Finmeccanica SpA, Betriebsteil Alenia Aerospazio.*
- Question referred for a preliminary ruling by Landesarbeitsgericht of Munich (Germany).
- Where a worker is linked to two different employers (A and B), he can sue the first employer before the court of the place where the worker carries out his activity for the second employer only if the first employer has an interest in the performance of the service that the worker will perform for the second employer at the place determined by the latter.

2003 05 15 (C160/01), Mau.

ECJ Judgment of 15 May 2003 (C160/01), Mau.

ECLI:EU:C: 2003:280.

- *Karen Mau v. Bundesanstalt für Arbeit.*
- Request for a preliminary ruling: Sozialgericht Leipzig (Germany).
- Directive 80/987/EEC (insolvency) requires the date on which the business insolvency occurs to be identified with the date on which the application was lodged and not with the decision on it.
- For these purposes, the concept of “employment relationship” excludes periods which, by their very nature, cannot give rise to wage credits (e.g. parental leave which does not give rise to entitlement to any remuneration).

2003 05 20 (C-465/00, C-138 and 139/01), Österreichische Rundfunk.

ECJ Judgment of 20 May 2003 (C-465/00, C-138 and 139/01), Österreichische Rundfunk.

ECLI:EU:C: 2003:294.

- *Rechnungshof v Österreichischer Rundfund and Others.*
- Request for a preliminary ruling: Verfassungsgerichtshof and Oberster Gerichtshof.
- (Directive 95/46/EC, Protection and processing of personal data): EU law allows the dissemination of data that is necessary and appropriate to achieve the objective of good management of public resources.
- The weighting and proportionality outlined above applies to the disclosure of data on the income of employees of entities subject to the control of the Rechnungshof (Court of Auditors).
- Data on income paid by certain entities to their beneficiaries constitutes personal data.

2003 05 22 (C-103/01) Commission v Germany.

ECJ judgment of 22 May 2003 (C-103/01), Commission v Federal Republic of Germany.

ECLI:EU:C: 2003:301.

- *Commission of the European Communities v Federal Republic of Germany.*
- Appeal for non-compliance.
- Directive 89/686/EEC (personal protective equipment): the additional requirements for firefighters' PPE (provided for in the legislation of certain Länder) are contrary to EU law because (by not participating in the maintenance of public order) they are outside the list of exclusions contained in the Directive and end up hindering the free movement of goods.

2003 05 22 (C-441/01) Commission v Netherlands.

ECJ judgment of 22 May 2003 (C-441/01), Commission v. Netherlands.

ECLI:EU:C: 2003:308.

- *Commission of the European Communities v Kingdom of the Netherlands.*
- Appeal for non-compliance filed.
- (Framework Directive): in the prevention of occupational risks, only when the competences in the company are insufficient should the employer resort to competences outside the company.
- The purpose of the Directive (balanced participation of employers and employees) means that the best way to ensure its effectiveness is to give preference to the organisation of such activities within the undertaking.
- Allowing the employer to choose between organising those activities within the undertaking or having recourse to competences external to it does not help to ensure the effectiveness of the directive, but constitutes a breach of the obligation to ensure its full implementation.

2003 06 05 (C-145/01), Commission v Italy.

ECJ judgment of 5 June 2003 (C-145/01), Commission v. Italy.

ECLI:EU:C: 2003:324.

- *Commission of the European Communities v Italian Republic.*
- Appeal for non-compliance.
- The proceedings against Italy in respect of non-compliance with Directive 77/187/EEC (transfer of undertakings) are irregular and are declared inadmissible.

2003 06 12 (E-112/00), Schmidberger.

ECJ Judgment of 12 June 20013 (C-112/00), Schmidberger.

ECLI:EU:C: 2003:333.

- *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich.*
- Request for a preliminary ruling: Oberlandesgericht Innsbruck (Austria).
- The exercise of any fundamental right (including the right to strike) cannot be unlimited, and must be within the limits of EU law.
- In the case: a rally called by an association for the protection of the environment of the Alps, which paralyzes traffic on the motorway for four hours on a Saturday; it is considered compatible with community freedoms.

2003 06 12 (C-405/01), Merchant Marine Officers.

ECJ Judgment of 12 June 2003 (C-405/01), College of Officers of the Spanish Merchant Navy.

ECLI:EU:C: 2003:515.

- *College of Officers of the Spanish Merchant Navy against State Administration.*
- Question referred for a preliminary ruling by the Tribunal Supremo (Spain).
- It is possible to reserve to nationals of a State the posts of master and first officer of merchant ships flying its flag “if the prerogatives of public authority attributed to masters and first officers are effectively exercised on a regular basis and do not represent a very small part of their activities”.
- Moreover, access to these jobs by other nationals cannot be made subject to reciprocity because it would be contrary to the principle of equal treatment and free movement of workers.

2003 09 09 (E-151/02) Jaeger.

ECJ Judgment of 9 September 2003 (C-151/02), Jaeger.

ECLI:EU:C: 2003:437.

- *Kiel vs. Norbert Jaeger.*
- Judgment from Landesarbeitsgericht Schleswig-Holstein (Germany).
- The physical presence of health personnel (in the hospital) is equivalent to working time (not rest), although it is possible to rest while their

services are not requested during the periods of inactivity existing in continuous care.

- EU law precludes compensating with rest periods only the time of effective provision of services when there is a physical presence in the hospital.

2003 09 11 (E-201/01), Walcher.

ECJ judgment of 11 September 2003 (C-201/01), Walcher.

ECLI:EU:C: 2003:450.

- *Maria Walcher v. Bundesamt für Soziales und Behindertenwesen Steiermark.*
- Request for a preliminary ruling: Oberster Gerichtshof (Austria).
- Directive 80/987 (insolvency) precludes an employee with a significant shareholding in the SL (but without controlling it) from losing insolvency protection if he does not claim, within 60 days, the periodic remuneration that should have been paid to him.
- A worker's claim arising from his or her contract of employment remains an unpaid claim within the meaning of that directive.

2003 09 30 (E-224/01), Köbler.

ECJ Judgment of 30 September 2003 (C-224/01), Köbler.

ECLI:EU:C: 2003:513.

- *Gerhard Köbler vs. Republik Österreich.*
- Question referred by Landesgericht für Zivilrechtssachen Wien - Austria.
- State compensation for damage caused to individuals by breaches of Community law applies if the breach results from a decision of a court of last instance, if the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link.
- It is for the legal system of each Member State to designate the court with jurisdiction to hear and determine disputes relating to such reparation.
- The judicial bodies must arbitrate the way to repair the damage when the legislator has not done so.
- A violation of Community law is sufficiently serious when the decision in question has been issued with a manifest disregard for the case-law of the ECJ on the matter.

2003 09 30 (E-47/02), Anker.

ECJ judgment of 30 September 2003 (C-47/02), Anker and others.

ECLI:EU:C: 2003:516.

- *Albert Anker, Klaas Ras, Albertus Snock v Bundesrepublik Deutschland.*
- Question referred for a preliminary ruling by the Schleswig-Holsteinisches Obergerverwaltungsgericht (Germany).
- (Public employment; Art. 45(4) TFEU): the restriction on freedom of movement may be invoked for private sector posts to which the State regularly assigns public authority functions.
- What is decisive is to resolve whether the activities carried out (in this case, the captain of a fishing vessel) are endowed with exorbitant powers with respect to the rules applicable to relations between individuals and are effectively exercised on a regular basis and do not represent a very small part of their activities.

2003 10 16 (C-32/02), Commission v Italy.

ECJ judgment of 16 October 2003 (C-32/02), Commission v. Italy.

ECLI:EU:C: 2003:555.

- *Commission of the European Communities v Italian Republic.*
- (Directive 98/59/EC; collective redundancy): Failure of a State to fulfil obligations when national law excludes non-profit-making activities from the scope of the Directive. Incomplete transposition.

2003 10 21 (C-317/10), Abatay.

ECJ Judgment of 21 October 2003 (C-317/01), Abatay.

ECLI:EU:C: 2003:572.

- *They were Abatay and Others (C-317/01) and Nadi Sahin (C-369/01) v Bundesanstalt für Arbeit.*
- Request for a preliminary ruling: Bundessozialgericht (Germany).
- (Freedom of movement with Turkey): not only an undertaking established in Turkey providing services in a Member State but also the employees of such an undertaking may object to a further restriction on the freedom to provide services; on the contrary, such freedom cannot be relied on for that purpose by an undertaking established in a Member State, where the recipients of the services are resident in the same Member State;.

2003 10 23 (C-4/02 and C-5/02), Schönheit and Becker.

ECJ judgment of 23 October 2003 (C-4/02 and C-5/02), Schönheit and Becker.

ECLI:EU:C: 2003:583.

- *Hilde Schönheit vs. Stadt Frankfurt am Main (C-4/02) and Silvia Becker vs. Land Hessen (C-5/02).*
- Requests for a preliminary ruling: Verwaltungsgericht Frankfurt am Main - Germany.
- (Non-discrimination in pay): there may be indirect discrimination on grounds of sex in the calculation of the retirement pension of part-time civil servants, because the majority of this group is female.
- Requirements for possible justification on objective grounds unrelated to any discrimination based on sex: cutting expenditure cannot justify discrimination.
- Protocol on Article 119 of the EC Treaty (now the Protocol on Article 141 EC). Effects over time.

2003 11 06 (C-4/01), Martin.

ECJ judgment of 6 November 2003 (C-4/01), Martin and others.

ECLI:EU:C: 2003:594.

- *Serene Martin, Rohit Daby and Brian Willis against South Bank University.*
- Request for a preliminary ruling: Employment Tribunal, Croydon (United Kingdom).
- The rights arising from dismissal or early retirement are transferred to the new employer in the event of succession (Directive 77/187/EC).
- The new employer may not lower the pre-existing conditions regarding early retirement, unless they are incorporated into an agreement that ceases to apply.

2003 11 06 (E-101/01), Lindqvist.

ECJ Judgment of 6 November 2003 (C-101/01), Lindqvist.

ECLI:EU:C: 2003:596.

- *Criminal proceedings brought against Bodil Lindqvist.*
- Decision referred for a preliminary ruling by Göta hovrätt v Sweden.
- (Directive 95/46/EC, data protection): EU law assumes a broad concept of what is health data (including the indication that a person has injured a foot and is on sick leave).

- Health data comprises information relating to all aspects of a person's health, both physical and mental.

2003 11 06 (C413/01), Ninni-Orasche.

ECJ Judgment of 6 November 2003 (C413/01), Ninni-Orasche.

ECLI:EU:C: 2003:600.

- *Franca Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst.*
- Question referred by the Verwaltungsgerichtshof (Austria).
- The actual exercise of work (not marginal or accessory) for two months confers the status of worker for the purposes of free movement.
- In the case: Italian resident in Austria who, after two months as a waitress, applies for a scholarship and after obtaining a degree remains looking for a job in line with it.

2003 11 20 (E-340/01) Sodexho.

ECJ Judgment of 20 November 2003 (C-340/01), Sodexho.

ECLI:EU:C: 2003:629.

- *Carlito Abler et al. v. Sodexho MM Catering Gesellschaft mbH.*
- Request for a preliminary ruling: Oberster Gerichtshof (Austria).
- There is a transfer of company when a Hospital terminates the catering contract and entrusts it to a third employer, who continues to use the same material elements (made available to him by the Hospital, owner of them).
- *The refusal of the new employer to take over the workers of the first employer is innocuous for these purposes.*

2004

2004 01 07 (E-117/01), K.B.

ECJ Judgment of 7 January 2004, (C-117/01), K.B.

ECLI:EU:C: 2004:7.

- *K.B. v. National Health Service Pensions Agency and Secretary of State for Health.*
- Request for a preliminary ruling: Court of Appeal (England and Wales) (Civil Division) - United Kingdom.
- The denial of a pension under an occupational regime to the transsexual partner of the member of the same sex as the original one of the transsexual is contrary to the principle of equal remuneration between men and women, since marriage between the two is not permitted and

this is a requirement for the granting of the pension. This is provided that the national requirements for sex change have been met.

2004 01 13 (C-440/00), Kühne & Nagel.

ECJ Judgment of 13 January 2004 (C-400/00), Kühne & Nagel.
ECLI:EU:C: 2004:16.

- *Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG v. Kühne & Nagel AG & Co. KG.*
- Request for a preliminary ruling: Bundesarbeitsgericht (Germany).
- (Directive 94/45/EC; European Works Council (EEC): the responsibility for providing information on the number of employees and the structure of the companies in the group, when their central management is not located in a Member State, lies with the “presumed central management”.

2004 01 13 (C-256/01), Allonby.

ECJ Judgment of 13 January 2004 (C-256/01), Allonby.
ECLI:EU:C: 2004:18.

- *Debra Allonby v. Accrington & Rossendale College, Education Reading Services, trading as Protocol Professional and Secretary of State for Education and Employment.*
- Request for a preliminary ruling: Court of Appeal (United Kingdom).
- (Occupational health): The term “worker” has a Community scope and cannot be interpreted restrictively. The formal qualification does not exclude that a person must be classified as a worker if his or her independence is only fictitious.
- The right to participate in an occupational pension plan falls within the scope of Article 119 of the EEC Treaty and the prohibition of discrimination contained therein.

2004 02 05 (C-157/02), Rieser Internationale Transporte.

ECJ Judgment of 5 February 2004 (C-157/02), Rieser Internationale Transporte.
ECLI:EU:C: 2004:76.

- *Rieser Internationale Transporte GmbH v. Autobahnen- und Schnellstraßen-Finanzierungs- AG (Asfinag).*
- Question referred: Oberster Gerichtshof (Austria).
- Road freight transport. Discrimination on grounds of nationality or origin or destination of transport. Setting of tariffs for the use of infrastructure: charging heavy goods vehicles for the use of certain infrastructures.

- Directive 1999/62/EC: obligation for Member States to transpose into national law within a certain time limit of transposition. Impossibility of invoking the direct effect until its completion. They may be invoked against an agency subject to the authority or control of the State or holder of prerogatives of the public power.

2004 03 04 (C-19/01, C-50/01 and C-84/01), Barsotti.

ECJ judgment of 4 March 2004 (C-19/01, C-50/01 and C-84/01), Barsotti.
ECLI:EU:C: 2004:119.

- *Istituto nazionale della previdenza sociale (INPS) v. Alberto Barsotti and Others (C-19/01), Milena Castellani v. Istituto nazionale della previdenza sociale (INPS) (C-50/01) and Istituto nazionale della previdenza sociale (INPS) v. Anna Maria Venturi (C-84/01).*
- Questions referred by the Tribunale di Pisa (Italy), the Tribunale di Siena (Italy) and the Corte suprema di cassazione (Italy).
- (Directive 80/987/EEC, Business insolvency): EU law does not allow the payment obligation of guarantee institutions to be limited to a sum covering the basic needs of the workers concerned and from which the amounts paid by the employer during the period covered by the guarantee are deducted.
- The full payment of the unpaid claims in question must be guaranteed (within the legal limits); partial payments, although they must be deducted from the salary claim in order to determine the extent to which they have ceased to be collected, cannot be deducted from the ceiling set by the Member State for the guarantee of unpaid debts.

2004 03 18 (E-342/01), Paz Merino.

ECJ Judgment of 18 March 2004 (C-342/01), Paz Merino.
ECLI:EU:C: 2004:160.

- *María Paz Merino Gómez v. Continental Industrias del Caucho, S.A.*
- Question referred for a preliminary ruling by the Juzgado de lo Social n.º 33 de Madrid.
- (Directive 93/104/EEC on working time and Directive 89/391/EEC on pregnant health): the right of pregnant women to take annual leave for a period other than that of her maternity leave, even if it coincides with the leave generally fixed by collective agreement and even where national legislation provides for a longer duration of leave than that laid down by the Directives.

2004 03 23 (E-138/02) Collins.

ECJ Judgment of 23 March 2004 (C-138/02), Collins.

ECLI:EU:C: 2004:172.

- *Brian Francis Collins v. Secretary of State for Work and Pensions.*
- Preliminary ruling from the Social Security Commissioner (United Kingdom).
- Unemployed people looking for their first job are not covered by the social benefits of free movement, but if they can prove that they are actively looking for work, they can benefit from financial support to facilitate their access to the labour market.

2004 03 30 (E-147/02), Alabaster.

ECJ Judgment of 30 March 2004 (C-147/02), Alabaster.

ECLI:EU:C: 2004:192.

- *Michelle K. Alabaster v. Woolwich plc and Secretary of State for Social Security.*
- Request for a preliminary ruling: Court of Appeal (England and Wales) (Civil Division) - United Kingdom.
- (Art. 119 TEC, equal pay by gender): where the remuneration received by the worker during her maternity leave is established, at least in part, on the basis of the salary received before the start of that leave, any increase in salary that occurs between the beginning of the period covered by the reference salary and the end of the leave must be integrated into the salary items used to calculate the amount of said remuneration.
- Such a requirement is not limited only to the situation where the increase is applied retroactively to the period covered by the reference salary.

2004 04 28 (C-373/02), Öztürk.

ECJ Judgment of 28 April 2004 (C-373/02), Öztürk.

ECLI:EU:C: 2004:232.

- *Sakir Öztürk v. Pensionsversicherungsanstalt der Arbeiter.*
- Request for a preliminary ruling: Oberster Gerichtshof (Austria).
- EU law precludes legislation which makes the acquisition of entitlement to an early old-age pension on grounds of unemployment subject to the condition that the person concerned has received, for a certain

period prior to the application for a pension, unemployment insurance benefits from that Member State only.

2004 04 29 (E-160/02), Skalka.

ECJ judgment of 29 April 2004, Skalka.

ECLI:EU:C: 2004:269.

- *Friedrich Skalka vs. Sozialversicherungsanstalt der gewerblichen Wirtschaft.*
- Request for a preliminary ruling: Oberster Gerichtshof - Austria.
- Social Security coordination regulations. Identification of special non-contributory benefits.

2004 05 15 (C-349/01), ADS Anker.

ECJ Judgment of 15 July 2004 (C-349/01), ADS Anker.

ECLI:EU: 2004:440.

- *Betriebsrat der Firma ADS Anker GmbH vs. ADS Anker GmbH.*
- Request for a preliminary ruling: Arbeitsgericht Bielefeld (Germany).
- (Directive 94/45/EC; European Works Council (EEC): responsibility to provide information on the number of employees and the structure of the group companies, when the group's central management is not located in a Member State.
- The State where the central (or presumed) management is located must require it to provide another member of the group with the information requested by its workers' representatives.

2004 06 08 (C-220/02), Österreichischer Gewerkschaftsbund.

ECJ judgment of 8 June 2004 (C-220/02), Österreichischer Gewerkschaftsbund.

ECLI:EU:C: 2004:334.

- *Österreichischer Gewerkschaftsbund and Gewerkschaft der Privatangestellten against Wirtschaftskammer Österreich.*
- Request for a preliminary ruling: Oberster Gerichtshof - Austria.
- (Directive 75/117, equal pay by gender): EU law does not preclude the calculation of severance pay from taking into account, for the purposes of the duration of the employment relationship, periods of military service or substitute civilian service, which are mostly performed by men, but not taking into account periods of leave for childcare to which women are mainly eligible.

2004 06 10 (C-333/03), Commission v Luxembourg.

ECJ judgment of 10 June 2004 (C-333/03), Commission v. Luxembourg.
ECLI:EU:C: 2004:369.

- *Commission of the European Communities v Grand Duchy of Luxembourg.*
- Failure of the State.
- Directive 98/50/EC (transfer of undertaking): non-compliance due to failure to transpose within the deadline.

2004 06 24 (C-269/02) Commission v. France.

ECJ judgment of 24 June 2004 (C-269/02), Commission v. France.
ECLI: EU:C: 2004:387.

- *Commission of the European Communities v French Republic.*
- Failure to fulfil obligations.
- Directive 98/24/EC (chemical agents at work): non-compliance due to failure to transpose within the deadline.

2004 09 07 (E-456/02), Trojani.

ECJ Judgment of 7 September 2004 (C-456/02), Trojani.
ECLI:EU:C: 2004:488.

- *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS).*
- Question referred for a preliminary ruling by the Tribunal du travail de Bruxelles (Belgium).
- A Frenchman who was taken in Brussels by the Salvation Army, where, in exchange for accommodation and some money for expenses, he works various jobs for about thirty hours a week as part of an individual socio-professional reintegration project, receiving benefits in kind in return.
- You can only be considered an employee for the purposes of receiving a minimum subsistence income if the activity you carry out is real and effective.

2004 09 14 (C-168/03) Commission v. Spain.

ECJ judgment of 14 September 2004 (C-168/03), Commission v. Spain.
ECLI:EU:C: 2004:525.

- *Commission of the European Communities v. Kingdom of Spain.*
- Appeal for non-compliance.
- Directive 89/655/EEC, version after Directive 95/63/EC (work equipment): it is not complied with when Royal Decree 1215/1997, of 18 July 1997, establishes an additional period of adaptation for work equi-

ment that was already available to workers in the company or establishment before 27 August 1997.

2004 09 30 (C-319/03), Briheche.

ECJ Judgment of 30 September 2004 (C-319/03), Briheche.

ECLI:EU:C: 2004:574.

- *Serge Briheche v. Ministre de l'Intérieur, Ministre de l'Education nationale and and Ministre de la Justice.*
- Question referred for a preliminary ruling by the Tribunal administratif de Paris (Administrative Court, Paris, France).
- Equal treatment between men and women: exemption from the age limit for entry into public employment for widows in need of work, excluding widows who have not remarried and who are in the same situation, is opposed to EU law.

2004 09 30 (C-359/03) Commission v. Austria.

ECJ judgment of 30 September 2004 (C-359/03), Commission v. Austria.

ECLI: EU:C: 2004:575.

- *Commission of the European Communities v Republic of Austria.*
- Appeal for non-compliance.
- Directive 90/270/EEC (display screens): non-compliance due to failure to transpose within the deadline.

2004 10 05 (C-397/01 to C-403/01), Pfeiffer.

ECJ (Grand Chamber) of 5 October 2004 (C-397/01 to C-403/01), Pfeiffer.

ECLI:EU:C: 2004:584.

- *Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v. Deutsches Rotes Kreuz, Kreisverband Waldshut e.V.*
- Request for a preliminary ruling: Arbeitsgericht Lörrach (Germany).
- The scope of the Framework Directive must be interpreted broadly and its exceptions restrictively.
- The Working Time Directive does not exclude civil protection services as such, but only “certain specific activities” whose particularities are conclusive.
- Lifeguards accompanying ambulances in a rescue service organised by the Deutsches Rotes Kreuz may not exceed the maximum working time set by EU law.

2004 10 12 (C-55/02), Commission v Portugal.

ECJ judgment of 12 October 2004 (C-55/02), Commission v. Portugal.
ECLI:EU:C: 2004:605.

- *Commission of the European Communities v Portuguese Republic.*
- (Directive 98/59/EC, collective redundancies): national law should extend the concept of collective redundancies to all those agreed for reasons not inherent to the person of the workers.
- The State fails to comply with the requirements of EU law when it limits the concept of collective redundancies to dismissals for reasons of a structural, technological or cyclical nature.

2004 10 12 (E-313/02), Wippel.

ECJ (Grand Chamber) of 12 October 2004 (C-313/02), Wippel.
ECLI:EU:C: 2004:607.

- *Nicole Wippel v. Peek & Cloppenburg GmbH & Co. KG.*
- Request for a preliminary ruling: Oberster Gerichtshof (Austria).
- (Directive 97/81/EC and 76/207/EEC): EU law does not preclude a part-time worker from having the same daily and weekly working hours, nor from his or her schedule depending on the needs of the company, being free to accept or not the requirements.

2004 10 12 (C-60/03), Wolff & Müller.

ECJ judgment of 12 October 2004 (C-60/03), Wolff & Müller.
ECLI:EU:C: 2004:610.

- *Wolff & Müller GmbH & Co. KG v. José Filipe Pereira Félix.*
- Request for a preliminary ruling: Bundesarbeitsgericht - Germany.
- (Freedom to provide services); EU law does not preclude the law according to which a subcontracting construction company is liable, as a guarantor who has waived the benefit of exclusion, for obligations for the payment of a worker's minimum wage or for contributions to a common body established by the parties to a collective agreement, where the minimum wage consists of the amount due to the worker after deduction of taxes and social security and employment promotion contributions or other equivalent social security expenditure (net salary), and where the protection of the worker's salary is not the main objective or is only a secondary objective of such legislation.

2004 10 14 (E-36/02), Omega.

ECJ Judgment of 14 October 2004 (C-36/02), Omega.

ECLI:EU:C: 2004:614.

- *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn.*
- Request for a preliminary ruling: Bundesverwaltungsgericht (Germany).
- EU law does not preclude an economic activity consisting in the commercial exploitation of games to simulate homicidal acts from being the subject of a national prohibition measure adopted on grounds of protection of public policy on the ground that this activity undermines human dignity.

2004 10 21 (C-445/03) Commission v Luxembourg.

ECJ judgment of 21 October 2004 (C-445/03), Commission v. Luxembourg.

ECLI:EU:C: 2004:655.

- *Commission of the European Communities v Grand Duchy of Luxembourg.*
- Luxembourg is in breach of EU law by requiring service providers established in another Member State, who wish to post workers from third States to its territory, to obtain individual work permits and by requiring those service providers to provide a bank guarantee.

2004 10 28 (C-357/03) Commission v Austria.

ECJ judgment of 28 October 2004 (C-357/03), Commission v. Austria.

ECLI: C: 2004:681.

- *Commission of the European Communities v Republic of Austria.*
- Appeal for non-compliance.
- Directive 98/24/EC (chemical agents): non-compliance due to failure to transpose within the deadline.

2004 10 28 (C-16/04) Commission v Germany.

ECJ judgment of 28 October 2004 (C-16/04), Commission v. Germany.

ECLI: EU:C: 2004:689.

- *Commission of the European Communities v Federal Republic of Germany.*
- Appeal for failure to fulfil obligations.

- Directive 89/654/EEC (workplaces): non-compliance due to failure to transpose within the deadline in matters relating to emergency doors, windows and overhead lighting.

2004 10 28 (T-219/02 and T-337/02), Lutz Herrera.

STPICE 28 October 2004 (T-219/02 and T-337/02), Lutz Herrera.
ECLI:EU:T: 2004:318.

- *Olga Lutz Herrera and Others v Commission of the European Communities.*
- Claims against the Selection Board.
- For access to the Community civil service , the principle of equal treatment and non-discrimination is not infringed, by setting a maximum age for access, since there is a proportionate and objective justification, consisting of career prospects and the need for a minimum period of activity.

2004 11 11 (E-425/02), Delahaye.

ECJ Judgment of 11 November 2004 (C-425/02), Delahaye.
ECLI:EU:C: 2004:706.

- *Johanna Maria Delahaye, Madame de Boor against Ministre de la Fonction publique et de la Réforme administrative.*
- Request for a preliminary ruling: Cour administrative (Luxembourg).
- Directive 77/187/EEC (transfer of undertakings) does not prevent the new employer from having to reduce the remuneration of workers if the new employer is public because it is required by the rules on public employment.
- When applying restrictive rules, the overall seniority of the worker must be taken into account.
- A significant reduction in remuneration is equivalent to a substantial change in working conditions, attributable to the employer.

2004 12 09 (E-19/02), Hlozek.

ECS of 9 December 2004 (C-19/02), Hlozek.
ECLI:EU:C: 2004:779.

- *Viktor Hlozek vs. Roche Austria Gesellschaft mbH.*
- Request for a preliminary ruling: Oberster Gerichtshof - Austria.
- Allowance granted to workers who have reached a certain age at the time of their dismissal; Granting of the allowance from a different age

depending on the sex of the dismissed workers, according to the legal retirement age, different according to sex.

2004 12 09 (C-333/04) Commission v Luxembourg.

ECJ judgment of 9 December 2004 (C-333/04), Commission v. Luxembourg.

ECLI:EU:C: 2004:792.

- *Commission of the European Communities v Grand Duchy of Luxembourg.*
- Appeal for failure to fulfil obligations.
- Directive 99/92/EC (explosive atmospheres): non-compliance due to failure to transpose within the deadline.

2004 12 09 (C-460/02), Commission v Italy.

ECJ judgment of 9 December 20004 (C-460/02), Commission v. Italy.

ECLI:EU:C: 2004:780.

- *Commission of the European Communities v Italian Republic.*
- (Directive 96/67/EC airport assistance): Italy violates EU law by imposing the subrogation of workers in the processes of liberalisation of ground handling; violation of basic economic freedoms.

2004 12 16 (C-358/03) Commission v Austria.

ECJ judgment of 16 December 2004 (C-358/03), Commission v. Austria.

ECLI: EU:C: 2004:824.

- *Commission of the European Communities v Republic of Austria.*
- Appeal for non-compliance.
- Directive 90/269/EEC (handling of loads): non-compliance due to non-transposition in the Land of Carinthia.

2004 12 16 (C520/03), Olaso Valero.

ECJ Judgment of 16 December 2004 (C520/03), Olaso Valero.

ECLI:EU:C: 2004:826.

- *José Vicente Olaso Valero v. Wage Guarantee Fund (Fogasa).*
- Request for a preliminary ruling: High Court of Justice of the Valencian Community.
- Where claims for compensation for unfair dismissal, recognised in an administrative judgment or decision, fall within the concept of “pay”, the identical claims, established in a judicial conciliation act, must be regarded as claims within the meaning of Directive 80/987 (insolvency).

- The national court must not apply domestic legislation which, in breach of the principle of equality, excludes the latter claims from the concept of “pay”.

2005

2005 01 27 (E-188/03), Junk.

ECJ Judgment of 27 January 2005 (C-188/03), Junk.
ECLI:EU:C:2005:59.

- *Irmtraud Junk vs. Wolfgang Kühnel*.
- Request for a preliminary ruling: Arbeitsgericht Berlin (Germany).
- (Directive 98/59/EC, collective redundancies): consultation of workers’ representatives: it must be prior to the dismissals.
- Likewise, notification to the competent public authority; it has to be prior to the dismissal and it is so that the authority “looks for solutions”.
- The fact that is valid as a dismissal is the manifestation of the employer’s will to terminate the employment contract.

2005 02 24 (C-320/04), Commission v Luxembourg.

ECJ judgment of 24 February 2005 (C-320/04), Commission v. Luxembourg.
EU:C:2005:115.

- *Commission of the European Communities v Grand Duchy of Luxembourg*.
- Luxembourg has not adopted the laws, regulations and administrative provisions necessary to transpose Directive 2000/43/EC on equal treatment without distinction as to race or ethnicity.

2005 02 24 (C-327/04), Commission v Finland.

ECJ judgment of 24 February 2005 (C-327/04), Commission v. Finland.

- *Commission of the European Communities v Republic of Finland*.
- Finland (as far as Åland is concerned) has not adopted the necessary laws, regulations and administrative provisions to transpose Directive 2000/43/EC on equal treatment without distinction as to race or ethnicity.

2005 03 10 (E-196/02), Vasiliki Nikoloudi.

ECJ Judgment of 10 March 2005 (C-196/02), Vasiliki Nikoloudi.
ECLI:EU:C:2005:141.

- *Vasiliki Nikoloudi vs. Tilepikoinonion Organisms Ellados AE*.

- Question referred by the Eirinodikeio Athinon (Greece).
- EU law does not preclude the permanent and part-time employment of cleaning to be reserved for women. But it is discriminatory that this category cannot access statutory employment in the public sector.
- The total exclusion from part-time employment in relation to the calculation of length of service constitutes indirect discrimination on grounds of sex, if it affects a much higher number of women than men; The accreditation of facts that presume discrimination shifts the burden of proof.

2005 04 14 (C-341/02), Commission v Germany.

ECJ judgment of 14 April 2005 (C-341/02), Commission v. Germany.
ECLI:EU:C:2005:220.

- *Commission of the European Communities v Federal Republic of Germany.*
- Failure of the State.
- (Directive 96/71/EEC) — guarantee of the minimum wage: the determination of that amount, to be carried out in accordance with the legislation of the State of destination, cannot mean that the comparison between that legislation and that of the sending State is carried out, thus forcing the application of the former, disregarding any items or supplementary remuneration paid to posted persons under the labour legislation of the second of those States, and that do not modify, to the detriment of the worker, the normal or customary relationship between their benefit and the consideration they receive in exchange.

2005 04 14 (C-6/03), Eiterkopfe.

ECJ Judgment of 14 April 2005 (C-6/03), Eiterkopfe.
ECLI:EU:C:2005:222.

- *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz.*
- Request for a preliminary ruling: Verwaltungsgericht Koblenz (Germany).
- (Directive 1999/31/EC, solid waste): EU law does not oppose more stringent regulations (with limits so low that they require mechanical-biological treatment or prior incineration), shorter deadlines (reducing the amount of waste destined for landfill) or a wider scope (not only biodegradable waste).

- The principle of proportionality does not apply to national measures of greater protection, provided that they do not affect other provisions of the Treaty.

2005 04 21 (C-140/03), Commission v. Greece.

ECJ judgment of 21 April 2005 (C-140/03), Commission v. Greece.
ECLI:EU:C:2005:242.

- *Commission of the European Communities v Hellenic Republic.*
- Failure of the State.
- (Freedom of establishment): Greece is in breach of EU law because it does not allow a qualified optician, a natural person, to operate more than one optician.
- The requirement that the holder of the authorisation to operate the optician must hold at least 50% of the company's capital and its profits and losses, whether the partnership is a general or limited partnership, and that optician has a maximum stake in another company owning an optician's shop, also infringes EU law. provided that the authorisation to open and operate it is issued in the name of another qualified optician.

2005 04 28 (C-329/04), Commission v Germany.

ECJ judgment of 28 April 2005, (C-329/04), Commission v. Germany.
EU:C:2005:263.

- *Commission of the European Communities v Federal Republic of Germany.*
- Germany has not adopted, within the deadline, the legislative, regulatory and administrative provisions necessary to transpose Directive 2000/43/EC on equal treatment without distinction as to race or ethnicity.

2005 05 03 (C-387, 391 and 403/02), Berlusconi and others.

ECJ (Grand Chamber) of 3 May 2005 (C-387, 391 and 403/02), Berlusconi and Others.
ECLI:EU:C:2005:2.

- *Criminal proceedings against Silvio Berlusconi (C-387/02), Sergio Adelchi (C-391/02) and Marcello Dell'Utri and others (C-403/02).*
- Questions referred for a preliminary ruling by the Tribunale di Milano (C-387/02 and C-403/02) and Corte d'appello di Lecce (C-391/02) - Italy.

- The principle of retroactive application of the lightest penalty is one of the general principles of Community law which the national court must comply with when applying the national law adopted for the implementation of Community law.
- A directive cannot, by itself and without the existence of a domestic law of a Member State adopted for its implementation, create or aggravate the criminal liability of accused persons. Such a consequence would be contrary to the limits resulting from the very nature of any directive.

2005 05 04 (C-335/04), Commission v Austria.

ECJ judgment of 4 May 2005, (C-335/04), Commission v. Austria.
EU:C:2005:273.

- *Commission of the European Communities v Republic of Austria.*
- Austria has not adopted, within the deadline, all the legislative, regulatory and administrative provisions necessary to transpose Directive 2000/43/EC on equal treatment without distinction as to race or ethnicity.

2005 05 26 (E-297/03), Sozialhilfeverband Rohrbach.

ECJ Judgment of 26 May 2005 (C-297/03), Sozialhilfeverband Rohrbach.
ECLI:EU:C:2005:315.

- *Sozialhilfeverband Rohrbach v. Arbeiterkammer Oberösterreich and Österreichischer Gewerkschaftsbund.*
- Request for a preliminary ruling: Oberster Gerichtshof (Austria).
- Directive 2001/23/EC (transfer of undertakings) is directly applicable to a private law limited liability company whose sole shareholder is a public-law social services association.
- A State body which transfers a business cannot rely on the direct application of Directive 2001/23 against a worker in order to require him to continue his employment relationship with the transferee.

2005 05 26 (E-478/03), Celtec.

ECJ Judgment of 26 May 2005 (C-478/03), Celtec.
ECLI:EU:C:2005:321.

- *Celtec Ltd v John Astley and others.*
- Request for a preliminary ruling: House of Lords (United Kingdom).
- For the purposes of labour subrogation (Directive 77/187/EEC), the date of the transfer is the date on which the change of employer respon-

sible for the operation takes place, and agreements altering it are not admissible.

- The contracts existing on that date are transferred to the assignee, without any other agreements between the affected companies being opposed.

2005 06 07 (C-543/03), Dodl.

ECJ judgment of 7 June 2005, Dodl.

ECLI:EU:C:2005:364.

- *Christine Dodl and Petra Oberhollenzer vs. Tiroler Gebietskrankenkasse.*
- Request for a preliminary ruling: Oberlandesgericht Innsbruck - Austria.
- Social Security coordination regulations. Family benefits and differential supplement.

2005 07 07 (E-153/03), Weide.

ECJ judgment of 7 July 2005, Weide.

ECLI:EU:C:2005:428.

- *Caisse nationale des prestations familiales v. Ursula Weide, for Schwarz marriage.*
- Request for a preliminary ruling: Cour de cassation - Luxembourg.
- Social Security coordination regulations. Family benefits and differential supplement.

2005 07 07 (E-227/03), Van Pommeren.

ECJ Judgment of 7 July 2005, Van Pommeren.

ECLI:EU:C:2005:431.

- *A. J. van Pommeren-Bourgon diën v Raad van bestuur van de Sociale verzekeringsbank.*
- Request for a preliminary ruling: Rechtbank te Amsterdam - Netherlands.
- Social Security coordination regulations. Determination of the applicable national law, mandatory nature. Retention of the right, change of residence.

2005 07 14 (C-386/03), Commission v. Germany.

ECJ judgment of 14 July 2005 (C-386/03), Commission v. Germany.

ECLI:EU:C:2005:461.

- *Commission of the European Communities v Federal Republic of Germany.*

- (Directive 96/67/EC; airport handling): Germany violates EU law by imposing the subrogation of workers in the processes of liberalisation of ground handling; violation of basic economic freedoms.

2005 07 14 (E-52/04), Personalrat der Feuerwehr Hamburg.

ECJ Order of 14 July 2005 (C-52/04), Personalrat der Feuerwehr Hamburg.

ECLI:EU:C:2005:467.

- *Personalrat der Feuerwehr Hamburg vs. Leiter der Feuerwehr Hamburg.*
- Request for a preliminary ruling: Bundesverwaltungsgericht (Germany).
- The scope of application of the Directives on occupational health does not depend on the assignment to the different sectors of activity (armed forces, civil protection, etc.) but on the specific tasks carried out by each person.
- The Framework Directive must apply to the activities of firefighters, even if they are carried out by the intervention forces on the ground, and it matters little whether they are intended to fight a fire or to provide relief in any other way, since they are carried out under normal conditions, in accordance with the task entrusted to the service concerned, and this even when the interventions derived from such activities are, by their very nature, unforeseeable and may expose the workers who carry them out to some risks to their safety and/or health.

2005 07 21 (E-207/04), Vergani.

ECJ Judgment of 21 July 2005 (C-207/04), Vergani.

ECLI:EU:C:2005:495.

- *Paolo Vergani and Agenzia delle Entrate, Ufficio di Arona.*
- Reference for a preliminary ruling from the Commissione tributaria provinciale di Novara (Italy).
- (Directive 76/207, gender equality in the workplace): The scope of equal pay goes as far as a tax advantage in taxation due to an incentive for the resignation of the worker that is granted at different ages depending on the sex of the worker.
- EU law precludes granting workers who have reached the age of 50, in the case of women, and 55 years, in the case of men, as an incentive to resign, an advantage consisting of taxation at a reduced rate of half of

the amounts paid to them on the occasion of the termination of the employment relationship.

2005 10 06 (E-328/04), Vajnai.

ECJ Order of 6 October 2005 (C-328/04), Vajnai.

ECLI:EU:C:2005:596.

- *Criminal proceedings against Attila Vajnai.*
- Request for a preliminary ruling from the Criminal Court (Hungary).
- (Directive 2000/43, equality by race or ethnicity): the prohibition of discrimination on grounds of ethnicity or race is alien to the criminal precept that punishes the public use of a certain symbol (red five-pointed star).

2005 11 13 (E-177/05), Guerrero Pecino.

ECJ Order of 13 November 2005 (C-177/05), Guerrero Pecino.

ECLI:EU:C:2005:764.

- *María Cristina Guerrero Pecino v. Wage Guarantee Fund (Fogasa).*
- Request for a preliminary ruling from the Single Labour Court of Algeciras.
- (Directive 80/987/EEC, Corporate insolvency): for the purposes of FOGASA, compensation reconciled in dismissal proceedings has the same protection as those imposed in an administrative or judicial decision.
- (Company and dismissed worker reach judicial conciliation on unfair dismissal with the legally provided compensation and payment of processing wages; ten months later the company is declared insolvent).

2005 11 22 (E-144-04), Mangold.

ECJ (Grand Chamber) of 22 November 2005 (C-144/04), Mangold.

ECLI:EU:C:2005:709.

- *Werner Mangold vs. Rüdiger Helm.*
- Request for a preliminary ruling: Arbeitsgericht München - Germany.
- (Directive 1999/70, temporary employment): EU law does not preclude the possibility of temporary employment on the basis of the worker's age and for reasons of employment promotion.
- (Directive 2000/78/C): EU law precludes the unrestricted conclusion of temporary contracts for those over 52 years of age, unless there is a "close connection" with a previous indefinite contract entered into by the same employer.

- The judicial body must disapply any law contrary to the principle of non-discrimination.

2005 12 15 (C-232/04 and C-233/04), Güney-Görres.

ECJ Judgment of 15 December 2005 (C-232/04), Güney-Görres.
CLI:EU:C:2005:778.

- *Nurten Güney-Görres (C-232/04) and Gul Demir (C-233/04) v. Securicor Aviation (Germany) Ltd and Kötter Aviation Security GmbH & Co. KG.*
- Request for a preliminary ruling: Arbeitsgericht Düsseldorf (Germany).
- In order to determine whether there is a succession of undertakings by transfer of the productive infrastructure (metal detectors, baggage conveyor belt with scanner, manual metal or explosives detectors), it is not necessary that these elements have been transferred for the purpose of their own economic management.
- To this end, it is immaterial whether the State (the owner of the airport) is the one who must assume the maintenance of the assets whose use is transferred.

2006

2006 01 12 (C-132/04), Commission v. Spain.

ECJ judgment of 12 January 2006 (C-132/04), Commission v. Spain.
ECLI:EU:C:2006:18.

- *Commission of the European Communities v. Kingdom of Spain.*
- Appeal for failure to fulfil obligations lodged.
- The Framework Directive does not define its scope on the basis of belonging to the various sectors of activity (armed forces, police and civil protection service), but exclusively on the specific nature of certain special tasks performed by workers within those sectors.
- Spain has failed to comply with the Directive in respect of non-civilian staff in the Public Administrations, by failing to fully transpose its domestic legal order into Articles 2(1) and (2) and 4 of that Directive.

2006 01 19 (C-244/04), Commission v Germany.

ECJ judgment of 19 January 2006 (C-244/04), Commission v. Germany.
ECLI:EU:C:2006:49.

- *Commission of the European Communities v Federal Republic of Germany.*

- (Freedom of movement:) Germany has failed to comply with EU law by making certain movements (longer than three months) of third-country nationals decided by companies providing services established in other Member States subject to a prior authorisation procedure (obtaining a specific visa to enter and remain in national territory) and by requiring that such workers be employed by them at least one year in advance of their displacement.

2006 01 26 (E-2/05), Herbosch Kiere.

ECJ Judgment of 26 January 2006, Herbosch Kiere.

ECLI:EU:C:2006:69.

- *Rijksdienst voor Sociale Zekerheid vs. Herbosch Kiere NV.*
- Request for a preliminary ruling: Arbeidshof te Brussel - Belgium.
- Social Security coordination regulations. Prohibition of letterbox companies. Value of PD A1 documents.

2006 02 16 (E-294/04), Sarkatzis Herrero.

ECJ Judgment of 16 February 2006 (C-294/04), Sarkatzis Herrero.

ECLI:EU:C:2006:109.

- *Carmen Sarkatzis Herrero v. Madrid Institute of Health (Imsalud).*
- Request for a preliminary ruling: Labour Court No. 30 of Madrid.
- (Directive 76/207/EEC, equality): EU law requires that a worker in a situation of maternity be recognised as the same rights as other applicants approved in the same selection procedure, with regard to the conditions of access to the civil service.
- The taking up of that worker's leave must be postponed until the end of the maternity leave, but without taking into account the duration of that leave for the purposes of calculating her seniority.

2006 02 21 (E-152/03), Ritter-Coulais.

ECJ Judgment of 21 February 2006 (C-152/03), Ritter-Coulais.

ECLI:EU:C:2006:123.

- *Hans-Jürgen Ritter-Coulais and Monique Ritter-Coulais v. Finanzamt Gernersheim.*
- Request for a preliminary ruling from the Bundesfinanzhof (Germany).
- Any Community national who has made use of the right to free movement of workers and who has pursued a professional activity in another Member State is, irrespective of his place of residence and nationality, included within the scope of freedom of movement (in

this case, for the purposes of determining the tax rate for personal earned income).

2006 03 09 (E-499/04), Werhof.

ECJ Judgment of 9 March 2006 (C-499/04), Werhof.

ECLI:EU:C:2006:168.

- *Hans Werhof v. Freeway Traffic Systems GmbH & Co. KG.*
- Request for a preliminary ruling: Landesarbeitsgericht Düsseldorf (Germany).
- Directive 77/187/EEC (transfer of undertaking) does not preclude the transferee who is not a party to that agreement from being bound by collective agreements subsequent to the one in force on the date of transfer of the business where the contract of employment refers to a collective agreement which is not binding on the transferor of the transfer.

2006 03 16 (C-131/04 and C-257/04) C. D. Robinson-Steele.

ECJ Judgment of 16 March 2006 (C-131/04 and C-257/04) C. D. Robinson-Steele.

ECLI:EU:C:2006:177.

- *C. D. Robinson-Steele/R. D. Retail Services Ltd and Michael Jason Clarke/Frank Staddon Ltd and J. C. Caulfield and others/Hanson Clay Products Ltd.*
- Question referred for a preliminary ruling by the Court of Leeds (United Kingdom) (C-131/04) and the Court of Appeal (England and Wales) (Civil Division) (United Kingdom) (C-257/04).
- Remuneration for holidays: the obligation to pay for holidays is intended to place the worker, during the aforementioned holidays, in a situation that, from the point of view of salary, is comparable to periods of work.
- National legislation cannot provide for exceptions to this right in a contract; nor does it require that part of the salary paid to the worker for the work carried out be charged to the remuneration of annual leave without the worker receiving an additional amount.
- Instalment payments of annual leave: prohibitions and exceptions.

2006 03 30 (E-10/05), Mattern and Cikotic.

ECJ judgment of 30 March 2006 (C-10/05), Mattern and Cikotic.

ECLI:EU:C:2006:220.

- *Cynthia Mattern, Hajrudin Cikotic v Ministre du Travail et de l'Emploi.*

- Reference for a preliminary ruling from the Cour administrative (Luxembourg).
- EU law does not grant a third-country national the right to take up an activity as an employed person in a Member State other than that in which his or her spouse, an EU national who has made use of his or her right to freedom of movement, is or has been employed by an employed person.
- In the case: third-country national married to a Luxembourg citizen; they live in Belgium, where she receives training as a clinical assistant and develops professional internships.

2006 04 06 (C-428/04), Commission v Austria.

ECJ judgment of 6 April 2006 (C-428/04), Commission v Republic of Austria.

ECLI:EU:C:2006:238.

- *Commission of the European Communities v Republic of Austria.*
- Appeal for non-compliance.
- The application of the Framework Directive is not conditioned by the size of the company, so it applies to both large companies and SMEs.
- It is possible to take into account the size of the undertaking as well as the nature of the activities in order to specify certain aspects, but not to exclude a priori the designation of the workers responsible for the protection and prevention activities in question.

2006 04 06 (E-124/05), Federatie Nederlandse.

ECJ Judgment of 6 April 2006 (C-124/05), Federatie Nederlandse.

ECLI:EU:C:2006:244.

- *Federatie Nederlandse Vakbewegingm vs. Staat der Nederlanden.*
- Question referred by the Gerechtshof te 's-Gravenhage (Netherlands).
- The right to holidays as a principle of social law is associated with the guarantee of the safety and health of workers and no type of exception is admissible against it.
- A leave guaranteed by European Union law cannot undermine the right to take another leave guaranteed by the same law.
- Effective guarantee of the enjoyment of holidays during the term of the employment contract if they were not taken in a given year, and the right to holidays cannot be replaced by financial compensation in a subsequent year.

2006 06 15 (C-255/04), Commission v. France.

ECJ judgment of 15 June 2006 (C-255/04), *Commission v. France*.
ECLI:EU:C:2006:401.

- *Commission of the European Communities v French Republic*.
- With regard to the regulation which, in order to prevent concealed work and fraud, is in force in France for the activity of artists, consisting in imposing the payment of a salary (a kind of presumption of salaried character) when the artist is established in his Member State of origin, where he habitually provides similar services.
- Such taxation constitutes an obstacle to the freedom to provide services, as it entails greater burdens for the undertakings contracting them.

2006 07 04 (E-212/04), Adeneler.

ECJ (Grand Chamber) of 4 July 2006 (C-212/04), *Adeneler*.
ECLI:EU:C:2006:443.

- *Konstantinos Adeneler and Others v Ellinikos Organisms Galaktos (ELOG, Hellenic Milk Agency)*.
- Question referred by the Monomeles Thessalonikis (Greece).
- (Directive 1999/70 on fixed-term work): the concept of worker applies both in the field of employment relations and in the civil service and statutory fields.
- The guarantees for fixed-term work are valid for all workers, without establishing differences for the application of the rule depending on the public or private nature of the employer.
- It opposes a successive use of temporary contracts simply because it is provided for by law. Only contracts that are not separated by intervals of more than 20 working days cannot be considered as successive.

2006 07 11 (C -13/05), Chacón Navas.

ECJ Judgment of 11 July 2006 (C-13/05), *Chacón Navas*.
ECLI:EU:C:2006:456.

- *Sonia Chacón Navas v. Eurest Colectividades SA*.
- Question referred for a preliminary ruling by the Juzgado de lo Social n.º 33 de Madrid.
- For the first time, the ECJ was asked whether the situation of illness was included in the protective scope of Directive 2000/78 because it constituted a disability and the answer was in the negative.
- EU law precludes dismissal on the grounds of disability which, in view of the obligation to provide reasonable accommodation for persons

with disabilities, is not justified by the fact that the person concerned is not competent, able or available to perform the essential tasks of the post concerned.

- But the disease, as such, cannot be regarded as a plea in addition to those other pleas in respect of which Directive 2000/78 prohibits any discrimination.
- (Employee in a collective catering company who takes sick leave, expecting that she would not resume her activity in the short term; company that dismisses, acknowledges unfairness and offers compensation).

2006 09 07 (53/04), Marrosu.

ECJ Judgment of 7 September 2006 (C-53/04), Marrosu.

ECLI:EU:C:2006:517.

- *Cristiano Marrosu and Gianluca Sardino against Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*.
- Request for a preliminary ruling: Tribunale di Genova (Italy).
- Possibility of excluding in the public sector the transformation of temporary contracts into employment relationships for an indefinite period when there is another effective measure to prevent and penalise, where appropriate, the abusive use by a public sector employer of successive fixed-term contracts.

2006 09 07 (180/04), Vasallo.

ECJ Judgment of 7 September 2006 (180/04), Vasallo.

ECLI:EU:C:2006:518.

- *Andrea Vassallo vs. Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*.
- Request for a preliminary ruling: Tribunale di Genova (Italy).
- (Directive 1999/70, temporary contracts): EU law does not preclude abuses in temporary employment when the employer is public from excluding conversion into a contract of indefinite duration (as in the private sector) provided that there is another effective measure to prevent and punish them (in the case: “compensation for consequential damages”).
- In the case: cook in a public hospital.

2006 09 07 (C81/05), Cordero Alonso.

ECJ Judgment of 7 September 2006 (C81/05), Cordero Alonso.

ECLI:EU:C:2006:529.

- *Anacleto Cordero Alonso v. Wage Guarantee Fund (Fogasa)*.
- Request for a preliminary ruling: High Court of Justice of Castilla y León.
- The situation protected by Spanish law before the entry into force of Directive 2002/74 (insolvency) falls within the scope of that directive.
- If FOGASA assumes the payment of the legal compensation due for the termination of the employment contract established by a court ruling, those derived from judicial conciliation must receive the same treatment.
- The national judge must disapply the law that excludes the liability of FOGASA for compensation agreed before the judicial body and approved by it.

2006 09 18 (E-506/04) Wilson.

ECJ Judgment of 19 September 2006 (C-506/04) Wilson.
EU:C:2006:587.

- *Graham J. Wilson and Ordre des avocats du barreau de Luxembourg*.
- Request for a preliminary ruling from the Cour administrative (Luxembourg).
- It is not for the Court of Justice, but for the national court, to rule on the compatibility of rules of national law with Community law.
- The Court does have jurisdiction to provide the national court with all the elements of interpretation relating to Community law which may enable it to assess the compatibility of the rules of national law with Community legislation.

2006 09 21 (C-168/04), Commission v Austria.

ECJ judgment of 21 September 2006 (C-168/04), Commission v. Austria.
ECLI:EU:C:2006:595.

- *Commission of the European Communities v Republic of Austria*.
- Austria is in breach of the Treaty by making the posting of non-EU workers in the service of an undertaking established in another Member State subject to the obtaining of a confirmation of European posting (to be issued within six weeks and the granting of which requires, in the first place, that the workers concerned have been working in that undertaking for at least one year or are linked to it by means of an employment contract of indefinite duration and that they must be employed by the Labour Federation). accredits compliance with Austrian working conditions and wages).

- It also fails to comply because its legislation contains a ground for automatic refusal of entry and residence permits, without exception, which does not allow the situation of workers who are nationals of a third country, lawfully posted by an undertaking established in another Member State, to be regularised when those workers have entered the national territory without a visa.

2006 10 03 (C 17/05), Cadman.

ECJ judgment of 3 October 2006 (C 17/05), Cadman.
ECLI:EU:C:2006:633.

- *B. F. Cadman v. Health & Safety Executive.*
- Request for a preliminary ruling: Court of Appeal (England and Wales) (Civil Division) - United Kingdom.
- (Non-discrimination by gender): in general, remuneration according to seniority is suitable to achieve the legitimate purpose of rewarding experience; The employer is not obliged to justify in a special way that the use of this criterion is suitable, unless the employee provides data that give rise to well-founded doubts in this regard.
- Where a system of occupational classification based on an evaluation of the work to be carried out is used for the determination of remuneration, it is not necessary to prove that a worker considered individually has acquired, during the relevant period, experience which has enabled him to perform his work better.

2006 12 01 (E-14/04) Dellas.

ECJ Judgment of 1 December 2006 (C-14/04), Dellas.
ECLI:EU:C:2005:728.

- *Abdelkader Dellas and Others v Premier Ministre y Ministre des Affaires sociales, du Travail et de la Solidarité.*
- Decision for a preliminary ruling from Conseil d'État (France).
- The face-to-face activity of social and health workers should not impede their right to rest, which can be hindered when an equivalence method is used.
- If national law improves the maximum working hours per week, the limits for verifying compliance with the Working Time Directive are exclusively those set by the Directive.

2006 12 13 (T-217/03 and T-245/03), FNCBV.

STJPI 13 December 2006 (T-217/03 and T-245/03), Fédération nationale de la coopération bétail et viande (FNCBV).

ECLI:EU:T:2006:391.

- *Fédération nationale de la coopération bétail et viande (FNCBV) (T-217/03) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others (T-245/03) v Commission of the European Communities.*
- Competition law: concept of company.

2006 12 28 (C-413/04), Parliament v Council.

ECJ judgment of 28 December 2006 (C-413/04), Parliament v Council.
ECLI:EU:C:2006:741.

- *European Parliament v. Council of the European Union.*
- (Electricity market): where the Community intends to adopt a legislative act during the period between the signing of the Treaty of Accession and its entry into force, the information and consultation procedure may lead to the granting, where appropriate, of transitional exemptions in favour of an acceding State with regard to the application of the provisions of the act which is envisaged for adoption in this way.

2007

2007 01 11 (E-208/05), ITC.

ECJ Judgment of 11 January 2007 (C-208/05), ITC.
ECLI:EU:C:2007:16.

- *ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit.*
- Request for a preliminary ruling: Sozialgericht Berlin (Germany).
- (Basic freedoms): the rule that the payment by a Member State to a private employment agency of the remuneration that a jobseeker owes to that agency for his placement is subject to the condition that the employment provided by that intermediary is subject to compulsory social security contributions in the territory of that State is contrary to EU law.
- It is for each national judge to seek an interpretation that conforms to the law; where this is not possible, in the case of EC Treaty rules granting rights that can be invoked, the application of any opposing national rules must be avoided.

2007 01 11 (E-437/05), Vorel.

ECJ Order of 11 January 2007 (C-437/05), Vorel.
ECLI:EU:C:2007:23.

- *Jan Vorel vs. Nemocnice Veský Krumlov.*

- Decision for a preliminary ruling from Okresní soud v veském Krumlovu (Czech Republic).
- Directive 93/104 (working time) requires that the times of presence of health personnel be counted as work, but it does not preclude differentiated remuneration depending on whether or not there has been effective productive activity during those shifts.

2007 01 11 (E-438/05), Viking.

ECJ Judgment of 11 January 2007 (C-438/05), Viking.

ECLI:EU:C:2007:772.

- *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti.*
- Request for a preliminary ruling: Court of Appeal (England and Wales), Civil Division - United Kingdom.
- (Maritime transport): Right of establishment and fundamental rights.
- Collective dispute measure by a trade union organisation against a private company: a collective agreement that may dissuade an undertaking from registering a ship under the flag of another Member State: freedom of establishment is at stake.
- Freedom of movement is affected by the conflictive measure intended to ensure that a private undertaking whose registered office is in a particular Member State concludes a collective labour agreement with a trade union established in that State and applies the clauses provided for by that agreement to employees of a subsidiary of that undertaking established in another Member State. The legitimacy of the measure depends on whether it is adequate and does not go beyond what is necessary.

2007 01 18 (C-385/05), CGT.

ECJ Judgment of 18 January 2007 (C-385/05), CGT.

ECLI:EU:C:2007:37.

- *Confédération générale du travail (CGT) and Others v Premier ministre and Ministre de l'Emploi, de la Cohésion sociale et du Logement.*
- Request for a preliminary ruling: Conseil d'État (France).
- (Directives 98/59/EC and 2002/14/EC, collective redundancies) Member States can improve the rules on information and consultation of workers.
- In order to calculate the number of workers employed, it is not possible to exclude workers belonging to a certain age category, even temporarily.

2007 01 25 (C278/05), Robins.

ECJ Judgment of 25 January 2007 (C278/05), Robins.

ECLI:EU:C:2007:56.

- *Carol Marilyn Robins et al. v. Secretary of State for Work and Pensions.*
- Reference for a preliminary ruling: High Court of Justice (England and Wales), Chancery Division (United Kingdom).
- Directive 80/987/EEC (insolvency) does not require that supplementary retirement pensions be financed entirely by the State in the event of the insolvency of the employer and insufficient financial resources of supplementary occupational or interprofessional pension schemes.
- In the event of incorrect transposition, the liability of the Member State concerned is subject to a finding that that State has manifestly and seriously failed to comply with the limits imposed on its discretion.

2007 01 30 C-150/04), Commission v. Denmark.

ECJ (Grand Chamber) of 30 January 2007 (C-150/04), Commission v. Denmark.

ECLI:EU:C:2007:69.

- *Commission of the European Communities v Kingdom of Denmark.*
- By maintaining in force a scheme which provides only for tax relief and exemptions for contributions to supplementary pension schemes whose promoters are established in Denmark, it is in breach of its obligations under Articles 39, 43, 49 and 56 TEC.

2007 02 15 (C-270/05), Panagiotidis.

ECJ Judgment of 15 February 2007 (C-270/05), Panagiotidis.

ECLI:EU:C:2007:101.

- *Athinaiki Chartopoïia AE v. L. Panagiotidis et al.*
- Request for a preliminary ruling: Areios Pagos - Greece.
- (Directive 98/59/EC, collective dismissal): “workplace” is a concept of Community law, which refers to a differentiated entity with permanence and stability.
- To this end, the data set must be examined, in a “given local context and in a given social environment”; There is no need for legal, economic, financial, administrative or technological autonomy, or geographical separation.

2007 03 06 (C-338/04 et al.), Placanica.

ECJ Judgment (Grand Chamber) of 6 March 2007 (C-338/04 and others), Placanica.

ECLI:EU:C:2007:133.

- *Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04).*
- Requests for a preliminary ruling: Tribunale di Larino (C-338/04) and Tribunale di Teramo (C-359/04 and C-360/04) - Italy.
- National legislation which prohibits the collection, acceptance, registration and transmission of betting proposals, in particular those relating to sporting events, in the absence of a police licence or authorisation issued by the Member State concerned, constitutes a restriction on the freedom of establishment and the freedom to provide services.

2007 03 13 (E-432/05), Unibet.

ECJ Judgment of 13 March 2007 (C-432/05), Unibet.

ECLI:EU:C:2007:163.

- *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern.*
- Request for a preliminary ruling: Högsta domstolen (Sweden).
- Judicial protection of Community freedoms: EU law does not require the State to provide for an autonomous action to challenge national provisions, provided that it can be done through other channels (including indirect ones).
- EU law requires that precautionary measures can be adopted with respect to community freedoms, regulated by the rules of each country.

2007 05 03 (C-303/05), VZW.

ECJ judgment of 3 May 2007, VZW).

ECLI:EU:C:2007:261.

- *Advocaten voor de Wereld VZW contra Leden van de Ministerraad.*
- Request for a preliminary ruling: Arbitragehof - Belgium.
- Belgian law does not violate EU law although it provides for an exception, without objective or reasonable justification, to the requirement of double criminality when it comes to executing a European arrest warrant, a requirement that is maintained for other offences.

2007 06 14 (C-127/05), Commission v United Kingdom.

ECJ (Third Chamber) of 14 June 2007 (C-127/05), Commission v. United Kingdom.

ECLI:EU:C:2007:338.

- *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.*
- The Framework Directive obliges the employer to guarantee workers a safe working environment.
- It cannot be said that the employer should be held objectively liable. The Directive merely lays down the general safety obligation incumbent on the employer, without ruling on the specific form of liability incumbent on him.
- The employer shall not be relieved of his responsibilities in the field of occupational safety and health when he has recourse to external competences, nor shall he be relieved by reason of the obligations of the workers in this area. Such provisions are intended to specify the nature and extent of the obligation and cannot be inferred from them that there is a particular form of liability in the event of accidents.

2007 07 05 (C-522/04), Commission v. Belgium.

ECJ judgment of 5 July 2007 (C-522/04), Commission v. Belgium.

ECLI:EU:C:2007:405.

- *Commission of the European Communities v Kingdom of Belgium.*
- An obstacle to the freedom of movement of workers is national provisions which grant tax advantages for the payment of premiums to supplementary insurance if they are received by a pension institution established in the Member State itself and not if the receiving institution is established in another Member State.

2007 07 05 (C-317/06), Commission v. Spain.

ECJ judgment of 5 July 2007 (C-317/2006), Commission v. Spain.

ECLI:EU:C:2007:415.

- *Commission of the European Communities v Kingdom of Spain.*
- Appeal for failure of State to fulfil obligations.
- (Directive 2002/14, information and consultation): Spain has not adapted the provisions necessary to transpose the Directive within the period allowed.
- 2007 07 18 (C-490/04), Commission v. Germany.
- ECJ judgment of 18 July 2007 (C-490/04), Commission v. Germany.
- *Commission of the European Communities v Federal Republic of Germany.*
- Appeal for non-compliance.

- (Freedom to provide services): the law according to which foreign temporary employment agencies are obliged to declare not only the assignment of a worker to a transferee company in Germany, but also any modification relating to the place where this worker is assigned by the user, is contrary to EU law.

2007 09 13 (C-307/05), Del Cerro Alonso.

ECJ Judgment of September 2007 (C-307/05), Del Cerro Alonso.
ECLI:EU:C:2007:509.

- *Yolanda Del Cerro Alonso against Osakidetza-Basque Health Service.*
- Request for a preliminary ruling: Labour Court No. 1 of San Sebastián.
- The concept of “working conditions” includes a seniority bonus reserved exclusively for permanent workers.
- EU law precludes a difference in treatment between fixed-term workers and permanent workers that is justified by the mere fact that it is provided for by a legal or regulatory provision or by a collective agreement.

2007 09 13 (E-458/05), Jouini.

ECJ Judgment of 13 September 2007 (C-458/05), Jouini.
ECLI:EU:C:2007:512.

- *Mohamed Jouini and Others v. Princess Personal Service GmbH (PPS).*
- Request for a preliminary ruling: Oberster Gerichtshof (Austria).
- There is a transfer of company if part of the administrative staff and temporary workers move to another temporary employment agency to carry out the same activities in the service of identical clients and there is a transfer of relevant assets (without the need, therefore, to use other important operating elements or other parts of the company).

2007 09 20 (E-116/06), Sari Kiiski.

ECJ Judgment of 20 September 2007 (C-116/06), Sari Kiiski.
ECLI:EU:C:2007:536.

- *Sari Kiiski vs. Tampereen kaupunki.*
- Request for a preliminary ruling from the Tampereen käräjäoikeus (Finland).
- (Directives 76/207/92/85 on equality and health of women workers): they oppose national legislation on childcare leave which allows employers to refuse to reduce the duration of parental leave for childcare

in order to replace it with maternity leave for a subsequent child, so that women are deprived of the rights inherent in maternity leave.

- The right to protection of pregnant women against risks is not limited to the fact that the pregnant woman is necessarily and currently exposed to such risks.

2007 10 11 (E-460/06), Paquay.

ECJ Judgment of 11 October 2007 (C-460/06), Paquay.

ECLI:EU:C:2007:601.

- *Nadine Paquay v. Société d'architectes Hoet + Minne SPRL*.
- Request for a preliminary ruling: Tribunal du travail de Bruxelles v Belgium.
- (Directive 92/85/EEC, occupational health of pregnant women): they prohibit not only the notification of a decision to dismiss on account of pregnancy or the birth of a child, during the period of protection referred to in Article 10 of Directive 92/85/EEC (pregnancy and maternity), but also the adoption of preparatory measures for such a decision before the expiry of that period.
- Dismissal due to pregnancy or maternity is contrary to EU law, regardless of when it is notified; The protection must be similar to that provided in the previous case.

2007 10 16 (E-411/05), Palacios De la Villa.

ECJ Judgment of 16 October 2007 (C-411/2005), Palacios De la Villa.

ECLI:EU:C:2007:604.

- *Félix Palacios de la Villa v. Cortefiel Servicios SA*.
- Request for a preliminary ruling: Juzgado de lo Social n.º 33 de Madrid - Spain.
- (Directive 2000/78/EC): Collective agreement that provides for the automatic termination of the employment relationship when the worker reaches 65 years of age and is entitled to a retirement pension.
- EU law does not preclude compulsory retirement as provided for in the collective agreement if it is based on a legitimate aim (employment policy), provided that the means used are deemed appropriate and necessary.

2007 12 06 (C-300/06), Ursula Voß.

ECJ Judgment of 6 December 2007 (C-300/06), Ursula Voß.

ECLI:EU:C:2007:757.

- *Ursula Voß v. Land Berlin*.
- Question referred by the Bundesverwaltungsgericht (Germany).
- EU law precludes hours worked outside individual working time from being paid differently for part-time employees (up to the limit of full-time working hours) in such a way that they are disadvantaged. This opposition is due to the fact that the group affected is mostly female and the justification for the different treatment is not accredited.

2007 12 11 (E-438/05), Viking.

ECJ Judgment of 11 December 2007 (C-438/05), Viking.

ECLI:EU:C:2007:772.

- *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*.
- Request for a preliminary ruling: Court of Appeal (England and Wales), Civil Division (United Kingdom).
- (Transport by ferry): the freedom to provide services is affected when a trade union seeks to have a collective agreement concluded by a private undertaking whose registered office is located in a Member State and apply it to the workers of a subsidiary established in another Member State.
- Such restrictions may, in principle, be justified by the protection of an overriding reason in the public interest, such as the protection of workers, provided that they are found to be appropriate for ensuring the attainment of the legitimate objective pursued and that they do not go beyond what is necessary to achieve that objective.
- Inapplicability of the Albany doctrine.

2007 12 18 (C-341/05), Laval.

ECJ (Grand Chamber) of 18 December 2007 (C-341/05), Laval.

ECLI:EU:C:2007:809.

- *Laval un Partneri Ltd against Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*.
- Request for a preliminary ruling: Arbetsdomstolen (Sweden).
- (Directive 96/71/EC, posting of workers in the construction sector): EU law precludes a trade union organisation from exerting pressure (collective dispute, blocking works) on a company established in another State in a State where working conditions are legally fixed (except for the minimum wage) to initiate negotiations on the wages to be

paid to posted workers and to adhere to a collective agreement that is more favourable than the minimum wage. the relevant legal provisions.

- EU law precludes the prohibition imposed on trade union organisations from taking collective action in order to repeal or amend a collective agreement concluded by third parties from being conditional on the measures relating to the working and employment conditions to which national law directly applies.

2008

2008 01 17 (C246/06), Velasco Navarro.

ECJ Judgment of 17 January 2008 (C246/06), Velasco Navarro.
ECLI:EU:C:2008:19.

- *Josefa Velasco Navarro v. Wage Guarantee Fund (Fogasa)*.
- Request for a preliminary ruling: Juzgado de lo Social Único de Algeciras.
- Failure to comply with the deadline for transposition of the Insolvency Guarantee Reform Directive (2002/74/C) and its possible direct effect do not allow an insolvency prior to the end of that period to be invoked.
- In relation to compensation for unfair dismissal recognised in judicial conciliation, in relation to a state of insolvency that occurred between the date of entry into force of the Directive and the date of expiry of the period for adaptation, it is necessary to ensure that Spanish legislation is applied in accordance with the principle of non-discrimination.

2008 02 14 (E-450/06), Varec.

ECJ Judgment of 14 February 2008 (C-450/06), Varec.
ECLI:EU:C:2008:91.

- *Varec SA v. Belgian State*.
- Request for a preliminary ruling: Conseil d'État (Belgium).
- Public procurement - Actions - Directive 89/665/EEC - Effective remedy - Concept - Balance between the adversarial principle and the right to respect for business secrets.
- The body responsible for review procedures should ensure the confidentiality of the information provided by economic operators.

2008 02 21 (C498/06), Robledillo Núñez.

ECJ Judgment of 21 February 2008 (C498/06, Robledillo Núñez).
ECLI:EU:C:2008:109.

- *Maira María Robledillo Núñez v. Wage Guarantee Fund (Fogasa)*.

- Request for a preliminary ruling: Juzgado de lo Social Único de Algeciras.
- EU law allows Spain to exclude compensation for unfair dismissal from FOGASA protection when it has been recognised in an extrajudicial conciliation act. Such an exclusion, objectively justified, constitutes a necessary measure in order to prevent abuses.
- (Company and dismissed worker agree in CEMAC that the dismissal is unfair and that compensation of € 1,237 is unfair, given the short length of the contract; after the insolvency of the company is declared, FOGASA rejects its responsibility).

2008 02 26 (E-506/06), Mayr.

ECJ Judgment of 26 February 2008 (C-506/06), Mayr.

ECLI:EU:C:2008:119.

- *Sabine Mayr vs. Bäckerei und Konditorei Gerhard Flöckner OHG*.
- Request for a preliminary ruling: Oberster Gerichtshof (Austria).
- Directive 76/207/ECC (occupational health of pregnant women) precludes the dismissal of a worker who is at an advanced stage of in vitro fertilisation treatment (between follicular puncture and the immediate transfer of the fertilised eggs in vitro to the uterus) in so far as that dismissal is essentially based on the fact that the worker concerned has undergone such treatment. Therefore, a discriminatory dismissal on grounds of sex is one that occurs in this period of time, even if the pregnancy does not actually exist and does not fall within the scope of Directive 92/85/EEC.

2008 04 01 (E-267/06), Maruko.

ECJ Judgment of 1 April 2008 (C-267/06), Maruko.

ECLI:EU:C:2008:179.

- *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*.
- Question referred by the Bayerisches Verwaltungsgericht München (Germany).
- (Directive 2000/78/EC, equality at work): a survivor's benefit granted under an occupational pension scheme falls within the scope of the equality rules.
- EU law precludes the surviving member of a registered partnership, after the death of the other partner, from being entitled to receive a survivor's pension equivalent to that granted to a surviving spouse, where, under national law, the institution of the registered partnership

places persons of the same sex in a situation comparable to that of spouses as regards that survivor's benefit.

2008 04 03 (C-346/06): Rüffert.

ECJ Judgment of 3 April 2008 (C-346/06), Rüffert.

ECLI:EU:C:2008:189.

- *Dirk Rüffert v Land Niedersachsen*.
- Request for a preliminary ruling: Oberlandesgericht Celle (Germany).
- (Directive 96/71, posting) EU law precludes a State from requiring potential public contractors to undertake in writing to pay their employees, as consideration for the performance of the services in question, at least the remuneration provided for in the collective agreement applicable at the place of performance.

2008 04 15 (E-268/06), Impact.

ECJ (Grand Chamber) of 15 April 2008 (C-268/06), Impact.

ECLI:EU:C:2008:223.

- *Impact v. Minister for Agriculture and Food and others*.
- Request for a preliminary ruling: Labour Court (Ireland).
- The non-discrimination rule contained in the Temporary Contracts Directive is unconditional and sufficiently precise to allow an individual to invoke it before a national court, unlike safeguards against abuse.
- The concept of working conditions includes conditions relating to remuneration and pensions which depend on the employment relationship, excluding conditions relating to pensions arising from a statutory social security scheme.

2008 04 24 (C-55/07 and 56/07), Michaeler.

ECJ Judgment 24 April 2008 (C-55/07 and 56/07), Michaeler.

ECLI:EU:C:2008:248.

- *Othmar Michaeler (C-55/07 and C-56/07), Subito GmbH (C-55/07 and C-56/07) and Ruth Volgger (C-56/07) v. Amt für sozialen Arbeitsschutz and Autonome Provinz Bozen*.
- Request for a preliminary ruling: Landesgericht Bozen (Italy).
- (Directive 97/81/EC; part-time): the obligation to notify the administration of a copy of part-time employment contracts within 30 days of their conclusion constitutes an administrative obstacle limiting the possibilities of part-time work.

2008 05 20 (C-352/06), Bosmann.

ECJ Judgment of 20 May 2008, Bosmann.

- *ECLI:EU:C:2008:290.*
- Brigitte Bosmann v Bundesagentur für Arbeit - Familienkasse Aachen.
- Request for a preliminary ruling: Finanzgericht Köln - Germany.
- Social Security coordination regulations. Access to family benefits in a non-competent State based on mere residence.

2008 06 12 (E-364/07), Vassilakis.

ECJ Order of 12 June 2008 (C-364/07). Vassilakis.

ECLI:EU:C:2008:346.

- *Spyridon Vassilakis et al. v. Dimos Kerkyraion.*
- Request for a preliminary ruling: Monomeles Protodikeio Kerkyras (Greece).
- (Directive 1999/70): the mere fact that it is provided for in legal provisions does not constitute objective grounds justifying the renewal of successive contracts in order to prevent the abuse of fixed-term contracts.
- EU law does not preclude an independent administrative authority from being competent to reclassify, where appropriate, fixed-term contracts as contracts of indefinite duration.

2008 06 19 (C-319/06), Commission v Luxembourg.

ECJ judgment of 19 June 2008 (C-319/06), Commission v. Luxembourg.

ECLI:EU:C:2008:350.

- *Commission of the European Communities v Grand Duchy of Luxembourg.*
- Failure of the State.
- (Directive 96/71, posting of workers): the national law that regulates the inspection work by the competent national authorities in a way that lacks the necessary clarity to guarantee the legal certainty of companies wishing to post workers is contrary to EU law.
- The law that requires the documents necessary for inspection work to be kept in Luxembourg in the possession of an ad hoc representative resident in that State also violates EU law.

2008 07 10 (E-54/07), Feryn.

ECJ Judgment of 10 July 2008 (C-54/07), Feryn.

EU:C:2008:397.

- *Centrum voor gelijkheid van kansen en voor racismebestrijding contra Firma Feryn NV*.
- Request for a preliminary ruling: Arbeidshof te Brussel - Belgium.
- (Directive 2000/43, non-discrimination on the basis of race or ethnicity): for an employer to publicly state that it will not employ workers of a particular ethnic or racial origin constitutes direct discrimination in recruitment.
- Such statements constitute a serious indication of discrimination and shift the burden of proving that this is not the case to the employer, for example by proving that the actual recruitment practice of his company does not correspond to those statements.
- EU law requires that in such cases the sanctioning regime when there is no identifiable victim is also effective, proportionate and dissuasive.

2008 07 17 (E-303/06), Coleman.

ECJ (Grand Chamber) of 17 July 2008 (C-303/06), Coleman.
ECLI:EU:C:2008:415.

- *S. Coleman v. Attridge Law and Steve Law*.
- Question referred for a preliminary ruling by the Employment Tribunal, London South (United Kingdom).
- Female worker who suffers unfavourable treatment because she is the mother of a child with a disability: this is discrimination (“by association”) on the basis of disability, contrary to Directive 2000/78/EC.
- The prohibition of direct discrimination and harassment is not limited to persons who are themselves disabled.
- Having a disabled child does not justify discriminatory treatment. This exists if it is proven that the unfavourable treatment is motivated by the disability suffered by a child to whom the worker lavishes most of the care that his condition requires.

2008 07 25 (C-504/06), Commission v Italy.

ECJ judgment of 25 July 2008 (C-504/06), Commission v. Italy.
ECLI:EU:C:2008:444.

- *Commission of the European Communities v Italian Republic*.
- Failure to fulfil obligations.
- Directive 92/57/EEC (temporary or mobile construction sites): misalignment of the obligation imposed on the owner or the site manager to appoint one or more safety and health coordinators.

2008 09 23 (E-427/06), Bartsch.

ECJ Judgment of 23 September 2008 (C-427/06), Bartsch.

ECLI:EU:C:2008:517.

- *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH.*
- Request for a preliminary ruling: Bundesarbeitsgericht - Germany.
- A national occupational pension scheme which excludes the right to a widow's pension for the surviving spouse who is more than 15 years younger than the deceased worker has no connection with EU law, which does not contain a prohibition of any discrimination on grounds of age, the application of which must be ensured by the courts of the Member States where any discriminatory conduct has no link with Community law.

2008 10 16 (E-313/07), Kirtruna and Vigano.

ECJ Judgment of 16 October 2008 (C-313/07), Kirtruna and Vigano.

ECLI:EU:C:2008:574.

- *Kirtruna SL and Elisa Vigano against Red Elite de Electrodomésticos SA and others.*
- Request for a preliminary ruling: Commercial Court No. 3 of Barcelona - Spain.
- Directive 2001/23/EC (transfer of undertakings) does not require, in the event of a transfer of an undertaking, the maintenance of the lease of a business premises concluded by the transferor of the undertaking with a third party, even if the termination of that contract may entail the termination of the employment contracts transferred to the transferee.

2008 10 16 (C-310/07), Svenska staten.

ECJ Judgment of 16 October 2008 (C-310/07), Svenska staten.

ECLI:EU:C:2008:573.

- *Svenska staten against Anders Holmqvist.*
- Reference for a preliminary ruling: Lunds tingsrätt - Sweden.
- For the purposes of Directive 80/987/EEC (protection against insolvency), in order for an undertaking established in one State (A) to be considered to have activities in the territory of another (B), it is not necessary that it have a subsidiary or a permanent establishment in B, but it does have the human resources to enable it to carry out activities.

- Having a person employed for the delivery of goods does not mean that the transport company has a permanent economic presence in another Member State.
- (Under the Directive, where an undertaking with activities in the territory of at least two Member States is in a state of insolvency, the institution competent to pay unpaid employment claims is that of the Member State in whose territory they carry on or habitually carry on their work.).

2008 11 27 (E-396/07), Juuri.

ECJ Judgment of 27 November 2008 (C-396/07), Juuri.

ECLI:EU:C:2008:656.

- *Mirja Juuri vs. Fazer Amica Oy.*
- Request for a preliminary ruling: Korkein oikeus (Finland).
- EU law does not require the transferee to guarantee compensation such as that of unfair dismissal when after the transfer of the company an objective and legal cause for contractual termination arises (change of conditions when the metal agreement ceases to apply and the hotel and catering agreement begins to apply).
- The maintenance of the working conditions agreed by a collective agreement that expires on the date of transfer of the company is not guaranteed beyond this date.

2008 12 16 (E-210/06) Cartesio.

ECJ Judgment of 16 December 2008 (C-210/06) Cartesio.

ECLI:EU:C:2008:723.

- *CARTESIO Oktató és Szolgáltató bt.*
- Request for a preliminary ruling from the Szegedi Ítéltábla (Hungary).
- Where there are rules of national law relating to an appeal against a decision making a reference for a preliminary ruling, which are characterised by the fact that the case in the main proceedings is still pending in its entirety before the referring court, with only the order for reference being the subject of a limited appeal, Article 234 EC, second paragraph, must be interpreted as meaning that the competence conferred by that provision of the Treaty on any national court to make a reference for a preliminary ruling to the Court cannot be called into question by the application of such rules as allowing the court hearing the appeal to amend the decision making a reference for a preliminary ruling to

the Court of Justice, set aside that reference for a preliminary ruling and order the court which issued that decision to resume the suspended domestic law proceedings.

2008 12 16 (E-213/07), Michaniki.

ECJ Judgment of 16 December 2008 (C-213/07), Michaniki.
ECLI:EU:C:2008:731.

- *Michaniki AE vs. Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias.*
- Reference for a preliminary ruling: Symvoulío tis Epikrateias (Greece).
- EU law precludes the establishment of an absolute presumption of incompatibility between the status of owner, partner, main shareholder or manager of an undertaking active in the media sector and the similar status of the person who undertakes the execution of works contracts, on the grounds of equal treatment of tenderers and transparency, supplies or services in the public sector.

2008 12 18 (E-306/07) Andersen.

ECJ Judgment of 18 December 2008 (C-306/07), Andersen.
ECLI:EU:C:2008:743.

- *Ruben Andersen vs. Kommunernes Landsforening.*
- Request for a preliminary ruling: Højesteret (Denmark).
- Directives 91/533 (contract information) and 1999/70/EC (temporary) have somewhat different concepts on the scope of the concept of temporary workers.
- For short-term contracts, if a State has not adopted a rule to that effect, that duration must be determined in such a way as to ensure the effective protection that EU law confers on workers.

2009

2009 01 20 (C-350/06 and C-520/06), Schultz-Hoff.

ECJ Judgment of 20 January 2009 (C-350/06 and C-520/06), Schultz-Hoff.
ECLI:EU:C:2009:18.

- *Gerhard Schultz-Hoff and Deutsche Rentenversicherung Bund, and in the proceedings between Stringer and Others and Her Majesty's Revenue and Customs.*
- Question referred by the Landesarbeitsgericht Düsseldorf (Germany).

- Holidays and medical leave: the worker on medical leave who is denied access to holidays must be able to enjoy them.
- Purpose of the right to vacation; Neither national laws nor practices may impose conditions which make it impossible for certain workers to exercise the right to paid annual leave.
- Calculation of the financial compensation that replaces the holiday period in the event of termination of the employment relationship: this corresponds to the ordinary remuneration.

2009 02 12 (E-466/07), Klarenberg.

ECJ Judgment of 12 February 2009 (C-466/07), Klarenberg.

ECLI:EU:C:2009:85.

- Dietmar Klarenberg v Ferrotron Technologies GmbH.
- Request for a preliminary ruling: Landesarbeitsgericht Düsseldorf (Germany).
- A transfer of an undertaking (Directive 2001/23/EEC) exists when the transferred party retains its organisational autonomy, provided that the functional link between the different factors of production transferred is maintained and that this allows the transferee to use them to carry out an identical or similar economic activity.

2009 03 05 (E-388/07), Age Concern.

ECJ Judgment of 5 March 2009 (C-388/07), Age Concern.

ECLI:EU:C:2009:128.

- *The Queen, at the request of The Incorporated Trustees of the National Council for Ageing (Age Concern England) against Secretary of State for Business, Enterprise and Regulatory Reform.*
- Request for a preliminary ruling: High Court of Justice, Queen's Bench Division (Administrative Court) - United Kingdom.
- A national measure which does not contain a precise list of the objectives justifying derogations from the principle of prohibition of discrimination on grounds of age is compatible with EU law.
- Directive 2000/78 allows for such derogations for measures justified by legitimate social policy objectives, such as those linked to employment, labour market or vocational training policies. It is for the national court to decide whether the State, having regard to the discretion available to it, has chosen appropriate and necessary means to achieve that objective.

2009 03 12 (C-458/07), Commission v Portugal.

ECJ judgment of 12 March 2009 (C-458/07), Commission v. Portugal.
ECLI:EU:C:2009:147.

- *Commission of the European Communities v Portuguese Republic.*
- (Telecommunications): Portugal has failed to comply with EU law by failing to ensure in practice that at least a general subscriber directory and a general subscriber information service are made available to all end-users.

2009 04 23 (C-378/07 to C-380/07), Angelidaki.

ECJ judgment of 23 April 2009 (C-378/07 to C-380/07), Angelidaki.
ECLI:EU:C:2009:250.

- *Kiriaki Angelidaki et al. v. Organismos Nomarchiakis Autodioikisis Rethymnis (C-378/07), Charikleia Giannoudi v. Dimos Geropotamou (C-379/07) and Georgios Karabousanos and Sofoklis Michopoulos v. Dimos Geropotamou (C-380/07).*
- (Directive 1999/70, temporary): measures aimed at preventing the abusive use of fixed-term contracts do not apply to the first or only temporary contract.
- The mere fact that it is provided for in legal provisions is not objective reasons justifying the renewal of successive contracts.
- Possibility of prohibiting the transformation of temporary contracts into permanent contracts in the public sector if there are other effective prevention and sanction measures.

2009 04 24 (E-519/08), Koukou.

ECJ Order of 24 April 2009 (C-519/08), Koukou.
ECLI:EU:C:2009:269.

- *Archontia Koukou vs. Elliniko Dimosio.*
- Request for a preliminary ruling: Monomeles Protodikeio Athinon (Greece).
- (Directive 1999/70): measures aimed at preventing the abuse of fixed-term contracts and an absolute prohibition on the contract becoming indefinite when the employer is a public employer.
- The need for equivalent safeguards and the role of the national court: interpretation in conformity with EU law.

2009 06 04 (C-22/08 and C-23/08), Vatsouras and Koupatantze.

ECJ judgment of 4 June 2009 (C-22/08 and C-23/08), Vatsouras and Koupatantze.

ECLI:EU:C:2009:344.

- *Athanasios Vatsouras (C-22/08) and Josif Koupatantze (C-23/08) v Arbeitsgemeinschaft (ARGE) Nürnberg 900.*
- Requests for a preliminary ruling from the Sozialgericht Nürnberg - Germany.
- (Free movement): To be considered a worker, or to maintain the status of such for the purposes of receiving benefits, it is necessary to prove that a real and effective activity has been carried out; and it is necessary to maintain a real link with the labour market.
- It does not matter whether the litigants have carried out activities of short duration or of little importance, or have obtained profits or remuneration of limited amount.

2009 06 11 (C-561/07), Commission v Italy.

ECJ judgment of 11 June 2009 (C-561/07), Commission v. Italy.

ECLI:EU:C:2009:363.

- *Commission of the European Communities v Italian Republic.*
- Failure of the State.
- Directive 2001/23/EC (transfer of companies): it is breached by maintaining in force provisions that do not guarantee the rights of workers when the ownership of a company declared in a state of crisis changes.

2009 06 18 (E-88/08), Hutter.

ECJ Judgment of 18 June 2009 (C-88/08), Hutter.

ECLI:EU:C:2009:381.

- *David Hütter v Technische Universität Graz.*
- Request for a preliminary ruling: Oberster Gerichtshof - Austria.
- National legislation is discriminatory which, in order not to disadvantage general education in relation to vocational training and to encourage the integration of young apprentices into the labour market, excludes the taking into account of periods of employment completed before the age of 18 for the purposes of determining the step corresponding to contract staff in the civil service of a Member State.

2009 07 16 (E-208/07), Chamier-Glisczinski.

ECJ judgment of 16 July 2009, Chamier-Glisczinski.

ECLI:EU:C:2009:455.

- *Petra von Chamier-Glisczinski v. Deutsche Angestellten-Krankenkasse.*
- Request for a preliminary ruling: Bayerisches Landessozialgericht - Germany.
- Social Security coordination regulations. Access to dependency benefits in a non-competent State based on mere residence.

2009 07 16 (C-537/07), Gómez-Limón Sánchez-Camacho.

ECJ Judgment of 16 July 2009 (C-537/07), Gómez-Limón Sánchez-Camacho.

ECLI:EU:C:2009:462.

- *Evangelina Gómez-Limón Sánchez-Camacho v. National Social Security Institute (INSS), General Social Security Treasury (TGSS) and Alcampo SA.*
- Request for a preliminary ruling from the Labour Court No. 30 of Madrid.
- (Directive 79/7/EEC, non-discrimination in social security): EU law does not preclude a worker from acquiring permanent incapacity pension entitlements during the period of part-time parental leave on the basis of the time worked and the salary received, and not as if he had worked full-time.
- (Directive 96/34/EC, Parental leave): EU law does not require that the enjoyment of parental leave be accompanied by the receipt of social security benefit.
- (A worker who reduces working hours and wages due to legal guardianship; three years later she becomes totally permanently disabled; the regulatory base of her pension is affected by this circumstance).

2009 07 16 (C-12/08), Mono Car Styling.

ECJ Judgment of 16 July 2009 (C-12/08), Mono Car Styling.

ECLI:EU:C:2009:466.

- *Mono Car Styling SA in liquidation against Dervis Odemis and others.*
- Request for a preliminary ruling: Cour du travail de Liège (Belgium).
- (Directive 98/59/EC, collective redundancies): EU law does not preclude legislation that limits the grounds for individual challenge to co-

llective redundancies, connecting them with the actions of their representatives, since there is no infringement of effective judicial protection.

- National legislation cannot reduce the obligations of information and consultation on the employer, otherwise a compliant interpretation must be assumed wherever possible (not *contra legem*).

2009 07 16 (E-69/08), Visciano.

ECJ Judgment of 16 July 2009 (C-69/08), Visciano.

ECLI:EU:C:2009:468.

- *Raffaello Visciano v. Istituto nazionale della previdenza sociale (INPS)*.
- Request for a preliminary ruling from the Tribunale di Napoli (Italy).
- (Directive 80/987, Business insolvency): EU law does not preclude national legislation that allows unpaid claims of employees to be classified as social security benefits when they are paid by a guarantee institution.
- EU law does not preclude the application of a one-year limitation period (equivalence principle). However, it is for the national court to examine whether its articulation makes it practically impossible or excessively difficult to exercise the rights recognised by the Community legal order (principle of effectiveness).

2009 09 10 (C-44/08), AEK ry.

ECJ Judgment of 10 September 2009 (C-44/08), AEK ry.

ECLI:EU:C:2009:533.

- *Akavan Erityisalojen Keskusliitto AEK ry et al. v. Fujitsu Siemens Computers Oy*.
- Request for a preliminary ruling: Korkein oikeus (Finland).
- (Directive 98/59/EEC) – the adoption within a group of undertakings of strategic decisions requiring the examination or planning of collective redundancies requires consultations.
- The obligation to consult only arises, for the subsidiary that has the status of employer, when it is identified as the one that can carry out the dismissals.
- The consultation procedure must have been concluded by the subsidiary before, although it follows direct instructions from its parent, it terminates the contracts.
- The recipient of the information obligations is the workers' company and not the company that controls it.

2009 09 10 (C-277/08), Vicente Pereda.

ECJ Judgment of 10 September 2009 (C-277/08), Vicente Pereda.
ECLI:EU:C:2009:542.

- *Francisco Vicente Pereda v. Madrid Movilidad SA.*
- Question referred for a preliminary ruling by Juzgado de lo Social No. 23 de Madrid (Spain).
- Holidays and medical leave: a worker who is on sick leave during a previously fixed period of annual leave is entitled, at his request and in order to be able to effectively take his annual leave, to take it on a date other than that of the sick leave.
- (Driver of the municipal tow truck who must enjoy holidays and a few days before suffers an accident at work, joining when he has two days of annual rest left; the setting of new vacations is of interest).

2009 10 01 (E-103/08), Gottwald.

ECJ Judgment of 1 October 2009 (C-103/08), Gottwald.
ECLI:EU:C:2009:597.

- *Arthur Gottwald v. Bezirkshauptmannschaft Bregenz.*
- Question referred by Unabhängiger Verwaltungssenat des Landes Vorarlberg - Austria.
- Having a transport card for disabled people may be limited to persons domiciled or habitually resident in the Member State.

2009 10 01 (C-219/08), Commission v Belgium.

ECJ judgment of 1 October 2010 (C-219/08), Commission v. Belgium.
ECLI:EU:C:2009:599.

- *Commission of the European Communities v Kingdom of Belgium.*
- There is no failure to fulfil obligations established by the fact that Belgium requires certain administrative documentation other than an authorisation from those exercising the freedoms of movement.

2009 10 29 (E-63/08), Virginie Pontin.

ECJ Judgment of 29 October 2009 (C-63/08), Virginie Pontin.
ECLI:EU:C:2009:666.

- *Virginie Pontin v. T-Comalux SA.*
- Request for a preliminary ruling: Tribunal du travail d'Esch-sur-Alzette (Luxembourg).
- (Directive 76/207/EEC, non-discrimination in employment on the basis of gender): legislation that deprives a pregnant or breastfeeding

worker made redundant during her pregnancy of a legal action for compensation, which can be brought by any other worker made redundant, if such limitation constitutes less favourable treatment of a woman in relation to her pregnancy, is contrary to EU law.

- The procedural rules in the event of dismissal must comply with the principle of effective judicial protection of the rights conferred on individuals by Community law, which it is for the referring court to determine.

2009 10 21 (C-452/08), Flores Fanega.

ECJ Order of 21 October 2009 (C-452/08), Flores Fanega.

ECLI:EU:C:2009:644.

- *Simón Rodríguez Otero against Televisión de Galicia and the Public Prosecutor's Office.*
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of the Basque Country.
- The question referred for a preliminary ruling was closed when the proposing Court withdrew it in view of the doctrine coined in the ECJ Judgment of 16 July 2009 (C-537/07), Gómez-Limón Sánchez-Camacho.

2009 10 22 (E-116/08), Meerts.

ECJ Judgment of 22 October 2009 (C-116/08), Meerts.

ECLI:EU:C:2009:645.

- *Christel Meerts v. Proost NV.*
- Request for a preliminary ruling: Hof van Cassatie (Belgium).
- EU law precludes compensation for termination of employment from being calculated on the basis of the reduced working hours enjoyed by the worker while the termination occurs (on part-time parental leave).

2009 11 23 (C-162/08 and others), Lagoudakis.

ECJ Order of 23 November 2009 (C-162/08 and others), Lagoudakis.

ECLI:EU:C:2009:72.

- *Geórgios K. Lagoudakis v. Kéntro Anoiktis Prostasias Hlikiomenon Dimou Rethymnis (C-162/08), Dimitrios G. Ladakis et al. v. Dimos Geropotamou (C-163/08) and Michail Zacharioudakis v. Dimos Lamps (C-164/08).*
- Requests for a preliminary ruling: Monomeles Protodikeio Rethymnis (Greece).

- (Directive 1999/70, temporary): measures intended to prevent the misuse of fixed-term contracts do not apply to the first or only temporary contract.
- The mere fact that it is provided for in legal provisions is not objective reasons justifying the renewal of successive contracts.
- Possibility of prohibiting the transformation of temporary contracts into permanent contracts in the public sector if there are other effective prevention and sanction measures.

2009 12 10 (E-323/08), Rodríguez Mayor.

ECJ Judgment of 10 December 2009, (C-323/08), Rodríguez Mayor.
ECLI:EU:C:2009:770.

- *Ovidio Rodríguez Mayor and others against Herencia yacente de Rafael de las Heras Dávila and others.*
- Request for a preliminary ruling: High Court of Justice of Madrid.
- (Directive 98/59/EC, collective dismissal): EU law does not preclude the SW from considering that the death of the individual employer and subsequent termination of employment contracts is neither considered a collective dismissal nor does it entail the payment of compensation.
- It is “materially impossible” in these cases to carry out the guarantee procedure contemplated in the Directive; consultations could not take place and therefore it would not be possible to prevent or reduce the termination of employment contracts or mitigate their consequences.
- (Death of an employer, natural person, renouncing the inheritance of his successors and ceasing the business activity).

2010

2010

2010 01 12 (E-341/08), Petersen.

ECJ Judgment of 12 January 2010 (C-341/08), Petersen.
ECLI:EU:C:2010:4.

- *Domnica Petersen vs. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe.*
- Request for a preliminary ruling: Sozialgericht Dortmund - Germany.
- It is discriminatory to set a maximum age limit for the exercise of the profession of contracted dentist (68 years) when its sole purpose is to protect the health of patients against the reduction of the faculties of

those dentists after that age, since that same age limit does not apply to non-contracted dentists.

2010 01 19 (C-555/07), Kükükdeveci.

ECJ Judgment of 19 January 2010 (C-555/07), Kükükdeveci.

ECLI:EU:C:2010:21.

- *Seda Küçükdeveci v. Swedex GmbH & Co. KG.*
- Request for a preliminary ruling: Landesarbeitsgericht Düsseldorf - Germany.
- Principle of non-discrimination on grounds of age (Directive 2000/78/EC). National legislation on dismissal which does not take into account the period of work completed before the worker has reached the age of 25 for the calculation of the period of notice: national legislation contrary to the Directive.
- Interpretation in conformity with the Treaty is inherent in the Treaty. Where this is not possible, it should be borne in mind that the principle of non-discrimination on grounds of age is a general principle of EU law.
- It is for the national court to disapply legislation contrary to the principle of equality, irrespective of whether it refers a question for a preliminary ruling. The optional nature of that reference is independent of the procedures which domestic law imposes for the disapplication of a national provision which it considers to be contrary to the Constitution.
- The power to request a preliminary ruling from the Court of Justice before disapplying a provision of national law which is contrary to EU law cannot, however, be transformed into an obligation by the fact that national law does not allow that court to refrain from applying a provision of national law which it considers to be contrary to the Constitution without that provision having previously been declared unconstitutional by the Tribunal Constitucional.

2010 01 26 (C-118/08), Urban Transport.

ECJ Judgment (Grand Chamber), of 26 January 2010, (C-118/08), Urban Transport.

ECLI:EU:C:2010:39.

- *Transportes Urbanos y Servicios Generales SAL v. State administration.*
- Request for a preliminary ruling from the Supreme Court of Spain.

- It is contrary to the principle of equivalence that a claim for the financial liability of the State based on an infringement of the EUD by a national law (declared by the ECJ after infringement proceedings) can only be upheld if the applicant has previously exhausted all domestic remedies aimed at challenging the validity of the harmful administrative act issued on the basis of that law, while this is not the case in the case of financial liability of the State based on the infringement of the Constitution by the same Law declared by the competent court (Spanish Constitutional Court).

2010 02 04 (E-14/09), Hava Genc.

ECJ Judgment of 4 February 2010 (C-14/09), Hava Genc.
ECLI:EU:C:2010:57.

- *Hava Genc v. Land Berlin*.
- The question referred for a preliminary ruling by the Verwaltungsgericht Berlin (Germany).
- (Decision No 1/80 — EEC-Turkey Association): Mrs Genc, a Turkish national, entered Germany on a visa to join her husband and obtained successive residence permits. After the separation of the spouses, the question arises whether Mrs. Genc can obtain an extension of her leave, which is denied on the basis of the limited nature of her activity as a cleaner (five and a half hours a week, with a salary of 7.87 euros per hour, which she must supplement with social benefits).
- All of the foregoing does not preclude the consideration of Ms Genc's link with the German labour market.

2010 02 11 (C-405/08), Ingeniørforeningen.

ECJ Judgment of 11 February 2010 (C-405/08), Ingeniørforeningen.
ECLI:EU:C:2010:69.

- *Ingeniørforeningen i Danmark contra Dansk Arbejdsgiverforening*.
- Request for a preliminary ruling: Vestre Landsret - Denmark.
- Directive 2002/14/EC (information and consultation) may be transposed by means of a collective agreement, the effect of which is that a category of workers is included in its scope even if they are not members of the signatory organisations and their sector of activity is not represented by that organisation, provided that the effective protection of rights is guaranteed.

2010 04 22 (C-486/08), ZLT Tirols.

ECJ Judgment of 22 April 2010 (C-486/08), ZLT Tirols.

ECLI:EU:C:2010:215.

- *Zentralbetriebsrat der Landeskrankenhäuser Tirols v. Land Tyrol*.
- Request for a preliminary ruling: Landesgericht Innsbruck - Austria.
- EU law does not allow the duration of holidays already accrued to be reduced as a result of a reduction in working hours.
- The right to leave acquired during the year prior to the birth of the child may not be lost as a result of taking a two-year parental leave.
- EU law precludes a national rule from excluding from its scope workers who have a fixed-term employment contract of up to six months, or who are only employed occasionally.

2010 06 10 (C-395/08 and C-396/08), Bruno.

ECJ Judgment of 10 June 2010 (C-395/08 and C-396/08), Bruno.

ECLI:EU:C:2010:329.

- *Istituto nazionale della previdenza sociale (INPS) v. Tiziana Bruno and Massimo Pettini (C-395/08) and Daniela Lotti and Clara Matteucci (C-396/08)*.
- Requests for a preliminary ruling: Corte d'appello di Roma (Italy).
- (Directive 97/81/EC, part-time): EU law precludes a national rule which, in relation to the retirement pension of vertical cyclical part-time workers, excludes periods not worked from the calculation of the length of service required to acquire an entitlement to such a pension, unless such a difference in treatment is justified on objective grounds.

2010 06 24 (E-98/09), Sorge.

ECJ Judgment of 24 June 2010 (C-98/09), Sorge.

ECLI:EU:C:2010:369.

- *Francesca Sorge v Poste Italiane SpA*.
- Request for a preliminary ruling: Tribunale di Trani (Italy).
- Directive 1999/70 (non-regressivity clause) does not preclude national legislation which abolishes certain rights, provided that these new conditions are offset by the adoption of other guarantees or protections or that they affect only a limited group of temporary workers.

2010 07 01 (E-194/08) Gassmayr.

ECJ Judgment of 1 July 2010 (C-194/08) Gassmayr.

ECLI:EU:C:2010:386.

- *Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung*.
- Request for a preliminary ruling: Verwaltungsgerichtshof (Austria).

- (Directive 92/85/EEC, occupational health of pregnant women): EU law does not preclude differences between the receipt received before the maternity benefit and that corresponding to it, since the right to full equal pay is not currently included.
- EU law does not preclude certain allowances such as availability allowances from being received during maternity leave.

2010 07 01 (E-471/08), Parviainen.

ECJ Judgment of 1 July 2010 (C-471/08), Parviainen.

ECLI:EU:C:2010:391.

- *Sanna Maria Parviainen v. Finnair Oyj.*
- Question referred by Helsingin Käräjäoikeus (Finland).
- (Directive 92/85 on the occupational health of pregnant women): EU law does not guarantee the receipt of the previous salary in the event of a woman's compulsory transfer to another post because of a risk to her safety or health and that of her child.
- EU law does guarantee the maintenance of the basic salary, the components of remuneration or the allowances inherent to her professional status, those related to her status as a hierarchical superior, her seniority and her professional qualifications.

2010 07 15 (C-271/08), Commission v. Germany.

ECJ judgment of 15 July 2010, (C-271/08), Commission v. Germany.

ECLI:EU:C:2010:426.

- *European Commission v. Federal Republic of Germany.*
- Direct award of a contract to cover the pension scheme for local civil service workers to insurance companies designated in a collective agreement concluded between the social partners: failure to comply with the Public Procurement Directives.

2010 07 29 (E-151/09) UGT-FSP.

ECJ Judgment of 29 July 2010 (C-151/09). UGT-FSP.

ECLI:EU:C:2010:452.

- *Federation of Public Services of the UGT (UGT-FSP) against the City Council of La Línea de la Concepción, María del Rosario Vecino Uribe and the Public Prosecutor's Office.*
- Request for a preliminary ruling: Juzgado de lo Social Único de Algeciras.

- A transferred economic entity retains its autonomy if its managers retain the substance of their organisational and managerial powers (giving orders and instructions, distributing tasks, deciding on the use of material resources) without direct intervention by other structures of the transferee.
- The mere change of the hierarchical top managers (now mayor and councillors) does not undermine the autonomy of the transferred entity, unless the new managers replace the workers' immediate superiors in decision-making.
- (After rescuing various public service concessions, the City Council of La Línea is subrogated to work; the City Council denies the hourly credit to the subrogated legal representatives on the grounds that they had ceased their task when they joined the municipal workforce).

2010 09 15 (E-386/09), Briot.

ECJ Order of 15 September 2010 (C-386/09), Briot.

ECLI:EU:C:2010:526.

- *Jhonny Briot v. Randstad Interim, Sodexo SA and Council of the European Union.*
- Request for a preliminary ruling: Cour du travail de Bruxelles (Belgium).
- When the employment contract of an employee transferred by temporary employment agency to the transferred company ends before the date on which the change of owner takes place, EU law is not infringed by its non-renewal.

2010 09 16 (E-149/10), Chatzi.

ECJ Judgment of 16 September 2010 (C-149/10), Chatzi.

ECLI:EU:C:2010:534.

- *Zoi Chatzi vs. Ypourgos Oikonomikon.*
- Request for a preliminary ruling: Dioikitiko Efeteio Thessalonikis (Greece).
- In the case of twin children, Directive 96/34/EC does not require parental leave for each child. However, the specific situation of the parents of twins must be taken into account.

2010 09 30 (E-104/09), Roca Álvarez.

ECJ Judgment of 30 September 2010 (C-104/09), Roca Álvarez.

ECLI:EU:C:2010:561.

- *Pedro Manuel Roca Álvarez v. Sesa Start España ETT SA.*

- Question referred for a preliminary ruling by the High Court of Justice of Galicia.
- (Directive 76/207/EEC): the Spanish law according to which women, mothers of a child and who have the status of employed persons, can take leave, according to various modalities (it is breastfeeding but similar to parental leave), during the first nine months following the birth of that child, is contrary to EU law, while men who are fathers of a child and who have the status of employed persons may only enjoy the aforementioned leave when the mother of that child also has the status of employed person.

2010 10 01 (C-3/10), Affatato.

ECJ Order of 1 October 2010 (C-3/10), Affatato.

ECLI:EU:C:2010:574.

- *Franco Affatato v. Azienda Sanitaria Provinciale di Cosenza*.
- Request for a preliminary ruling: Tribunale di Rossano (Italy).
- (Directive 1999/70, temporary employment): the exclusion in the public sector of the transformation of abusive successive temporary contracts into permanent contracts is possible provided that other effective measures are provided for to prevent and punish abuses of successive temporary contracts.
- These measures cannot be less favourable than other similar internal measures, nor can they be impossible or very difficult to exercise.

2010 10 05 (C-400/10), MCB.

ECJ Judgment of 5 October 2010 (C-400/10), McB.

ECLI:EU:C:2010:582.

- *J. McB. v. L. E.*
- Request for a preliminary ruling: Supreme Court - Ireland.
- (Hague Convention of 25 October 1980; Regulation No 2201/2003). Minors whose parents are not married and the father's right of custody.
- EU law does not preclude the legal system of a Member State from making the acquisition of custody rights by the father of a child, who is not married to the child's mother, subject to the father obtaining a decision from the competent national court conferring on him such a right which may render unlawful the removal of the child by his or her mother or the non-return of the child.

2010 10 07 (C-515/08), dos Santos Palhota and others.

ECJ Judgment of 7 October 2010 (C-515/08), dos Santos Palhota and others.

ECLI:EU:C:2010:589.

- *Criminal proceedings brought against Vítor Manuel dos Santos Palhota and others.*
- Request for a preliminary ruling: Rechtbank van eerste aanleg te Antwerpen (Belgium).
- (Articles 56 TFEU and 57 TFEU, freedom of establishment and movement): EU law precludes the State from obliging an employer established in another and posting workers to that one to obtain a registration number (provided after the prior declaration of posting, with a period of five days to grant it).
- EU law does not preclude legislation requiring an employer established in another posting State to have at the disposal of the national authorities of the receiving State (during the posting period) a copy of documents equivalent to the social or employment documents required by the law of the State of origin, as well as to send said copy to these authorities at the end of this period.

2010 10 07 (E-224/09), Martha Nussbaumer.

ECJ Judgment of 7 October 2010 (C-224/09), Martha Nussbaumer.
ECLI:EU:C:2010:594.

- *Criminal proceedings against Martha Nussbaumer.*
- Question referred for a preliminary ruling by the Court of Bolzano (Italy).
- Scope of Directive 92/57/EEC (temporary or mobile construction sites): whenever several undertakings are involved, a safety coordinator must be appointed (even for private works); the preparation of the safety plan depends on the nature of the concurrent risks and not on the number of undertakings involved.

2010 10 12 (E-499/08), Andersen.

ECJ Judgment of 12 October 2010 (C-499/08), Andersen.
ECLI:EU:C:2010:600.

- *Ingeniørforeningen i Danmark contra Region Syddanmark.*
- Request for a preliminary ruling: Vestre Landsret - Denmark.
- Discriminatory is national legislation under which workers who are entitled to receive a retirement pension paid by their employer under a pension scheme which they joined before the age of 50 cannot, on that basis, receive special severance pay intended to promote the reintegration into employment of workers with more than 12 years' service in the undertaking.

2010 10 12 (E-45/09), Rosenbladt.

ECJ Judgment 12 October 2010; (C-45/09), Rosenbladt.

ECLI:EU:C:2010:601.

- *Gisela Rosenblatt vs. Oellerking Gebäudereinigungsges. mbH.*
- Reference for a preliminary ruling: Arbeitsgericht Hamburg - Germany.
- A national law permitting clauses for the automatic termination of employment contracts on the worker's attainment of retirement age is not discriminatory, in so far as it is objectively and reasonably justified by a legitimate aim related to employment and labour market policy and, on the other hand, the means of achieving that aim are appropriate and necessary.

2010 10 14 (E-428/09), Union Syndicale Solidaires Isère.

ECJ Judgment of 14 October 2010 (C-428/09), Union Syndicale Solidaires Isère.

ECLI:EU:C:2010:612.

- *Union syndicale Solidaires Isère v Premier ministre and others.*
- Question referred for a preliminary ruling by the Conseil d'État (France).
- (Directive 2003/88/EC, working time): EU law covers holders of participation contracts in education, who carry out occasional and seasonal activities in holiday and leisure centres and work a maximum of 80 days a year.
- Right to a minimum daily rest.

2010 10 21 (C467/08), Padawan.

ECJ Judgment of 21 October 2010 (C467/08), Padawan.

EU:C:2010:620.

- *Padawan SL v. Sociedad General de Autores y Editores de España (SGAE).*
- Request for a preliminary ruling: Audiencia Provincial de Barcelona.
- Apart from the action for failure to fulfil obligations, it is not for the Court to decide on the compatibility of a national provision with EU law. That falls within the competence of the national courts, after obtaining, where appropriate, from the Court of Justice, by way of reference for a preliminary ruling, the necessary clarifications on the scope and interpretation of that law.

2010 10 21 (E-242/09) Albron Catering.

ECJ Judgment of 21 October 2010 (C-242/09), Albron Catering.

ECLI:EU:C:2010:625.

- *Albron Catering BV v FNV Bondgenoten and John Roest*.
- Request for a preliminary ruling: Gerechtshof te Amsterdam (Netherlands).
- For the purposes of Directive 2001/23/EC, in the event of a transfer of an undertaking belonging to a group to an external third party, the undertaking to which the workers were permanently assigned may be regarded as a “transferor”, even if their employment contract formally ran with an undertaking other than that group.

2010 10 26 (T-23/09), CNOP.

Judgment of the Supreme Court of 26 October 2010 (T-23/09), Conseil national de l’Ordre des pharmaciens (CNOP).
ECLI:EU:T:2010:452.

- *Conseil national de l’Ordre des pharmaciens (CNOP) and Conseil central de la section G de l’Ordre national des pharmaciens (CCG) v. European Commission*.
- Competition law: a company is the body that brings together and represents a certain number of professionals, including office pharmacists.

2010 11 09 (E-92/09), Volker.

ECJ 9 November 2010 (C-92/09), Volker.
EU: C: 2010:662.

- *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen*.
- Request for a preliminary ruling from the Verwaltungsgericht Wiesbaden.
- (Directive 95/46, personal data): EU law does not impose generalised prior control on the processing of personal data; Ex-post control by the competent authorities should generally be considered as a sufficient measure.
- Regulations requiring (natural persons benefiting from certain aid) to publish personal data of all beneficiaries, without making distinctions on the basis of relevant criteria, such as the periods during which they have received such aid, its frequency or even the type and magnitude of the aid, are invalid.

2010 11 11 (E-232/09), Dita Danosa.

ECJ Judgment (Second Chamber) of 11 November 2010 (C-232/09), Dita Danosa.
ECLI:EU:C:2010:674.

- *Dita Danosa vs. LKB Lūzings SIA*.
- Request for a preliminary ruling: Augstvēks Tiesas Sēvts (Latvia).
- The concept of worker cannot be interpreted in a way that varies according to national law and must be defined on the basis of objective criteria.
- The essential characteristic of the employment relationship is the fact that a person performs, for a certain period of time, for the benefit of another and under the direction of another, certain services in exchange for which he receives remuneration.
- (Directive 92/85/EEC, pregnant health): the members of the board of directors of a capital company, who provide services to it and who form an integral part of it, have the status of employees if their activity is carried out, for a specified period, under the direction or control of another body of that company and if, In exchange for this activity, they receive remuneration.
- Under these conditions, the protection of pregnant workers against dismissal operates.

2010 11 18 (E-247/09), Xhymshiti.

ECJ Judgment of 18 November 2010 (C-247/09), Xhymshiti.

ECLI:EU:C:2010:698.

- *Alketa Xhymshiti vs. Bundesagentur für Arbeit - Familienkasse Lörrach*.
- Request for a preliminary ruling: Finanzgericht Baden-Württemberg - Germany.
- EU law does not apply, in the Member State of residence, to a national of a third country who is legally resident in a Member State of the European Union and who works in Switzerland.

2010 11 18 (C-250/09 and C-268/09), Georgiev.

ECJ Judgment 18 November 2010 (C-250/09 and C-268/09), Georgiev.

ECLI:EU:C:2009:549.

- *Vasil Ivanov Georgiev vs. Tehnicheski universitet - Sofia, Plovdiv subsidiary*.
- Requests for a preliminary ruling: Rayonen sad Plovdiv - Bulgaria.
- National legislation which provides for the compulsory retirement of university professors on reaching the age of 68 and the continuation of their activity beyond the age of 65 only by means of fixed-term contracts of one year which may be extended a maximum of two times is

non-discriminatory, since that legislation pursues a linked legitimate objective, in particular, with employment and labour market policy, such as the establishment of quality teaching and the optimal distribution of teaching posts between generations, and allows this objective to be achieved by appropriate and necessary means.

2010 11 18 (E-356/09), Kleist.

ECJ Judgment of 18 November 2010 (C-356/09), Kleist.
ECLI:EU:C:2010:703.

- *Pensionsversicherungsanstalt v. Christine Kleist.*
- Request for a preliminary ruling: Oberster Gerichtshof - Austria.
- Discrimination on grounds of sex prohibited by that directive is national legislation which, in order to promote access to employment for younger persons, allows an employer to dismiss workers who have acquired the right to a retirement pension, since women acquire that right at an age five years younger than the age at which men do.

2010 12 16 (C-89/09), Commission v. France.

ECJ Judgment of 16 December 2010 C-89/09 - Commission v France.
ECLI:EU:C:2010:772.

- *European Commission v. French Republic.*
- Failure of the State.
- (Freedom of establishment): France is in breach of EU law because it prohibits biologists from owning a shareholding in more than two companies set up for the joint operation of one or more biomedical analysis laboratories.

2010 12 22 (C-444/09 and C-456/09), Gavieiro.

ECJ Judgment of 22 December 2010, (C-444/09 and C-456/09), Gavieiro.
ECLI:EU:C:2010:819.

- *Rosa María Gavieiro Gavieiro (C-444/09) and Ana María Iglesias Torres (C-456/09) against the Ministry of Education and University Planning of the Xunta de Galicia.*
- Requests for a preliminary ruling: Contentious-Administrative Courts No. 3 of A Coruña and No. 3 of Pontevedra -.
- (Directive 1999/70, temporary): the principle of non-discrimination between permanent and temporary workers is directly invocable against the State. Application to interim civil servants.

- It is discriminatory to deny the seniority salary supplement to these personnel while recognizing comparable career civil servants. This right to payment of three-year increments has retroactive effect from the date of expiry of the period given to the Member States for the transposition of this Directive into national law.

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2011 01 18 (E-272/10), Berkizi-Nikolakaki.

ECJ Order of 18 January 2011 (C-272/10), Berkizi-Nikolakaki.
ECLI:EU:C:2011:19.

- *Souzana Berkizi-Nikolakaki v. Anotato Symvoulío epilogis prosopikou (ASEP) and Aristoteleio Panepistimio Thessalonikis.*
- Request for a preliminary ruling: Dioikitiko Efeteio Thessalonikis (Greece).
- The rule that grants a period (two months) in order to request the corresponding public employer to transform successive temporary contracts into permanent contracts is valid as long as it is not less favourable than the one in force in general.

2011 01 20 (E-463/09), CLECE.

ECJ judgment of 20 January 2011 (C-463/09), CLECE v. Cobisa.
ECLI:EU:C:2011:24.

- *CLECE SA v. María Socorro Martín Valor and Cobisa City Council.*
- Request for a preliminary ruling: Tribunal Superior de Justicia de Castilla-La Mancha - Spain.
- The Transfer of Companies Directive does not operate if a municipality (Cobisa), which had commissioned a private company to clean its premises, decides to terminate the contract concluded with that company and carry out the task itself, recruiting new staff for that purpose.

2011 02 10 (C-307/09), Vicoplus and others.

ECJ Judgment of 10 February 2011 (C-307/09), Vicoplus and others.
ECLI:EU:C:2011:64.

- *Vicoplus SC PUH (C-307/09), BAM Vermeer Contracting sp. zoo (C-308/09) and Olbek Industrial Services sp. zoo (C-309/09) v Minister van Sociale Zaken en Werkgelegenheid.*
- Request for a preliminary ruling: Raad van State - Netherlands.
- (Directive 96/71/EEC) – posting is a supply of services for remuneration, whereby the posted worker remains employed by the supplier un-

dertaking and does not conclude any employment contract with the user undertaking.

- It is characterised by the fact that the posting of the worker to the host Member State is the very object of the provision of services by the supplier undertaking and that that worker carries out his or her tasks under the control and direction of the user undertaking.

2011 02 10 (C-30/10), Lotta Andersson.

ECJ judgment of 10 February 2011 (C-30/10), Lotta Andersson.

ECLI:EU:C:2011:66.

- *Lotta Andersson vs. Staten genom Kronofogdemyndigheten i Jönköping, Tillsynsmyndigheten.*
- Request for a preliminary ruling: Linköpings tingsrätt (Sweden).
- Directive 2008/94/EC (insolvency) does not preclude national law which excludes an employee from the right to a guarantee for the payment of unpaid claims because, alone or together with close relatives, he owns a substantial part of the undertaking concerned and exercises considerable influence over its activities during the six months preceding the application for bankruptcy of that undertaking.
- It is important that in cases such as this it cannot be excluded that the employee, who is denied the right to the guarantee, may be liable for the insolvency of the company in question.
- (A worker who, at the same time, owns 50% of the company, had held positions on its Board of Directors and had acted as a representative of the company, in addition to maintaining a sentimental relationship with the second shareholder, owner of the remaining shares).

2011 03 01 (C-236/09) Association belge des Consommateurs Test-Achats and others.

ECJ Judgment of 1 March 2011 (C-236/09), Association belge des Consommateurs Test-Achats.

ECLI:EU:C:2011:100.

- *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres.*
- Request for a preliminary ruling: Cour constitutionnelle - Belgium.
- (Directive 2004/113 on non-discrimination in goods and services): there is a risk that EU law will allow the derogation from equal treatment between women and men in the calculation of insurance premiums in-

definitely, and the rule in question is therefore declared invalid with effect from 21 December 2012.

2011 03 03 (C-437/09), AG2R Prévoyance.

ECJ Judgment of 3 March 2011 (C-437/09), AG2R Prévoyance.

ECLI:EU:C:2011:112.

- *AG2R Prévoyance v. Beaudout Père et Fils SARL*.
- Request for a preliminary ruling: Tribunal de grande instance de Périgueux – (France).
- Obligation to contribute to health insurance established by collective agreement; compatibility with competition rules.

2011 03 03 (C-235/10 to C-239/10), Claes.

ECJ Judgment of 3 March 2011 (C-235/10 to C-239/10), Claes.

ECLI:EU:C:2011:119.

- *David Claes (C-235/10), Sophie Jeanjean (C-236/10), Miguel Rémy (C-237/10), Volker Schneider (C-238/10) and Xuan-Mai Tran (C-239/10) v Landsbanki Luxembourg SA*.
- Requests for a preliminary ruling: Cour de cassation (Luxembourg).
- (Directive 98/59/EC, collective redundancies): the collective redundancy procedure must be applied when the court orders the dissolution and liquidation of the insolvent company (even if the national legislation provides for the immediate termination of employment contracts); the case is different from that of the death of the employer.
- The obligations must be fulfilled by the management of the company or, where appropriate, by whoever acts as liquidator.

2011 03 04 (E-258/10) Grigore.

ECJ Order of 4 March 2011 (C-258/10), Grigore.

ECLI:EU:C:2011:122.

- *Nicu v. Grigore vs. Regia Națională a Pădurilor Romsilva - Direcția Silvică București*.
- Request for a preliminary ruling: Tribunalul Dâmbovița – Romania.
- The task of the forestry officer responsible for monitoring a plot is counted as working time insofar as it requires his physical presence.
- Providing accommodation does not directly condition the calculation of effective working time.

2011 03 10 (C-379/09), Casteels.

ECJ Judgment of 10 March 2011, Casteels.

ECLI:EU:C:2011:131.

- *Maurits Casteels v British Airways plc*.
- Request for a preliminary ruling: Arbeidshof te Brussel - Belgium.
- Social protection rights (supplementary social security) on the part of an employee of a multinational who worked for it in several Member States.
- It is contrary to freedom of movement not to take into account for the purposes of completing periods of acquisition of supplementary pension rights the working time under a global contract for the same employer in other Member States, and it is also contrary to that freedom to equate, for the same purposes, the cross-border change of workplace with resignation, when the change of workplace within the same Member State is not equated.

2011 03 11 (E-109/09), Kumpan.

ECJ Judgment of 10 March 2011 (C-109/09), Kumpan.

ECLI:EU:C:2011:129.

- *Deutsche Lufthansa AG v. Gertraud Kumpan*.
- Request for a preliminary ruling: Bundesarbeitsgericht (Germany).
- The obligation (Directive 1999/70) on objective reasons for permitting the renewal of temporary contracts is not, from the point of view of its content, unconditional and sufficiently precise for an individual to be able to rely on it.
- However, an interpretation of national law in conformity with EU law must be sought where there have been abuses as a result of the successive use of fixed-term employment contracts, and such abuses may be duly penalised and the consequences of the infringement of EU law may be eliminated.

2011 03 10 (C-477/09), Defossez.

ECJ Judgment of 10 March 2011 (C-477/09), Defossez.

ECLI:EU:C:2011:134.

- *Charles Defossez v. Christian Wiart and others*.
- Request for a preliminary ruling: Cour de cassation (France).
- Directive 80/987 (insolvency) does not preclude national legislation from providing that a worker may benefit from the wage guarantee of the national institution, in accordance with the law of that Member State, on a supplementary or substitute basis, as opposed to that offered by the institution which, pursuant to that directive, is designated as the

competent institution, provided that this guarantee gives rise to a higher level of protection for the worker.

2011 03 15 (C-29/10), Koelzsch.

ECJ Judgment of 15 March 2011 (C-29/10), Koelzsch.

ECLI:EU:C:2011:151.

- *Heiko Koelzsch v. État du Grand Duchy of Luxembourg.*
- Question referred for a preliminary ruling by the Cour d'appel de Luxembourg (Luxembourg).
- Concept of a habitual place of work when the worker (driver of international shipments) performs his work in several States.
- Application of the criterion of compliance with the main part of the labor obligations.

2011 03 18 (C-273/10), David Montoya.

ECJ Order of 18 March 2011 (C-273/10), David Montoya.

ECLI:EU:C:2011:167.

- *David Montoya Medina v. Wage Guarantee Fund and University of Alicante.*
- Request for a preliminary ruling: High Court of Justice of the Valencian Community.
- Principle of non-discrimination between permanent and temporary employees: application to university assistant professors with doctorates.
- EU law precludes denying access to the seniority salary supplement to these staff while granting contract professors comparable doctorates.

2011 04 07 (E-151/10), Dai Cugini.

ECJ Order of 7 April 2011 (C-151/10), Dai Cugini.

ECLI:EU:C:2011:223.

- *Dai Cugini NV v. Rijksdienst voor Sociale Zekerheid.*
- Request for a preliminary ruling: Arbeidshof te Antwerpen (Belgium).
- (Directive 97/81/EC, part-time); EU law does not preclude a rule imposing obligations on employers to retain and publish the contracts and timetables of part-time workers if it ensures that such legislation does not result in such workers being treated less favourably than full-time workers.

2011 04 07 (E-519/09), May.

ECJ Order of 7 April 2011 (C-519/09), May.

ECLI:EU:C:2011:221.

- *May v AOK Rheinland/Hamburg – Die Gesundheitskasse (Rhineland/Hamburg General Local Health Insurance Fund)*.
- Question referred for a preliminary ruling by the Arbeitsgericht Wuppertal (Labour Court, Wuppertal, Germany).
- Leave: scope of the Directive: the concept of “worker” includes an employee of a public-law body to whom the rules on paid annual leave for civil servants apply.

2011 04 28 (E-61/11), El Dridi.

ECJ Judgment of 28 April 2011 (C-61/11), El Dridi.

ECLI:EU:C:2011:268.

- *Criminal proceedings against Hassen El Dridi, alias Soufi Karim*.
- Request for a preliminary ruling: Corte d’appello di Trento - Italy.
- Member States may not impose a prison sentence solely on the basis of an irregular stay.

2011 05 10 (E-147/08), Römer.

ECJ (Grand Chamber) of 10 May 2011 (C-147/08), Römer.

ECLI:EU:C:2011:286.

- *Jürgen Römer against Freie und Hansestadt Hamburg*.
- Question referred by the Arbeitsgericht Hamburg (Germany).
- (Art. 157 TFEU; Directive 2000/78/EC, equality at work): refusal to calculate the retirement pension because the same-sex couple cannot be taken into account for the purposes of the existence of family responsibilities which constitutes discrimination on grounds of sexual orientation.
- There is direct discrimination on grounds of sexual orientation, owing to the fact that, under national law, the registered life partner is in a legal and factual situation similar to that of a married person for the purposes of the pension in question.
- Consideration of the retirement pension received from a supplementary pension system as remuneration.

2011 05 12 (C391/09), Runeviv-Vardyn.

ECJ judgment of 12 May 2011, Runeviv-Vardyn and Wardyn, C391/09, EU:C:2011:291.

- *Malgožata Runeviv-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and others*.

- Request for a preliminary ruling: Vilniaus miesto 1 apylinkųs teismas - Lithuania.
- (Directive 2000/43 on non-discrimination on grounds of ethnicity or race): EU law does not preclude national legislation which provides that a person's first and last names may only be transcribed in documents evidencing civil status in accordance with the spelling rules of the official national language.

2011 05 19 (C-256/10 and C-261/10), David Barcenilla Fernández.

ECJ Judgment of 19 May 2011 (C-256/10 and C-261/10), Barcenilla Fernández.

ECLI:EU:C:2011:326.

- *David Barcenilla Fernández and Pedro Antonio Macedo Lozano v. Gerardo García, S.L.*
- Question referred for a preliminary ruling by the High Court of Castile and León.
- Directive 2003/10/EC, as amended by Directive 2007/30/EC (risks arising from physical agents): exposure to noise below 85 dB(A) presupposes its measurement without taking into account the effects of the use of individual hearing protectors: the company does not comply only by providing such protectors.
- EU law does not require the payment of the conventional hardship bonus by measuring environmental noise.

2011 06 21 (E-15/11). Sommer.

ECJ Judgment of 21 June 2011 (C-15/11). Sommer.

ECLI:EU:C:2012:371.

- *Leopold Sommer v Landesgeschäftsstelle des Arbeitsmarktservice Wien.*
- Request for a preliminary ruling: Verwaltungsgerichtshof - Austria.
- The conditions of access to the labour market for Bulgarian students may not be more restrictive than those for third-country nationals for the purposes of studies, student exchanges, unpaid traineeships or voluntary services.

2011 06 22 (E-161/11), Wine.

ECJ Order of 22 June 2011 (C-161/11), Wine.

ECLI:EU:C:2011:420.

- *Cosimo Damiano Vino vs. Poste Italiane SpA.*

- Request for a preliminary ruling: Tribunale di Trani (Italy).
- EU law does not seek to harmonise the regulation of temporary employment contracts but to establish general principles and minimum rules.
- It does not include disparity in treatment between different categories of temporary workers.
- The Directive does not require justification on objective grounds for the conclusion of a single temporary employment contract.
- The ECJ is manifestly incompetent to rule on the issue.

2011 07 07 (C-310/10), Agafitei et al.

Judgment of the Court of Justice of the Fourth Chamber, 7 July 2011, Agafitei and Others, C-310/10.

EU:C:2011:467.

- *Ministerul Justiției și Libertății Cetățenești v. Ștefan Agafitei and others.*
- Request for a preliminary ruling: Curtea de Apel Bacău - Romania.
- (Directives 2000/43 and 2000/78): EU law does not provide for discrimination on grounds of socio-occupational category or workplace.

2011 07 21 (C-159/10 and C-160/10), Fuchs.

ECJ Judgment of 21 July 2011 (C-159/10 and C-160/10), Fuchs.

ECLI:EU:C:2011:508.

- *Gerhard Fuchs (C-159/10) and Peter Köhler (C-160/10) v. Land Hessen.*
- Requests for a preliminary ruling: Verwaltungsgericht Frankfurt am Main - Germany.
- A law providing for the compulsory retirement of civil servants for life (tax) at the age of 65 is not discriminatory, even if it allows them to continue working until the maximum age of 68, if the interest of the service so requires, provided that it seeks to establish a balanced age structure in order to promote the employment and promotion of young people, to optimise personnel management, as well as to prevent possible disputes relating to the employee's ability to carry out his or her activity beyond a certain age, and to enable this objective to be achieved by appropriate and necessary means.

2011 09 06 (E-108/10). Scattolon.

ECJ Judgment of 6 September 2011 (C-108/10), Scattolon.

ECLI:EU:C:2011:542.

- *Ivana Scattolon v. Ministero dell'Istruzione, dell'Università e della Ricerca*.
- Request for a preliminary ruling: Tribunale di Venezia (Italy).
- There is a transfer of an undertaking when a public authority is subrogated to the employment relationship (maintenance and administrative assistance tasks) that the worker had with another Administration.
- The transfer of an undertaking that entails immediate application of the agreement of the transferee company cannot entail a significant salary reduction as a result of the previous seniority not being carried forward.

2011 09 08 (C-177/10), Rosé.

ECJ Judgment of 8 September 2011 (C-177/10), Rosado.
ECLI:EU:C:2011:557.

- *Francisco Javier Rosado Santana v. Ministry of Justice and Public Administration of the Regional Government of Andalusia*.
- Request for a preliminary ruling: Juzgado de lo Contencioso-Administrativo No 12 de Sevilla - España.
- EU law precludes the exclusion of previous periods of service as an interim civil servant from being taken into account for the access of the latter (already a career civil servant) to an internal promotion in which only career civil servants can participate, unless such exclusion is justified by objective reasons other than the mere temporary duration of the relationship.

2011 09 08 (C-297/10 and C-298/10), Hennigs.

ECJ Judgment 8 September 2011 (C-297/10 and C-298/10), Hennigs.
ECLI:EU:C:2011:560.

- *Sabine Hennigs (C-297/10) v. Eisenbahn-Bundesamt and Land Berlin (C-298/10) v. Alexander Mai*.
- Requests for a preliminary ruling: Bundesarbeitsgericht - Germany.
- A measure provided for by a collective agreement which provides that, within each grade, the basic salary step of a public employee is determined on the basis of the age of that employee at the time of recruitment, is discriminatory. The fact that EU law precludes that measure and that it is contained in a collective agreement does not infringe the right to negotiate and conclude collective agreements (Article 28 of the Convention on the Functioning of the European Union).

2011 09 13 (E-447/09), Prigge.

ECJ (Grand Chamber) of 13 September 2011 (C-447/09), Prigge.

EU:C:2011:573.

- *Reinhard Prigge and Others v Deutsche Lufthansa AG*.
- Request for a preliminary ruling: Bundesarbeitsgericht (Germany).
- (Directive 2000/78, non-discrimination in employment): EU law precludes a clause in a collective agreement from setting at 60 years the age limit from which pilots are no longer considered to have the physical capacities necessary to carry out their activity, despite the fact that national and international regulations set this age at 65 years.

2011 11 15 (C256/11), Dereci.

ECJ (Grand Chamber) of 15 November 2011 (C256/11), Dereci.
EU:C:2011:734.

- *Murat Dereci and Others v Bundesministerium für Inneres*.
- Request for a preliminary ruling: Verwaltungsgerichtshof - Austria.
- EU law does not preclude a Member State from refusing residence to a third-country national where that third-country national intends to reside with a family member who is a third-country national and domicile and has never exercised his or her right to freedom of movement.
- That is subject to the proviso that such a refusal would deprive that Union citizen of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union, which is a matter for the referring court to determine.

2011 11 17 (C435/10), van Ardenne.

ECJ judgment of 17 November 2011 (C435/10), van Ardenne.
ECLI:EU:C:2011:751.

- *J.C. van Ardenne against Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*.
- Request for a preliminary ruling: Centrale Raad van Beroep (Netherlands).
- (Directive 80/987, Business insolvency): EU law precludes national legislation that makes the possibility for workers whose employer is insolvent to fully exercise their right to the recovery of unpaid wage claims subject to the obligation to register as jobseekers.

2011 11 21 (C-411/10 and C-493/10), NS.

ECJ Judgment of 21 November 2011 (C-411/10 and C-493/10), NS.
ECLI:EU:C:2011:865.

- *N.S. (C-411/10) v Secretary of State for the Home Department and M.E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform.*
- Requests for a preliminary ruling: Court of Appeal (England and Wales) (Civil Division) – United Kingdom and High Court of Ireland – Ireland.
- Prohibition of inhuman or degrading treatment: Common European asylum system. Regulation (EC) No 343/2003. Concept of “safe countries”. Transfer of an asylum seeker to the responsible Member State.
- Obligation. Rebuttable presumption of respect by that Member State for fundamental rights. EU law - Principles - Fundamental rights.
- Application of Union law. Prohibition of inhuman or degrading treatment. Common European asylum system.

2011 11 22 (E-214/10), KHS AG.

ECJ 22 November 2011 (C-214/10), KHS AG.

EU:C:2011:761.

- *KHS AG and Winfried Schulte.*
- Question referred by Landesarbeitsgericht Hamm (Germany).
- Limitation of periods of accrual of leave: EU law does not apply to national provisions or practices (such as collective agreements) that limit after the lapse of a period of time (fifteen months) the accumulation of rights to such leave of a worker who is incapacitated for work during several consecutive periods of accrual of vacation.

2011 11 24 (C468/10 and C469/10), ASNEF.

ECJ Judgment 24 November 2011 (C468/10 and C469/10), ASNEF.

EU:C:2011:777.

- *National Association of Financial Credit Establishments (ASNEF) and Federation of Electronic Commerce and Direct Marketing (FECMD) against State Administration.*
- Preliminary ruling submitted by the Supreme Court.
- (Directive 95/46/EC, data protection): EU law precludes the LOPD and its Regulation, in order to allow the processing of personal data, from requiring, in the absence of the consent of the data subject, not only that the fundamental rights and freedoms of the data subject be respected, but also that such data be contained in sources accessible to the public, thus categorically and generally excluding any processing of data that does not appear in such sources.

2011 12 06 (E-329/11), Achughbabian.

ECJ Judgment of 6 December 2011 (C-329/11), Achughbabian.
ECLI:EU:C:2011:807.

- *Alexandre Achughbabian v. Préfet du Val-de-Marne*.
- Request for a preliminary ruling: Cour d'appel de Paris (France).
- Member States may not detain a person staying illegally while the return procedure is being conducted.

2011 12 09 (E-349/11), Yangwei.

ECJ Order of 9 December 2011 (C-349/11), Yangwei.
ECLI:EU:C:2011:826.

- *Auditeur du travail v. Yangwei SPRL*.
- Request for a preliminary ruling: Tribunal de première instance de Liège (Belgium).
- (Directive 97/81/EC, part-time): EU law does not preclude a rule imposing obligations on employers to preserve and publish the contracts and timetables of part-time workers if it is ensured that such legislation does not result in such workers being treated less favourably than full-time workers who are in a comparable or comparable situation. if it is ensured, if there is a difference in treatment, that it is justified on objective grounds and does not go beyond what is necessary to achieve the objectives pursued.

2011 12 15 (E-384/10), Voogsgeerd.

ECJ Judgment of 15 December 2011 (C-384/10), Voogsgeerd.
ECLI:EU:C:2011:842.

- *Jan Voogsgeerd v Navimer SA*.
- Question from Hof van Cassatie (Belgium).
- The criterion of the hiring establishment is of a subsidiary nature, it is only applied when it is impossible to determine a usual place of work and refers to the facts exclusive to the worker's hiring procedure, not to the development of the employment relationship.

2011 12 15 (C-257/10), Bergström.

ECJ judgment of 15 December 2011, Bergström.
ECLI:EU:C:2011:839.

- *Försäkringskassan v. Elisabeth Bergström*.
- Request for a preliminary ruling: Högsta förvaltningsdomstolen (anciennement Regeringsrätten) - Sweden.
- Social Security coordination regulations. Assimilation of conditions.

2012

2012 01 24 (C- 282/10), Domínguez.

ECJ Judgment of 24 January 2012 (C-282/10), Domínguez.

ECLI:EU:C:2012:33.

- *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique y Préfet de la région Centre.*
- Request for a preliminary ruling: Cour de cassation (France).
- (Directive 2003/88/EC): EU law precludes a rule that makes the right to paid annual leave conditional on the existence of a minimum effective working time of ten days or one month during the reference period (in the case: temporary contract and medical leave).
- It is for the national court to determine whether there is room for an interpretation of national law which treats the worker's leave as periods of accrual of leave.
- Where the direct effect of the Directive cannot be applied, the State may be held liable for compensation.
- A national provision which provides, depending on the origin of the worker's medical leave, for a duration of paid annual leave equal to or greater than the minimum period of four weeks guaranteed by that directive is not contrary to EU law.

2012 01 26 (C-586/10), Küçük.

ECJ Judgment of 26 January 2012 (C-586/10), Küçük.

ECLI:EU:C:2012:39.

- *Bianca Küçük vs. Land Nordrhein-Westfalen.*
- Request for a preliminary ruling: Bundesarbeitsgericht (Germany).
- The need to replace part of the staff on a recurring basis may be an objective cause that legitimises the use of temporary contracts, although it is also possible to hire permanent workers.
- In order to avoid abuses in such cases , all the circumstances of the particular case must be examined, including the number and cumulative duration of fixed-term employment contracts or relationships concluded in the past with the same employer.

2012 02 09 (C-556/11), Lorenzo Martínez.

ECJ Order of 9 February 2012 (C-556/11), Lorenzo Martínez.

ECLI:EU:C:2012:67.

- *Request for a preliminary ruling: Contentious Court No. 4 of Valladolid.*

- María Jesús Lorenzo Martínez v. Junta de Castilla y León, Directorate-General for Human Resources of the Ministry of Education.
- EU law precludes the Spanish regulation which reserves, without objective justification, the right to receive the remuneration supplement for lifelong training to career civil servant teachers, excluding temporary teachers, when, in relation to the receipt of said supplement, both categories of workers are in comparable situations.

2012 03 10 (E-393/10), O’Brien.

ECJ Judgment of 1 March 2012 (C-393/10), O’Brien.

ECLI:EU:C:2012:110.

- *Dermod Patrick O’Brien and Ministry of Justice, formerly the Department for Constitutional Affairs.*
- Request for a preliminary ruling from the Supreme Court of the United Kingdom.
- It is for the national legislature to determine whether judges who work part-time and are remunerated on the basis of daily fees fall under the concept of “part-time workers who have a contract or an employment relationship”.
- EU law precludes national legislation from distinguishing between full-time judges and part-time judges paid on the basis of daily fees for access to the retirement pension scheme, unless such a difference in treatment is justified by objective reasons.

2012 03 08 (E-251/11), Huet.

ECJ Judgment of 8 March 2012 (C-251/11), Huet.

ECLI:EU:C:2012:133.

- *Martial Huet v. Université de Bretagne occidentale.*
- Request for a preliminary ruling: Tribunal administratif de Rennes (Administrative Court, Rennes, France).
- When a temporary contract is transformed as a result of abuse, EU law does not require that the indefinite contract reproduce all its content.
- It is necessary to avoid that such transformation being accompanied by substantial modifications of the clauses of the previous contract in a sense that is generally unfavourable to the interested party when the latter’s tasks and the nature of his functions remain the same.

2012 03 15 (E-157/11), Sibilio.

ECJ Judgment of 15 March 2012 (C-157/11), Sibilio.

ECLI:EU:C:2012:148.

- *Giuseppe Sibilio against Comune di Afragola*.
- Request for a preliminary ruling: Tribunale di Napoli (Italy).
- The Temporary Contracts Directive (1999/70) does not preclude the exclusion of “socially useful” Italian workers because they do not have an employment contract under the internal rules and their remuneration is not equal to that of those who are contracted.
- (Outline of the community concept of worker).

2012 04 19 (C- 415/10), Meister.

ECJ Judgment of 19 April 2012 (C-415/10), Meister.

EU:C:2012:217.

- *Galina Meister v. Speech Design Carrier Systems GmbH*.
- Request for a preliminary ruling from the Bundesarbeitsgericht.
- (Non-discrimination directives): EU law does not recognise the right of a worker who credibly claims that he or she meets the conditions set out in a recruitment notice (and whose application has not been selected) to access information indicating whether at the end of the selection process the employer has recruited another candidate.
- However, it cannot be ruled out that a total refusal of access to information by a defendant may constitute one of the factors to be taken into account in the context of establishing the facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to ascertain whether that is the case in the main proceedings, taking into account all the circumstances of the dispute before it.
- (Citizen of Russian origin who applies for a job in Germany).

2012 04 24 (C571/10), Kamberaj.

ECJ (Grand Chamber) of 24 April 2012 (C-571/10), Kamberaj.

EU:C:2012:233.

- *Servet Kamberaj v. Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and others*.
- Request for a preliminary ruling from the Tribunale di Bolzano (Italy).
- Non-discrimination on grounds of ethnicity leaves aside the conditions governing the entry, residence and rights of third-country nationals and stateless persons in the territory of the Member States.
- In principle, EU law precludes a regulation on the granting of housing allowance which treats third-country nationals with long-term resident

status differently from the treatment afforded to nationals residing in the same province or region.

2012 05 03 (E-337/10), Neidel.

ECJ Judgment of 3 May 2012 (C-337/10), Neidel.

ECLI:EU:C:2012:263.

- *Georg Neidel/Stadt Frankfurt am Main.*
- Question referred by the Verwaltungsgericht Frankfurt am Main (Germany).
- Personal scope of the Leave Directive: it applies to an official who is a firefighter.
- There is a right to financial compensation in the event that the termination of the relationship occurs while on medical leave due to illness, although this guarantee only operates for the minimum duration provided for by the Directive.
- EU law precludes the right from expiring nine months after the end of the annual reference period.

2012 06 14 (C-542/09), Commission v. Netherlands.

ECJ judgment of 14 June 2012, Commission v. Netherlands.

ECLI:EU:C:2012:346.

- *European Commission v. Kingdom of the Netherlands.*
- Free movement of workers. Access to social benefits.

2012 06 21 (E-78/11), ANGED.

ECJ Judgment of 21 June 2012 (C-78/11), ANGED.

ECLI:EU:C:2012:372.

- *National Association of Large Distribution Companies (ANGED) and Federation of Trade Union Associations (FASGA), Federation of Independent Commerce Workers (FETICO), State Federation of Commerce, Hospitality, Tourism and Gaming Workers of UGT, Federation of Commerce, Hospitality and Tourism of CCOO.*
- Question referred for a preliminary ruling by the Labour Chamber of the Supreme Court.
- Holidays and medical leave: the worker who is in a situation of incapacity for work supervening during the period of paid annual leave is entitled to subsequently enjoy the annual leave coinciding with the period of incapacity for work.

- (Accumulated collective disputes claiming the right to enjoy holidays when they coincide with periods of leave due to temporary incapacity for work).

2012 07 05 (E-141/11), Hornfeldt.

ECJ Judgment of 5 July 2012 (C-141/11), Hornfeldt.

ECLI:EU:C:2012:421.

- Torsten Hörnfeldt and Posten Meddelande AB.
- Request for a preliminary ruling from the Södertörns tingsrätt.
- A national measure which allows an employer to terminate a worker's contract of employment solely on the ground that he or she has reached the age of 67, without regard to the amount of the retirement pension to be received by the person concerned, is not discriminatory if such a measure is objectively and reasonably justified by a legitimate aim relating to employment and labour market policies and constitutes an appropriate and necessary means to achieve it.

2012 09 05 (C-71/11), Federal Republic of Germany v. Y and Z.

ECJ (Grand Chamber) of 5 September 2012 (C-71/11), Germany v Y and Z.

ECLI:EU:C:2012:518.

- *Bundesrepublik Deutschland vs. Y and Z.*
- Requests for a preliminary ruling from the Bundesverwaltungsgericht (Germany).
- (Pakistanis of Ahmadiyya religion): the right to freedom of religion enshrined in Article 10(1) of the Charter corresponds to the right guaranteed by Article 9 of the ECHR, with the same meaning and scope.
- The applicant's fear of persecution is well-founded if it is reasonable to think that, upon returning to his or her country of origin, the practice of religious acts will expose him or her to a real risk of persecution.

2012 10 04 (E-115/11), Format.

ECJ Judgment of 4 October 2012, Format.

ECLI:EU:C:2012:606.

- *Format Urządzenia i Montaż Przemysłowe sp. z o.o. v. Zakład Ubezpieczeń Społecznych.*
- Request for a preliminary ruling from the Sąd Apelacyjny — Sąd Pracy i Ubezpieczeń Społecznych w Warszawie.
- Social Security coordination regulations. Determination of the applicable law in the case of subcontracting of works to a company that sent employees to projects in other Member States.

2012 10 18 (C-302/11 to C-305/11), Valenza.

ECJ Judgment of 18 October 2012 (C-302/11 to C-305/11), Valenza.
ECLI:EU:C:2012:64.

- *Rosanna Valenza and Others v Autorità Garante della Concorrenza e del Mercato.*
- Requests for a preliminary ruling from the Consiglio di Stato (Italy).
- EU law precludes the absolute exclusion for the purposes of seniority of periods served as temporary when they are assumed for an indefinite period in a stabilisation process.
- The mere temporary nature of the contract that gave rise to the previous services is not an objective reason that protects the exclusion of these periods; nor to prevent reverse discrimination against workers who pass a public competition.

2012 10 18 (C583/10), Nolan.

ECJ Judgment of 18 October 2012 (C583/10), Nolan.
ECLI:EU:C:2012:638.

- *United States of America v. Christine Nolan.*
- Request for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division).
- (Directive 98/59/EC, collective redundancies): the ECJ lacks jurisdiction to rule on a case (closure of an American military base) in which there is no evidence that national legislation is applicable and that it invokes EU law.

2012 11 08 (E-40/11), Iida.

ECJ Judgment of 8 November 2012 (C40/11), Iida.
EU:C:2012:691.

- *Yoshikazu Iida vs. Stadt Ulm.*
- Request for a preliminary ruling from the Verwaltungsgerichtshof Baden-Württemberg.
- A third-country national may only rely on a right of residence derived from a Union citizen in the specific cases provided for by EU law.

2012 11 08 (C-229/11 and C-230/11), Heimann and Toltschin.

ECJ Judgment of 8 November 2012 (C-229/11 and C-230/11), Heimann and Toltschin.
ECLI:EU:C:2012:693.

- *Alexander Heimann and Konstantin Toltschin v. Kaiser GmbH.*

- Request for a preliminary ruling from the Arbeitsgericht Passau.
- Reduction of the right to paid annual leave based on the reduction of working time in the periods of contractual suspension agreed for business reasons.
- EU law does not apply to national provisions or practices, such as a social plan negotiated between an undertaking and its works council, according to which the worker's entitlement to paid annual leave with reduced working time is calculated on the basis of the principle of *pro rata temporis*.

2012 11 22 (C-385/11), Elbal Moreno.

ECJ Judgment of 22 November 2012 (C-385/11), Elbal Moreno.
ECLI:EU:C:2012:746.

- *Isabel Elbal Moreno v. National Social Security Institute (INSS) and General Treasury of Social Security (TGSS)*.
- Request for a preliminary ruling from the Juzgado de lo Social de Barcelona.
- (Directive 79/7/EEC, equality in social security): EU law precludes legislation in a Member State that requires part-time workers, the vast majority of whom are women, to have a proportionally longer contribution period than full-time workers in order to access, where appropriate, a contributory retirement pension in an amount proportionally reduced to the part-time working hours.
- (Community of Owners cleaner for 18 years, part-time for 4 hours a week; three children; correction factors: theoretical contribution days of five hours and multiplier coefficient of 1.5 ex DA 7th LGSS in force; minimum grace period would require 100 years of that work).

2012 12 06 (E-152/11), Odar.

ECJ Judgment of 6 December 2012 (C-152/11), Odar.
ECLI:EU:C:2012:772.

- *Johann Odar v Baxter Deutschland GmbH*.
- Question referred for a preliminary ruling by Arbeitsgericht München (Labour Court, Munich, Germany).
- The Company Plan is non-discriminatory in respect of persons over 54 years of age who are dismissed for economic reasons, according to which: (1) Their compensation is calculated in accordance with the earliest possible date of retirement, contrary to the provisions of the general method of calculation (according to which such compensation

is based, in particular, on length of service in the company); (2) They are compensated with an amount less than that resulting from the application of this general method, even if it is at least equal to half of the latter.

2012 12 06 (C-430/11), Sagor.

ECJ Judgment of 6 December 2012 (C-430/11), Sagor.

ECLI:EU:C:2012:777.

- *Criminal proceedings brought against Md Sagor.*
- Request for a preliminary ruling: Tribunale di Rovigo - Italy.
- EU Member States cannot establish sanctions such as house arrest if they cannot guarantee that it is completed as soon as their repatriation is legally possible.

2013

2013 01 07 (E-416/10), Krizan.

ECJ Judgment of 7 January 2013 (C-416/10), Krizan.

ECLI:EU:C:2013:8.

- *Jozef Krizan and others v Slovenská inspekcia zivodtneho prostredia.*
- Request for a preliminary ruling from the Najvyšší súd Slovenskej republiky (Slovakia).
- Presumption of relevance of the questions referred: it is solely for the national court to assess the need for a preliminary ruling in order to be able to deliver judgment and the relevance of the questions referred.
- The ECJ's obligation, as a general rule, is to rule on the consultation. Exceptions are made in cases where the question is disconnected from the subject-matter of the main proceedings, hypothetical questions or lack of the facts and law necessary to respond adequately.

2013 01 31 (C-394/11), Belov.

ECJ Judgment of 31 January 2013 (C-394/11), Belov.

EU:C:2013:48.

- *Valeri Hariev Belov vs. CHEZ Elektro Balgaria AD and others.*
- Request for a preliminary ruling from the Komisia za zashtita ot diskriminatsia (Bulgaria).
- The body (Commission for the Defence of Discrimination) that raises the issue of unequal treatment by ethnicity (since the meters have been installed at a considerable height in a certain neighbourhood, mostly inhabited by Roma), lacks jurisdictional competence.

2013 02 21 (C-282/11), Salgado González.

ECJ Judgment of 21 February 2013, Salgado González.

ECLI:EU:C:2013:86.

- *Concepción Salgado González v. National Social Security Institute (INSS) and General Social Security Treasury (TGSS).*
- Request for a preliminary ruling from the High Court of Justice of Galicia.
- Social Security coordination regulations. Calculation of the Spanish pension for migrant self-employed workers.

2013 02 21 (E-46/12), L.N.

ECJ Judgment of 21 February 2013 (C-46/12), L.N.

ECLI:EU:C:2013:97.

- *L.N. v. Styrelsen for Videregående Uddannelser og Uddannelsesstøtte.*
- Request for a preliminary ruling from the Ankenævnet for Statens Uddannelsesstøtte (Denmark).
- (Freedom of movement): EU law precludes the refusal of student support allowance for studies in a host Member State who is simultaneously engaged in a genuine and effective employment in that Member State capable of conferring on him or her the status of “worker” within the meaning of Article 45 TFEU.

2013 02 21 C-194/12), Concepción Maestre.

ECJ Order of 21 February 2013 (C-194/12), Concepción Maestre.

ECLI:EU:C:2013:102.

- *Concepción Maestre García v. Centros Comerciales Carrefour SA.*
- Question referred for a preliminary ruling by the Labour Court of Benidorm (Alicante).
- Holidays and medical leave: the right to enjoy annual leave, at the end of temporary disability, for a period other than that initially set unilaterally by the company for productive or organisational reasons.

2013 02 26 (E-617/10), Akerberg.

ECJ Judgment of 26 February 2013 (C-617/10), Akerberg.

ECLI:EU:C:2013:105.

- *Åklagaren v. Hans ÅkerbergFransson.*
- Request for a preliminary ruling from the Haparandatingsrätt (Sweden).
- Where a legal situation does not fall within the scope of EU law, the Court of Justice does not have jurisdiction to hear it and the provisions

of the CEFEU that may be relied on cannot in themselves establish such jurisdiction.

- Ne bis in idem principle: EU law does not preclude a VAT breach from giving rise to a tax surcharge and a criminal penalty, provided that the former is not criminal in nature.
- EU law precludes a practice which makes the national court's obligation not to apply any provision which infringes a fundamental right guaranteed by the CEFEU subject to the requirement that such an infringement be clearly apparent from the text of the Charter or from the relevant case-law, since it deprives the national court of the power to assess fully, with the cooperation of the ECJ where appropriate, the compatibility of that provision with the Charter.

2013 02 26 (E-399/11), Melloni.

ECJ Judgment of 26 February 2013 (C-399/11), Melloni.

ECLI:EU:C:2013:107.

- *Stefano Melloni v. Public Prosecutor's Office*.
- Request for a preliminary ruling from the Spanish Constitutional Court.
- Article 53 of the Convention on the Functioning of the European Union does not allow a Member State to make the surrender of a person convicted in absentia subject to the condition that the conviction can be reviewed in the issuing Member State, in order to avoid a breach of the right to a fair trial and the rights of the defence protected by its Constitution.
- European arrest warrant. Surrender procedures between Member States. Decisions issued following a trial in which the interested party has not appeared. Execution of a sentence imposed in absentia. Possibility of review of the sentence.

2013 02 28 (E-427/11), Kenny et al.

ECJ Judgment of 28 February 2013 (C-427/11), Kenny and Others.

ECLI:EU:C:2013:122.

- *Margaret Kenny et al. v. Minister for Justice, Equality and Law Reform and others*.
- Question referred for a preliminary ruling by the High Court (Ireland).
- (Directive 75/117/EEC on equal pay for gender): the same work or work of equal value is provided if, having regard to a set of factors (nature of the work, training, working conditions) a comparable situation can be considered to exist.

- In the context of indirect wage discrimination, it is for the employer to provide an objective justification for the difference in pay.

2013 03 07 (E-178/12), IMDECO.

ECJ Order of 7 March 2013 (C-178/12), IMDECO.

ECLI:EU:C:2013:150.

- *Rafaela Rivas Montes vs. Instituto Municipal de Deportes de Córdoba (IMDECO)*.
- Question referred for a preliminary ruling by the Labour Court No. 1 of Córdoba.
- Non-discrimination between permanent and temporary staff: EU law cannot examine differences in treatment between civil servants and contract staff (in the case: calculation of previous service for the purposes of the seniority supplement).

2013 03 07 (E-393/11), Bertazzi.

ECJ Order of 7 March 2013 (C-393/11), Bertazzi.

ECLI:EU:C:2013:143.

- *Autorità per l'energia elettrica e il gas contra Antonella Bertazzi y otros*.
- Question raised by the Consiglio di Stato (Italy).
- Principle of non-discrimination between permanent and temporary workers: EU law precludes the absolute exclusion for the purposes of seniority of periods provided as temporary when they are assumed for an indefinite period in a stabilisation process.
- The mere temporary nature of the contract that gave rise to the previous services is not an objective reason that protects the exclusion of these periods; nor the desire to avoid reverse discrimination against workers who pass a public competition.

2013 04 11 (C-290/12), Della Rocca.

ECJ Judgment of 11 April 2013 (C-290/12), Della Rocca.

ECLI:EU:C:2013:235.

- *Oreste Della Rocca v Poste Italiane SpA*.
- Request for a preliminary ruling from the Tribunale di Napoli.
- Directive 99/70 (temporary contracts) does not apply to the fixed-term employment relationship between a temporary worker and a temporary work agency or to the fixed-term employment relationship between that worker and a user undertaking.

2013 04 11 (C-335/11 and C-337/11), Ring and Werge.

ECJ Judgment of 11 April 2013 (C-335/11 and C-337/11), Ring and Werge.
ECLI:EU:C:2013:222.

- *HK Danmark, representing Jette Ring against Dansk almennyttigt Boligselskab (C335/11) and HK Danmark, representing Lone Skouboe Werge against Dansk Arbejdsgiverforening, representing Pro Display A/S (C337/11).*
- Questions referred by the Søg og Handelsretten (Denmark).
- Illness as a disability (after the UN Convention) when it entails a limitation, resulting in particular from physical, mental or mental ailments which, when interacting with various barriers, may prevent the full and effective participation of the person concerned in professional life on an equal basis with other workers, and if this limitation is of long duration (low back pain, whiplash).
- EU law precludes the termination of the contract due to absenteeism before the company adopts measures to adapt to the job.
- EU law precludes such termination if the leave is the result of disability, unless the employment law on which it is based pursues a legitimate aim and does not go beyond what is necessary to achieve it, a fact which it is for the referring court to assess.

2013 04 11 (E-401/11), Soukupová.

ECJ Judgment of 11 April 2013 (C-401/11), Soukupová.
ECLI:EU:C:2013:223.

- *Blanka Soukupová against Ministerstvo zemědělství.*
- Request for a preliminary ruling from the Nejvyšší správní soud (Czech Republic).
- National legislation setting a retirement age that varies according to sex and, in the case of women, according to the number of children raised; equal treatment between women and men in the framework of aid for the early cessation of agricultural activity.

2013 04 16 (E-202/11), Anton Las.

ECJ Judgment of 16 April 2013 (C-202/11), Anton Las.
ECLI:EU:C:2013:239.

- *Anton Las vs. PSA Antwerp NV.*
- Request for a preliminary ruling from the Arbeidsrechtbank te Antwerpen (Belgium).

- (Freedom of movement for workers): EU law precludes legislation of a federated entity of a Member State which requires any employer having its place of business in the territory of that entity to draw up employment contracts of a cross-border nature exclusively in the official language of that federated entity, under penalty of the judge declaring the nullity of the contracts ex officio.

2013 04 18 (C247/12), Meliha Veli Mustafa.

ECJ Judgment of 18 April 2013 (C247/12, Meliha Veli Mustafa.
ECLI:EU:C:2013:256.

- *Meliha Veli Mustafa contra Direktor na fond «Garantirani vzemania na rabotnitsite i sluzhitelite» kam Natsionalnia osiguriteln institut.*
- Request for a preliminary ruling from the Varhoven administrativen sad (Bulgaria).
- Directive 2008/94/EC (insolvency) does not require guarantees to be put in place for employees' claims at each stage of their employer's insolvency proceedings.
- It is permissible for a State to provide a guarantee only for employees' claims arising prior to the registration in the commercial register of the decision opening insolvency proceedings, even if that decision does not entail the cessation of the employer's activities.

2013 04 25 (C398/11), Hogan.

ECJ Judgment of 25 April 2013 (C398/11), Hogan.
ECLI:EU:C:2013:272.

- *Thomas Hogan and Others v Minister for Social and Family Affairs, Ireland and Attorney General.*
- Request for a preliminary ruling from the High Court (Ireland).
- Directive 2008/94/EC (insolvency) applies to the rights of former employees in relation to supplementary pensions, without the State pension being taken into account for this purpose.
- Protection comes into play if the supplementary occupational pension scheme does not have sufficient funds when the employer becomes insolvent and the employer cannot raise them either.

2013 04 25 (C81/12), Asociavia Accept.

ECJ Judgment of 25 April 2013, C81/12), Asociavia Accept.
EU:C:2013:275.

- *Asociația Accept contra Consiliul Național pentru Combaterea Discriminării*.
- Request for a preliminary ruling from the Curtea de Apel București (Romania).
- (Directive 2000/78 on equal treatment at work): a public statement by a football official excluding the hiring of an athlete on the basis of his homosexuality constitutes an indication of discrimination on grounds of sexual orientation.
- EU law precludes the fact that, once discrimination on grounds of sexual orientation has been established, after the expiry of the limitation period of six months from the date on which the facts occurred, a reprimand may be issued only if such discrimination is not punished under substantive and procedural conditions which render the sanction effective, proportionate and dissuasive.

2013 05 08 (C-87/12), Ymeraga.

ECJ Judgment of 8 May 2013 (C87/12), Ymeraga.

EU:C:2013:291.

- *Kreshnik Ymeraga and Others v Ministre du Travail, de l'Emploi et de l'Immigration*.
- Request for a preliminary ruling from the Cour administrative.
- EU law does not preclude a Member State from refusing to grant a third-country national residence in its territory, even though that national intends to reside with a member of his family who is a citizen of the European Union residing in that Member State of which he is a national and has never exercised his right of free movement as a citizen of the Union.
- The foregoing has the proviso that such refusal entails depriving the Union citizen concerned of the effective enjoyment of the essential content of the rights conferred by the status of citizen of the Union.

2013 05 30 (E-342/12), Worten.

ECJ Judgment 30 May 2013 (C-342/12), Worten.

ECLI:EU:C:2013:355.

- *Worten — Equipamentos para o Lar, S.A. vs. Autoridade para as Condições de Trabalho (ACT)*.
- Request for a preliminary ruling from the Tribunal do Trabalho de Viseu (Court of Labour of Viseu, Portugal).

- (Directive 95/46 on processing of personal data): EU law does not preclude the employer from being obliged to make the recording of working time available to the labour authority provided that the processing of such data (includes the indication of the hours at which each worker starts and ends the working day, as well as the corresponding breaks or rest periods) is necessary to monitor compliance with the labor standard.

2013 06 13 (E-415/12), Brandes.

ECJ Order of 13 June 2013 (C-415/12), Brandes.

ECLI:EU:C:2013:398.

- *Bianca Brandes v. Land Niedersachsen*.
- Request for a preliminary ruling from the Arbeitsgericht Nienburg (Germany).
- (Directive 2003/88/EC, working time): EU law conflicts with the rule that a full-time worker who was unable to take his or her right to paid annual leave during the reference period and becomes active on a part-time basis has his or her rest period reduced proportionately.
- A reduction in the working day from full-time to part-time cannot reduce the worker's entitlement to annual leave during the period of full-time work.

2013 06 20 (C-635/11), Commission v Netherlands.

ECJ judgment of 20 June 2013 (C-635/11), European Commission v. Netherlands.

ECLI: EU:C:2013:408.

- *European Commission v. Kingdom of the Netherlands*.
- Failure of the State to transpose Directive 2005/56/EC (corporate mergers) by failing to adopt all the laws, regulations and administrative provisions necessary to ensure that employees of the establishments of a company resulting from a cross-border merger with its registered office in the Netherlands, located in other Member States, enjoy participation rights identical to those of employees employed in the Netherlands.
- Interpretation of the “before-after” principle in the context of workers’ rights of involvement and application of this principle in the specific case of cross-border mergers in which participation systems exist.

2013 06 20 (E-7/12), Riežniece.

ECJ Judgment of 20 June 2013 (C-7/12), Riežniece.

ECLI:EU:C:2013:410.

- *Nadežda Riežniece against Zemkopības ministrija and Lauku atbalsta dienests.*
- Request for a preliminary ruling from the Augstākās tiesas Senāts (Latvia).
- For the purposes of an evaluation of workers, in the context of a write-off of civil servants' jobs due to national economic difficulties, those on parental leave may not be disadvantaged as a result.
- EU law provides that a worker, who has been transferred to another job at the end of her parental leave and as a result of this assessment, is dismissed due to the amortisation of that new job. Unless it was impossible to reinstate her to her previous job.

2013 06 20 (C-20/12), Giersch.

ECJ Judgment of 20 June 2013, Giersch.

ECLI:EU:C:2013:411.

- *Elodie Giersch and Others v. État du Grand-Duché de Luxembourg.*
- Request for a preliminary ruling from the tribunal administratif (Luxembourg).
- Free movement of workers. Access to social benefits.

2013 07 18 (E-426/11) Alemo-Herron.

ECJ Judgment of 18 July 2013 (C-426/11), Alemo-Herron and Others.

ECLI:EU:C:2013:521.

- *Mark Alemo-Herron and Others v Parkwood Leisure Ltd.*
- Request for a preliminary ruling from the Supreme Court of the United Kingdom.
- EU law precludes dynamic referral clauses to collective agreements negotiated and approved after the date of transfer from being enforced against the transferee where the transferee does not have the possibility of participating in the negotiation process of those agreements.

2013 09 12 (E-614/11), Kuso.

ECJ Judgment of 12 September 2013 (C-614/11), Kuso.

ECLI:EU:C:2013:544.

- *Niederösterreichische Landes-Landwirtschaftskammer (Regional Agrarian Chamber of the Land of Lower Austria) v. Anneliese Kuso.*
- Question referred by the Oberster Gerichtshof (Austria).
- According to Article 2(2) of Directive 76/207, which distinguishes between direct and indirect discrimination, only indirect discrimination

can escape classification as discrimination, provided that it can “be objectively justified by a legitimate aim and that the means of achieving that aim are appropriate and necessary”. On the other hand, such a possibility is not provided for in the case of direct discrimination.

- If employment legislation forms an integral part of an employment contract and provides that the employment relationship is to be terminated when the retirement age is reached, which differs according to the sex of the worker, it constitutes direct discrimination prohibited by that directive.

2013 09 12 (E-64/12), Schlecker.

ECJ Judgment of 12 September 2013 (C-64/12), Schlecker.
ECLI:EU:C:2013:551.

- *Anton Schlecker vs. Melitta Josefa Boedeker*.
- Question referred by Hoge Raad der Nederlanden (Netherlands).
- Law applicable to the contract of employment: application of the escape clause of Article 6 of the Rome Convention (Article 8 of the Rome I Regulation) in the case of a worker successively transferred by her employer.
- Even if the worker carries out his activity on a regular and long-term basis in the same country, the national court may rule out the application of that legislation where it is apparent from all the circumstances that the contract has a closer link with another country.

2013 09 19 (C-5/12), Betriu Montull.

ECJ Judgment of 19 September 2013 (C-5/12), Betriu Montull.
ECLI:EU:C:2013:571.

- *Marc Betriu Montull v National Social Security Institute (INSS)*.
- Request for a preliminary ruling from the Juzgado de lo Social No 1 de Lleida.
- (Directives 76/207/EEC and 92/85/EEC, equality): EU law does not preclude the Spanish regulation on the possible transfer of part of maternity leave to the working father, which provides that the father of a child can only access part of the maternity leave with the consent of the mother and only if she works, while the mother can access maternity leave in any case and regardless of the father’s work activity.

2013 09 19 (C-140/12), Brey.

ECJ Judgment of 19 September 2013, Brey.
ECLI:EU:C:2013:565.

- *Pensionsversicherungsanstalt v. Peter Brey*.
- Request for a preliminary ruling from the Oberster Gerichtshof.
- Social Security coordination regulations. Access to non-contributory benefits for inactive EU citizens in temporary residence.

2003 11 06 (C-413/01), Ninni-Orasche.

ECJ judgment of 6 November 2003 (C-413/01), Ninni-Orasche.

ECLI:EU:C: 2003:600.

- *Franca Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst*.
- (Freedom of movement): Temporary employment held for two and a half months by a national of a Member State in the territory of another Member State of which he is not a national may confer on him the status of worker provided that the activity carried out as an employee is not of a merely marginal and ancillary nature.
- The termination of the temporary employment contract does not necessarily confer on the migrant the status of voluntary unemployment.

2013 11 07 (E-522/12), Isbir.

ECJ Judgment of 7 November 2013 (C-522/12), Isbir.

ECLI:EU:C:2013:711.

- *Tevfik Isbir v. DB Services GmbH*.
- Request for a preliminary ruling from the Bundesarbeitsgericht (Germany).
- (Directive 96/71, posting): EU law does not preclude the inclusion in the minimum wage of remuneration items that do not alter the relationship between the worker's service, on the one hand, and the consideration that the worker receives as remuneration for that benefit, on the other.
- A comparison between the laws of the sending State and the host State, on which the application of the wage guarantee in question depends, cannot be carried out, thus forcing such application, without regard to any items or supplementary remuneration paid to posted persons in accordance with the labour legislation of the former of those States and which do not change to the detriment of the worker. when making that comparison, the one identified as the normal or usual relationship between the worker's benefit and the consideration he receives in return.

2013 11 28 (C-309/12), Gomes Viana Novo.

ECJ Judgment of 28 November 2013 (C-309/12), Gomes Viana Novo.

ECLI:EU:C:2013:774.

- *María Albertina Gomes Viana Novo and others against the IP Wage Guarantee Fund.*
- Request for a preliminary ruling from the Tribunal Central Administrativo Norte (Portugal).
- (Directive 80/987/EEC, insolvency): EU law is compatible with the rule that excludes from the wage guarantee salary claims due before the six months preceding the exercise of the action for declaration of insolvency, even if they have previously been claimed in court.
- If the remuneration of the last three months of the employment relationship is guaranteed, the law may limit the insured credit.

2013 12 12 (E-327/12), Soa Nazionale Costruttori.

ECJ Judgment of 12 December 2013 (C-327/12), Soa Nazionale Costruttori.

- *Ministero dello Sviluppo economico y Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture contra SOA Nazionale Costruttori — Organismo di Attestazione SpA.*
- Request for a preliminary ruling from the Consiglio di Stato (Italy).
- It affects EU law to impose minimum prices on bodies that must issue certifications of requirements necessary to access public procurement, even though they are required equally from national companies.

2013 12 12 (E-361/12), Carratù.

ECJ Judgment of 12 December 2013 (C-361/12), Carratù.

ECLI:EU:C:2013:83.

- *Carmela Carratù v Poste Italiane SpA.*
- Request for a preliminary ruling from the Tribunale di Napoli.
- (Directive 1999/70): The principle of non-discrimination between permanent and temporary workers may be invoked directly against a State body.
- The concept of “working conditions” includes compensation that an employer is obliged to pay to a worker due to the unlawful inclusion of a termination clause in his or her employment contract.
- EU law does not require that compensation awarded in the event of the unlawful inclusion of a termination clause in an employment contract be treated in the same way as compensation paid in the event of unlawful termination of an employment contract of indefinite duration.

2013 12 12 (E-50/13), Papalia.

ECJ Order of 12 December 2013 (C-50/13), Papalia.

ECLI:EU:C:2013:873.

- *Rocco Papalia v. Comune di Aosta.*
- Request for a preliminary ruling from the Ordinary Court of Aosta (Italy).
- EU law precludes the possibility of transforming the contract into one of indefinite duration when the employer is public and there has been a chain of temporary contracts, only compensation being contemplated.

2014

2014 01 15 (E-176/12), Association de Médiation sociale.

ECJ Judgment (Grand Chamber) of 15 January 2014 (C-176/12), Association de Médiation sociale.

ECLI:EU:C:2014:2.

- *Association de médiation sociale v. Union locale des syndicats CGT and others.*
- Request for a preliminary ruling from the Cour de cassation (France).
- The right of participation of employees (EU Charter of Fundamental Rights and Directive 2002/14/EC) cannot be invoked between individuals for the purpose of displacing the application of a national law (French Labour Code).
- An interpretation of national law in conformity with EU law cannot serve as a basis for an interpretation contra legem of its legal provisions.
- The State must compensate for the damages caused by its non-compliance when it is not possible to interpret it in conformity.

2014 01 23 (E-296/12) European Commission v. Belgium.

Judgment of the Court of Justice of 23 January 2014, (C-296/12) European Commission v. Belgium.

ECLI:EU:C:2014:24.

- *European Commission v. Kingdom of Belgium.*
- Tax reduction measures for contributions to pension schemes made to entities or funds established in Belgium are contrary to the freedom to provide services between Member States, since the tax reductions provided for only apply if the financial institutions receiving the payment are established in Belgium.

2014 02 13 (C-512/11 and C-513/11), Terveys-ja.

ECJ Judgment of 13 February 2014 (C-512/11 and C-513/11), Terveys-ja.
ECLI:EU:C:2014:73.

- *Terveys ja sosiaalialan neuvottelujärjestö (TSN) ry against Terveyspalvelualan Liitto ry e Ylemmät Toimihenkilöt (YTN) ry against Teknologiaeollisuus ry and Nokia Siemens Networks Oy.*
- Requests for a preliminary ruling from the työtuomioistuin.
- (Directive 96/34/EC, parental leave): EU law goes against a rule that does not recognise the remuneration during maternity leave of a pregnant worker who interrupts unpaid parental leave to take it.

2014 02 27 (E-588/12), Lyreco Belgium.

ECJ Judgment of 27 February 2014 (C-588/12), Lyreco Belgium.
ECLI:EU:C:2014:99.

- *Lyreco Belgium NV vs. Sophie Rogiers.*
- Question referred by the arbeidshof te Antwerpen (Belgium).
- (Directive 96/34, parental leave): it is contrary to EU law for the global protection compensation of a full-time worker who is dismissed during part-time parental leave without compelling reasons or just cause to be calculated according to the salary received during this parental leave.

2014 03 06 (E-458/12), Amatori.

ECJ Judgment of 6 March 2014 (C-458/12), Amatori and others.
ECLI:EU:C:2014:124.

- *Lorenzo Amatori and Others v Telecom Italia SpA and Telecom Italia Information Technology Srl.*
- Request for a preliminary ruling from the Tribunale di Trento (Italy).
- When there is a transfer of a part of the company, EU law allows the transferee to succeed the transferor in the employment relationship, although the transfer does not constitute a functionally autonomous economic unit prior to its transfer.
- The above approach is maintained even if the transferor retains significant control over the transferee.
- (Telecom divides a previous branch of activity into several small units; the staff assigned to one of these fractions rejects that there is subrogation and claims membership of the parent company).

2014 03 06 (C-595/12), Napoli.

ECJ Judgment of 6 March 2014 (C-595/12), Napoli.

ECLI:EU:C:2014:128.

- *Loredana Napoli v. Ministero della Giustizia (Dipartimento dell'Amministrazione penitenziaria)*.
- Request for a preliminary ruling from the Tribunale amministrativo regionale per il Lazio (Italy).
- (Directive 2006/54 on gender equality at work): EU law precludes national legislation which, on grounds of public interest, dismisses a woman on maternity leave from vocational training which is an essential part of her job and which is compulsory in order to be eligible for a permanent appointment as a civil servant, as well as to improve their working conditions, even if they are guaranteed the right to participate in the next training that is organized, the date of which is uncertain.
- A woman's right to return to work under non-unfavourable conditions after maternity leave.

2014 03 06 (E-206/13), Siragusa.

ECJ Judgment of 6 March 2014 (C-206/13), Siragusa.

ECLI:EU:C:2014:126.

- *Cruciano Siragusa vs. Regione Sicilia (Soprintendenza Beni Culturali e Ambientali di Palermo)*.
- Request for a preliminary ruling from the Tribunale amministrativo regionale per la Sicilia (Italy).
- The principle of proportionality is one of the general principles of EU law which must be respected by national legislation which falls within the scope of or implements EU law.
- If the connection link appears to be non-existent, the ECJ lacks jurisdiction.

2014 03 13 (E-38/13), Nierodzik.

ECJ Judgment of 13 March 2014 (C-38/13), Nierodzik.

ECLI:EU:C:2014:152.

- *Małgorzata nierodzik contra samodzielny publiczny psychiatryczny zakład opieki zdrowotnej im. dr Stanisława Deresza w Choroszczy*.
- Request for a preliminary ruling from the Sąd Rejonowy w Białymstoku (Poland) Non-discrimination between permanent and temporary workers: "working conditions" include the notice period for the termination of fixed-term employment contracts.

- A national regulation that provides for different notice periods for temporary workers and comparable permanent workers is contrary to EU law.

2014 03 13 (E-190/13), Márquez Samohano.

ECJ Judgment of 13 March 2014 (C-190/13), Márquez Samohano.
ECLI:EU:C:2014:146.

- *Antonio Márquez Samohano against Universitat Pompeu Fabra.*
- Reference for a preliminary ruling requested by the Labour Court No. 3 of Barcelona.
- (Directive 1999/70/EC): abuses in temporary recruitment of associate university professors.
- EU law does not preclude the University from renewing the contract as an Associate as long as there are objective reasons for doing so and that they meet provisional needs.
- It is necessary to ensure that the regulation of such contracts is not used to cover permanent and long-term needs for the recruitment of teaching staff.

2014 03 18 (E-167/12), C.D.

ECJ Judgment of 18 March 2014 (C-167/12), C.D.
ECLI:EU:C:2014:169.

- *C.D. v. S.T.*
- Request for a preliminary ruling from the Employment Tribunal (Newcastle upon Tyne).
- Directive 92/85/EEC (health of pregnant workers): must be interpreted as meaning that Member States are not required under Article 8 of that directive to grant maternity leave to a worker in her capacity as a surrogate mother who has had a child under a surrogacy agreement, even when you can breastfeed that child after birth or effectively breastfeed him.

2014 03 18 (C-363/12), Z.

ECJ Judgment of 18 March 2014 (C-363/12), Z.
ECLI:EU:C:2014:159.

- *Z v. A Government department and The Board of management of a community school.*
- Question referred for a preliminary ruling by the Equality Tribunal (Ireland).

- The situation of a surrogate mother with regard to the granting of adoption leave does not fall within the scope of Directive 2000/78 because it does not relate to matters of employment and occupation.
- The sterility of the intended mother is not a disability with occupational repercussions, which activates the discriminatory prohibition.

2014 03 27 (C-265/13), Torralbo Marcos.

ECJ Judgment of 27 March 2014 (C-265/13), Torralbo Marcos.
ECLI:EU:C:2014:187.

- *Emiliano Torralbo Marcos v. Korota, S.A., and the Wage Guarantee Fund.*
- Question referred for a preliminary ruling by the Labour Court No. 2 of Terrassa (Barcelona).
- Lack of jurisdiction of the ECJ to determine whether it is consistent with Article 47 of the Convention on the Functioning of the European Union for the worker to be required to pay a fee to appeal in the context of a compulsory enforcement procedure in order to obtain a judicial declaration of insolvency of the employer and thus have recourse to FOGASA.

2014 04 08 (C-293/12 and C-594/12), Digital Rights.

ECJ (Grand Chamber) of 8 April 2014 (C-293/12 and C-594/12), Digital Rights.
ECLI:EU:C:2014:238.

- *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others.*
- Requests for a preliminary ruling from the High Court (Ireland) and the Verfassungsgerichtshof.
- Nullity of Directive 2006/24, obliging providers of telephone communications services to retain traffic and location data relating to those communications.
- Nullity because the Directive is not limited to what is strictly necessary, since it covers all persons, electronic means of communication and data in a generalized manner and does not establish any objective criteria that allow the access of the competent national authorities to data and their subsequent use.
- Virtuality of the Charter of Fundamental Rights of the European Union (in the case: on the protection of personal data).

2014 04 30 (C-89/13), D’Aniello.

ECJ Order of 30 April 2014 (C-89/13), D’Aniello.

ECLI:EU:C:2014:299.

- *Luigi D’Aniello and Others v Poste Italiane SpA*.
- Request for a preliminary ruling from the Tribunale di Napoli.
- Permanent and temporary: the principle does not allow the compensation awarded in the event of unlawful termination of a false temporary employment contract to be compared with that paid in the event of unlawful interruption of an employment contract of indefinite duration.

2014 05 13 (E-131/12), Google Spain and Google.

ECJ judgment of 13 May 2014 (C-131/12), Google Spain and Google.
ECLI:EU:C:2014:317.

- *Google Spain, S.L. and Google Inc. v. Spanish Data Protection Agency (AEPD) and Mario Costeja González*.
- Preliminary ruling submitted by the National High Court.
- (Directive 95/46/EC, personal data): the search engine processes data and its operator is obliged to remove from the list of results obtained after a search carried out on the basis of a person’s name links to web pages, published by third parties and containing information relating to that person, even if this name or information is not previously or simultaneously deleted from these websites, and, where appropriate, even if the publication on said pages is in itself lawful (“right to be forgotten”) and is not deleted from the original website.

2014 05 22 (E-356/12), Glatzel.

ECJ Judgment of 22 May 2014 (C-356/12), Glatzel.
ECLI:EU:C:2014:350.

- *The question referred by the Bayerischer Verwaltungsgerichtshof*.
- Wolfgang Glatzel vs. Freistaat Bayern.
- (Art. 21.1 DDFEU Charter, discrimination on the basis of disability): does not prevent the difference in treatment for a driving licence depending on whether or not you have the visual acuity necessary to drive motor vehicles, provided that such a requirement effectively responds to an objective of general interest (in the case, to improve road safety), is necessary (in the case it is essential that the persons to whom a driving licence is granted have the physical capacities necessary conditions, in particular of vision, since physical impairments can have significant consequences) and does not constitute an unreasonable burden, as is the case in the Annex at issue.

- Article 26 of the Charter of DDFUUEE as a guiding principle: the principle enunciated by that article does not imply that the Union legislator is obliged to adopt one or another specific measure and in order for it to fully produce its effects, it must be specified by provisions of Union law or national law.

2014 06 05 (C-255/13), Mr. I.

ECJ Judgment of 5 June 2014, Mr. I.
ECLI:EU:C:2014:1291.

- *I v. Health Service Executive.*
- Request for a preliminary ruling from the High Court (Ireland).
- Social Security coordination regulations. Differentiation between temporary stay and residence for the purposes of health care.

2014 06 12 (E-118/13), Gülay Bollacke.

ECJ Judgment of 12 June 2014 (C-118/13), Gülay Bollacke.
ECLI:EU:C:2014:1755.

- *Gülay Bollacke vs. K+K Klaas & Kock BV & Co. KG.*
- Question referred by Landesarbeitsgericht Hamm (Germany).
- Holidays and death of the worker: when the employment relationship is terminated due to the death of the worker, there is a right to financial compensation for the holidays not taken.
- The right to such compensation cannot be made subject to a prior request by the data subject.

2014 06 19 (C501/12 to C506/12, C540/12 and C541/12), Spetch.

ECJ Judgment of 19 June 2014 (C501/12 to C506/12, C540/12 and C541/12), Spetch.
EU:C:2014:2005.

- *Thomas Specht and Others v Land Berlin and Bundesrepublik Deutschland.*
- Request for a preliminary ruling from the Verwaltungsgericht Berlin (Germany).
- (Directive 2000/78, non-discrimination in employment): the remuneration conditions of civil servants may not be discriminatory, as is the case when three steps are established in each grade according to the age of entry.
- EU law does not preclude a law that progressively ends the system of age steps.

- EU law does not require the retroactive payment of pay differences to those who have been discriminated against.

2014 06 19 (C-507/12), *Jessy Saint Prix*.

ECJ Judgment of 19 June 2014 (C-507/12), *Jessy Saint Prix*.

ECLI:EU:C:2014:2007.

- *Jessy Saint Prix v. Secretary of State for Work and Pensions*.
- Request for a preliminary ruling from the Supreme Court of the United Kingdom.
- (Free movement of workers; Art. 45 TFEU): an EU citizen is a worker who gives up work due to physical limitations related to the last stage of pregnancy and the period following childbirth, provided that she returns to work or finds employment again within a reasonable period of time after the birth of her child.

2014 07 03 (C-362/13 and others), *Fiamingo*.

ECJ Order of 3 July 2014 (C-362/13 and others), *Fiamingo*.

ECLI:EU:C:2014:2238.

- *Maurizio Fiamingo (C-362/13), Leonardo Zappalà (C-363/13) and Francesco Rotondo and others (C-407/13) v Rete Ferroviaria Italiana SpA*.
- Requests for a preliminary ruling: Corte suprema di cassazione (Italy).
- The concept of fixed-term employment contract includes temporary ferry workers who make a journey between two ports located in the same Member State.
- The conversion of such contracts into permanent contracts is in accordance with EU law provided that it is an appropriate measure to prevent and punish abuses.

2014 07 08 (E-83/13), *Fonnship*.

ECJ (Grand Chamber) of 8 July 2014 (C-83/13), *Fonnship*.

ECLI:EU:C:2014:2053.

- *Fonnship (Norwegian transport company) v Swedish Transport Workers' Union (ST) and Services and Communication Union (SEKO)*.
- Request for a preliminary ruling from the Arbetsdomstolen (Sweden).
- (Regulation 4055/86, maritime transport): A Norwegian company which owns a ship flying the flag of Panama and which engages the crew may invoke the freedom to provide services if its recipients are established in an EEA State other than that of its registered office.

- EU law (freedom to provide services) applies even if the ship flies the flag of a non-EEA state or its crew is non-EU if its activity takes place between States integrated into it and the owner company provides maritime transport services.
- Any restriction that, without objective justification, may have prohibited, hindered or detracted from the interest of the provision of such services is contrary to EU law.
- (Norwegian company owning a Panamanian-flagged vessel that carries out transport between EEA countries; it is crewed by people from Russia and Poland; a collective agreement agreed with a Russian union is applied; during a stopover in a Swedish port the TS requires the company to adhere to another collective agreement and pay it a certain amount, which it achieves after obstructing its loading and unloading; the company sues ST claiming damages).
- (Subsequently, similar events were reproduced in another Swedish port SEKO; the company also filed a legal action against the union, arguing that the union pressures were unlawful and that it did not agree voluntarily).

2014 07 10 (C198/13), Julián Hernández.

ECJ Judgment of 10 July 2014 (C198/13), Julián Hernández and others.
ECLI:EU:C:2014:2055.

- *Víctor Manuel Julián Hernández and Others v Kingdom of Spain (Sub-delegation of the Government of Spain in Alicante) and Others.*
- Request for a preliminary ruling from the Labour Court No. 1 of Benidorm.
- The rule on the payment by the State of processing wages from a certain date in the event of unfair dismissal falls outside the scope of Directive 2008/94/EC and cannot be examined in the light of the fundamental rights guaranteed by the CEFEU.
- It is not possible to examine whether there is discrimination on the ground that this State obligation is non-existent in the case of null dismissal.

2014 07 17 (E-173/13), Leone.

ECJ Judgment of 17 July 2014 (C-173/13), Leone.
ECLI:EU:C:2014:2090.

- *Maurice Leone and Blandine Leone v. Garde des Sceaux, ministre de la Justice y Caisse nationale de retraite des agents des collectivités locales.*

- Request for a preliminary ruling from the Cour administrative d'appel de Lyon (French Court).
- Discrimination in pay on grounds of sex: Discrimination on grounds of sex may be a professional regime that grants bonuses on periods of acquisition for early pension due to the suspension of the provision of services for certain periods due to birth, adoption or childcare. Indirect discrimination against men.

2014 09 03 (C201/13), Deckmyn and Vrijheidsfonds.

ECJ (Grand Chamber) of 3 September 2014 (C201/13), Deckmyn and Vrijheidsfonds.

ECLI:EU:C:2014:2132.

- *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and others.*
- Request for a preliminary ruling from the Hof van beroep te Brussel (Belgium).
- For copyright purposes, the essential characteristics of “parody” are, on the one hand, to evoke an existing work, although perceptibly different from it, and, on the other hand, to depict a humorous or burlesque manifestation. It is not subject to requirements that imply the need for the parody to have its own original character, beyond the presence of perceptible differences with respect to the original parodied work, can reasonably be attributed to a person other than the author of the original work himself, affects the original work itself or mentions the source of the parodied work.
- The right of the author of the parodied work must be protected in order to prevent it from being associated with discriminatory meanings.
- (A calendar editor whose cover features a drawing analogous to that of an album, alien, from a long time ago and where one of the main characters of the album, covered by a white robe, throws coins, which a crowd is busy collecting. In the drawing at issue in the main proceedings, the mayor of the city of Ghent and those who collect the coins wear burqas or are people of colour) take the place of that personage.

2014 09 03 (C318/13), X.

ECJ Judgment of 3 September 2014, (C318/13), X.

ECLI:EU:C:2014:2133.

- X.

- Question referred by the Korkein hallinto-oikeus (Finland).
- (Directive 79/7/EEC, non-discrimination in Social Security): it is against EU law to calculate a pension resulting from an accident at work by applying, as an actuarial factor, the difference in life expectancy between men and women.
- Sufficiently serious infringement of EU law for the purposes of claiming liability from the State for infringement of EU law: it is for the national court to assess whether the conditions for the Member State to be liable are satisfied.
- Criteria which the national court must take into account in order to determine whether the national legislation at issue in the main proceedings constitutes a “sufficiently serious” infringement of EU law.

2014 09 04 (E-152/14), Bertazzi.

ECJ Order of 4 September 2014 (C-152/14), Bertazzi.
ECLI:EU:C:2014:2181.

- *Autorità per l'energia elettrica e il gas contra Antonella Bertazzi y otros.*
- Request for a preliminary ruling from the Consiglio di Stato.
- It is against EU law to exclude periods of service from temporary periods when they are taken on for an indefinite period in a stabilisation process.
- The mere temporary nature of the contract that gave rise to the previous services is not an objective reason that protects the exclusion of these periods, nor is it that the objective is to avoid reverse discrimination against workers who pass a public competition.

2014 09 11 (E-91/13), Essent.

ECJ Judgment of 11 September 2011 (C-91/13), Essent.
ECLI:EU:C:2014:2206.

- *Essent Energie Productie BV v Minister van Sociale Zaken en Werkgelegenheid.*
- Request for a preliminary ruling from the Raad van State.
- EU law precludes the requirement that a work permit be granted to those workers when an undertaking established in another Member State supplies workers from third States for the benefit of a user undertaking established in the first State.

2014 09 11 (C-112/13), B and others.

ECJ Judgment of 11 September 2014 (C-112/13), B and others.

ECLI:EU:C:2014:2195.

- *A vs. B and others.*
- Request for a preliminary ruling from the Oberster Gerichtshof (Austria).
- It is against EU law for national courts to be obliged to go to the Constitutional Court to disapply a law that is contrary to it.
- If a national court considers that a provision of national law is not only contrary to EU law but is also vitiated by unconstitutionality, it is not deprived of the power or exempt from the obligation, laid down in Article 267 TFEU, to refer to the Court of Justice questions concerning the interpretation or validity of EU law on the ground that a finding of the unconstitutionality of a provision of domestic law necessarily requires a prior appeal to the constitutional judge.

2014 09 11 (E-328/13) Österreichischer Gewerkschaftsbund.

ECJ Judgment of 11 September 2014 (C-328/13), Österreichischer Gewerkschaftsbund.

ECLI:EU:C:2014:2197.

- *Österreichischer Gewerkschaftsbund vs. Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmen.*
- Request for a preliminary ruling from the Oberster Gerichtshof (Austria).
- In the event of a transfer of company, the working conditions established in the collective agreement already denounced but in force (ultra-activity) must be respected until a new agreement comes into force or an individual agreement is reached with the affected workers.

2014 09 18 (C-549/13), Bundesdruckerei.

ECJ Judgment of 18 September 2014 (C-549/13), Bundesdruckerei.

ECLI:EU:C:2014:2235.

- *Bundesdruckerei GmbH v Stadt Dortmund.*
- Request for a preliminary ruling from the Vergabekammer bei der Bezirksregierung Arnsberg (Germany).
- (Art. 56 TFEU, freedom to provide services; Directive 96/71/EC, Posting of workers): EU law rejects the imposition on the employer competing in a public tender of the obligation to pay minimum wages of the State of the contracting authority when the competing company intends to take the order from another country.

- (The city of Dortmund announces a tender for the digitization of documents, including the obligation to pay a certain salary to the people who provide services for the successful bidder or its subcontractors; the company that says it would face the tasks from Poland competes).

2014 10 15 (C-221/2013), Mascellani.

ECJ Judgment of 15 October 2014 (C-221/2013), Mascellani.

ECLI:EU:C:2014:2286.

- *Teresa Mascellani v. Ministero della Giustizia.*
- Request for a preliminary ruling from the Tribunale ordinario di Trento (Italy).
- (Directive 97/81/EC, part-time work): EU law does not preclude national law from providing for the conversion of a part-time employment contract into a full-time contract without the agreement of the worker concerned, the State itself being the employer and there are strong objective reasons for this.

2014 11 05 (C-476/12), OG.

ECJ Judgment of 5 November 2014 (C-476/12), OG.

ECLI:EU:C:2014:2332.

- *Österreichischer Gewerkschaftsbund vs. Verband Österreichischer Banken und Bankiers.*
- Request for a preliminary ruling from the Oberster Gerichtshof (Austria).
- EU law does not allow a particular collective agreement to provide for a dependent child supplement paid by the employer to part-time workers on the basis of the principle of *pro rata temporis*.

2014 11 05 (E-311/13), O.Tümer.

ECJ Judgment of 5 November 2014 (C-311/13), O.Tümer.

ECLI:EU:C:2014:2337.

- *O. Tümer v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen.*
- Request for a preliminary ruling from the Centrale Raad van Beroep (Netherlands).
- EU law precludes legislation under which an employee of a third country who is not legally resident in the Member State concerned is not entitled to a business insolvency benefit.

2014 11 11 (C-333/13), Dano.

ECJ Judgment of 11 November 2014, Dano.

ECLI:EU:C:2014:2358.

- *Elisabeta Dano and Florin Dano against Jobcenter Leipzig*.
- Request for a preliminary ruling from the Sozialgericht Leipzig.
- Social Security coordination regulations. Denial of special non-contributory benefit to an inactive EU citizen who is not actively looking for a job.

2014 11 11 (E-530/13), Schmitzer.

ECJ Judgment of 11 November 2014; (C-530/13), Schmitzer.

ECLI:EU:C:2014:2359.

- *Leopold Schmitzer v. Bundesministerin für Inneres*.
- Request for a preliminary ruling from the Verwaltungsgerichtshof.
- Discriminatory national legislation which, in order to put an end to a situation of discrimination on grounds of age, takes into account periods of training and service prior to the age of 18 but which, at the same time, introduces only in respect of officials who suffer from such discrimination a three-year extension of the period necessary to be able to be promoted from the first to the second level of each type of employment and of each salary bracket.

2014 11 13 (E-416/13), Vital Pérez.

ECJ Judgment of 13 November 2014 (C-416/13), Vital Pérez.

ECLI:EU:C:2014:2371.

- *Mario Vital Pérez against Oviedo City Council*.
- Request for a preliminary ruling from the Juzgado de lo Contencioso-Administrativo No 4 de Oviedo.
- A national regulation that sets the maximum age for access to a position as a Local Police officer at 30 years is discriminatory.

2014 11 26 (E-22/13 and others), Mascolo.

ECJ Judgment of 26 November 2014 (C-22/13 and others), Mascolo.

ECLI:EU:C:2014:2401.

- *Raffaella Mascolo and Others v Ministero dell'Istruzione, dell'Università e della Ricerca y Comune di Napoli*.
- Requests for a preliminary ruling from the Tribunale di Napoli and the Corte costituzionale (Italy).

- EU law precludes the extension of temporary vacancies without indicating specific deadlines for the completion of these selection processes and excluding any possibility for these teachers and those staff to obtain compensation for the damage suffered, where appropriate, as a result of such renewal.
- Need for the renewal of temporary contracts to be subject to objective and transparent criteria.

2014 12 03 (C-315/13), De Clercq and Others

ECJ Judgment of 3 December 2014 (C-315/13), De Clercq and Others.
ECLI:EU:C:2014:2408.

- *Edgard Jan De Clercq and others.*
- Request for a preliminary ruling from the Rechtbank van eerste aanleg te Mechelen (Belgium).
- (Articles 56 and 57 TFEU, freedom to provide services): EU law does not preclude the law from requiring the recipient of services performed by workers posted from a service provider to declare to the competent authorities, before the commencement of the employment of those workers, the identification data of those workers where they themselves are unable to provide proof of the declaration that their employer should have made to the competent authorities the competent authorities of the host Member State before the start of the benefit.
- This is subject to the requirement being justified by the general interest (protection of workers, fight against fraud), being adequate and proportionate.

2014 12 04 (E-413/13), FNV Kunsten Informatie en Media.

ECJ Judgment of 4 December 2014 (C-413/13), FNV Kunsten Informatie en Media.
ECLI:EU:C:2014:2411.

- *FNV Kunsten Informatie en Media v Staat der Nederlanden.*
- Request for a preliminary ruling from the Gerechtshof te Vs-Gravenhage (Netherlands).
- (Restriction of competition): a collective agreement establishing minimum fees for the self-employed worker who is affiliated to one of the signatory organisations and who, through a contract for work or service, carries out the same activity for an employer as employees if he is a “false self-employed”, is excluded from the prohibition of restrictive practices.

2014 12 11 (C576/13), Commission v. Spain.

Judgment of the Court of Justice of the European Union of 11 December 2014 (C576/13), Commission v. Spain.

ECLI:EU:C:2014:2430.

- *European Commission v. Kingdom of Spain.*
- Action for failure to fulfil obligations brought by the Commission.
- It is against the freedom of establishment that companies must register with a public limited company for the management of port stevedores and participate in its capital, establishing restrictions on the hiring of its personnel.
- A legitimate objective such as the protection of workers or the need to ensure safety in port waters is not sufficient to validly justify a restriction.
- There are less stringent and similar measures (e.g. providing for the stevedoring companies themselves, being able to freely recruit permanent or temporary workers, to manage the employment offices that are to supply them with their labour and to organise the training of these workers, or the possibility of creating a pool of workers managed by private companies, that function as temporary employment agencies and that make workers available to stevedoring companies).

2014 12 11 (E-86/14), León Medialdea.

ECJ Order of 11 December 2014 (C-86/14), León Medialdea.

ECLI:EU:C:2014:2447.

- *Marta León Medialdea against the City Council of Huetor Vega.*
- Request for a preliminary ruling from the Juzgado de lo Social n° 1 de Granada.
- Abuses of temporary contracts: indefinite-non-permanent.
- It is contrary to EU law not to provide for effective measures to sanction abuses resulting from the successive use of contracts in the public sector.
- It is up to the judicial body to assess the extent to which compensation can be an effective measure to sanction abuses in the field of temporary contracts.
- (Journalist of the City Council between 2011 and 2012, under supposedly temporary contracts, dismissed due to amortization of her position).

2014 12 11 (C- 249/13) Boudjlida.

ECJ Judgment of 11 December 2014 (C-249/13) Boudjlida.

ECLI: EU:C:2014:2431.

- *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*.
- Request for a preliminary ruling from the tribunal administratif de Pau (administrative court, Pau) (France).
- In judicial proceedings for return due to irregular stay, each State must regulate the right of defence of the affected person, and must respect the principles of equivalence and effectiveness.

2014 12 18 (C-354/13), Kaltoft.

ECJ Judgment of 18 December 2014 (C-354/13), Kaltoft.

ECLI:EU:C:2014:2463.

- *Fag og Arbejde (FOA) vs. Kommunernes Landsforening (KL)*.
- Question referred by the retten i Kolding of Denmark.
- EU law does not, as such, enshrine a general principle of non-discrimination on grounds of obesity in the field of employment and occupation, but that circumstance may be regarded as a “disability” where it entails a long-term limitation, resulting in particular from physical, mental or mental ailments, which, when interacting with various barriers, may prevent the full and effective participation of the person concerned in professional life on an equal basis with other workers.
- It is for the national court to verify whether those conditions are satisfied.

2014 12 18 (E-523/13), Larcher.

ECJ Judgment of 18 December 2014, Larcher.

ECLI:EU:C:2014:2458.

- *Walter Larcher vs. Deutsche Rentenversicherung Bayern Süd*.
- Request for a preliminary ruling from the Bundessozialgericht (Germany).
- Social Security coordination regulations. Non-assimilation.

2015

2015 01 14 (E-171/13), Demirci.

ECJ Judgment of 14 January 2015 (C-171/13), Demirci.

ECLI:EU:C:2015:8.

- *Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Uwv) v. M.S. Demirci and others*.
- Request for a preliminary ruling from the Centrale Raad van Beroep (Netherlands).

- Nationals of a Member State who have been part of the legal labour market of that State as Turkish workers cannot, on the ground that they have retained Turkish nationality, rely on EU law to oppose a residence condition laid down by the legislation of that State.

2015 01 21 (C-529/13), Felber.

ECJ Judgment of 21 January 2015 (C-529/13), Felber.
ECLI:EU:C:2015:20.

- *Georg Felber v Bundesministerin für Unterricht, Kunst und Kultur.*
- Request for a preliminary ruling from the Verwaltungsgerichtshof.
- National legislation which ignores periods of study completed by a civil servant before the age of 18 for the purposes of granting a right to a pension and calculating it is not discriminatory. Such a measure is objectively and reasonably justified by a legitimate aim relating to employment and labour market policies and, moreover, constitutes an appropriate and necessary means for that purpose.

2015 01 28 (E-417/13), Starjakob.

ECJ Judgment 28 January 2015 (C-417/13), Starjakob.
ECLI:EU:C:2015:38.

- *ÖBB Personenverkehr AG v Gotthard Starjakob.*
- Request for a preliminary ruling from the Oberster Gerichtshof.
- Discriminatory is national legislation which, in order to put an end to discrimination on grounds of age, takes into account periods of service completed before the age of 18, but at the same time includes a rule, which is in fact applicable only to workers who are victims of such discrimination, which extends by one year the period required for promotion in each of the first three steps of remuneration, and that in doing so it definitively maintains a difference in treatment based on age.

2015 01 28 (C-688/13) San Andrés Sports Gym.

ECJ Order of 28 January 2015 (C-688/13), San Andrés Sports Gymnasium.
ECLI:EU:C:2015:46.

- *Proceedings initiated by Gimnasio Deportivo San Andrés, S.L.*
- Question referred for a preliminary ruling by the Commercial Court No. 3 of Barcelona.

- EU law allows that when an insolvent company is awarded to another, social security debts are not transferred provided that workers are guaranteed protection at least equivalent to that of Directive 80/987/EEC.
- EU law does not lay down obligations in respect of the transferor's charges resulting from employment contracts or relationships that had already expired before the date of the transfer, but it does not preclude Member State law from allowing the transfer of such charges to the transferee.

2015 02 05 (E-117/14), Nisttahuz Poclava.

ECJ Judgment of 5 February 2015 (C-117/14), Nisttahuz Poclava.

ECLI:EU:C:2015:60.

- *Grima Janet Nisttahuz Poclava vs. José María Ariza Toledano (Taberna del Marqués).*
- Request for a preliminary ruling from the Juzgado de lo Social n.º 23 de Madrid.
- The Spanish contract to support entrepreneurs is not included in the scope of the Directive, due to its indefinite duration and because the European regulation does not cover the probationary period.
- The ECJ is not competent to rule on the interpretation of rules of international law that are binding on Member States but are excluded from the sphere of EU law.
- *The ECJ lacks jurisdiction to hear this contract.*

2015 02 12 (E-396/13), Sähköalojen ammattiliitto.

ECJ Judgment of 12 February 2015 (C-396/13), Sähköalojen ammattiliitto.

ECLI:EU:C:2015:86.

- *Sähköalojen ammattiliitto ry contra Elektrobudowa Spolka Akcyjna.*
- Request for a preliminary ruling from the Satakunnan käräjäoikeus (Finland).
- EU law precludes the legislation of the State where the company posting workers is domiciled (Poland) from prohibiting the assignment of claims arising from industrial relations and preventing a trade union from bringing a legal action in the host State (Finland), where this is permitted.
- For the purposes of integrating the minimum wage in these cases (transnational travel), the restaurant voucher or the payment of accommodation does not count, but the holiday remuneration, the attendance

bonus or the daily travel bonus (time over one hour) is taken into account.

- (Electricity company in Poland that hires 186 people in its country to work in Finland; it is disputed about the time spent on the daily journeys to go from the place where they stay to the plant and back).

2015 03 17 (E-533/13) AKT.

ECJ Judgment of 17 March 2015 (C-533/13) AKT.

ECLI:EU:C:2015:173.

- *Auto- ja Kuljetusalan Työntekijäliitto AKT ry y Öljytuote ry, Shell Aviation Finland Oy.*
- The question referred by the työtuomioistuim (Finland).
- (Directive 2008/104/EC, ETT): on prohibitions or restrictions on the use of temporary assignment of workers by temporary work agencies: EU law obliges States to verify the justified nature of existing ones.
- EU law does not impose an obligation on national courts to disapply any provision of national law that entails prohibitions or restrictions relating to the use of temporary assignment of workers by temporary employment agencies that are not justified for reasons of public interest.

2015 03 19 (C-266/13), Kik.

ECJ Judgment of 19 March 2015 (C-266/13), Kik.

ECLI:EU:C:2015:188.

- *L. Kik v. Staatssecretaris van Financiën.*
- Request for a preliminary ruling from the Hoge Raad der Nederlanden.
- Social Security coordination regulations. Work on a deep-sea vessel. Subjective scope of application of the Regulations.

2015 03 26 (C-238/14), Commission v Luxembourg.

ECJ judgment of 26 February 2015 (C-238/14), Commission v Luxembourg.

ECLI:EU:C:2015:128.

- *European Commission v. Grand Duchy of Luxembourg.*
- Abuses in fixed-term contracts.
- Luxembourg is in breach of Directive 1999/70/EC by excluding temporary workers in the entertainment sector from measures to prevent the misuse of successive fixed-term contracts.

2015 03 26 (E-316/13), Fenoll.

ECJ Judgment of 26 March 2015 (C-316/13), Fenoll.

ECLI:EU:C:2015:200.

- *Gérard Fenoll v Centre d'aide par le travail "La Jouvene" and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon.*
- Request for a preliminary ruling from the Cour de Cassation (Cour de Cassation) (France).
- (Directive 2003/88/EC, working time): the concept of worker may include a person admitted to a help-through-work (social reintegration) centre.
- In the case: citizen who carries out tasks of social integration, for at least five consecutive years, in exchange for remuneration, and in the course of which he also received support of a medical-social nature due to his condition of disability; reduced remuneration in exchange for activities with useful and productive results.
- Holiday protection covers any person who carries out real and effective activities, excluding those carried out on such a small scale that they are merely marginal and ancillary.

2015 04 14 (E-527/13), Cachaldora Fernández.

ECJ Judgment of 14 April 2015 (C-527/13), Cachaldora Fernández.

ECLI:EU:C:2015:215.

- *Lourdes Cachaldora Fernández v. National Social Security Institute (INSS) and General Social Security Treasury (TGSS).*
- Request for a preliminary ruling from the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia).
- (Directives 79/7/EEC and 97/81/EC; part-time and non-discrimination in Social Security): the system of integration of contribution gaps (taking the minimum bases of the immediately preceding period) is not discriminatory (it can benefit or harm), in addition to the fact that it has not been proven that the majority of people affected are women.

2015 04 30 (E-80/14), USDAW.

ECJ Judgment of 30 April 2015 (C-80/14), USDAW.

ECLI:EU:C:2015:291.

- *Union of Shop, Distributive and Allied Workers (USDAW) and B. Wilson v WW Realisation 1 Ltd and Others.*
- Request for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division).

- (Collective redundancies): “workplace” is a concept of Union law, distinct from the concept of enterprise.
- The dismissal of a single worker is contrary to the concept of collective dismissal.
- EU law does not preclude legislation that triggers collective redundancies when at least 20 workers are dismissed from a specific workplace in a company within a 90-day period, and not when the cumulative number of redundancies in all workplaces in an undertaking, or in some of them, during the same period, it reaches or exceeds the threshold of 20 workers.

2015 05 13 (E-182/13), Lyttle.

ECJ Judgment of 13 May 2015 (C-182/13), Lyttle.

ECLI:EU:C:2015:317.

- *Valerie Lyttle et al. v Bluebird UK Bidco 2 Limited.*
- Request for a preliminary ruling from the Industrial Tribunals (Northern Ireland).
- (Directive 98/59/EC, collective redundancies): the term “establishment” is a concept of Union law and distinct from the concept of an undertaking. The company and not the workplace cannot be used as the only reference unit, if this has the consequence that if the latter reference unit were used, it would be a collective dismissal and not if the company unit is used.
- EU law does not preclude legislation that triggers collective redundancies when at least 20 workers are dismissed from a specific workplace in a company within a 90-day period, and not when the cumulative number of redundancies in all workplaces in an undertaking, or in some of them, during the same period it reaches or exceeds the threshold of 20 workers.
- Terminations of temporary employment contracts are not to be taken into account when such terminations take place on the scheduled date or when the contract comes to an end.

2015 05 13 (E-392/13), Rabal Cañas.

ECJ Judgment of 13 May 2015 (C-392/13), Rabal Cañas.

ECLI:EU:C:2015:318.

- *Andrés Rabal Cañas v. Nexea Gestión Documental, S.A., and the Wage Guarantee Fund.*

- Request for a preliminary ruling from the Juzgado de lo Social de Barcelona.
- (Directive 98/59/EC, collective redundancy): for the purposes of collective redundancies, “establishment” is a concept of Union law.
- The company cannot be used as the only reference unit (discarding the workplace) when this has the consequence that if this last reference unit were used, it would be a collective dismissal and vice versa.
- Terminations of temporary employment contracts should not be taken into account when they take place on the scheduled date or when the contract comes to an end.

2015 05 21 (E-65/14) Rosselle.

ECJ Judgment of 21 May 2015 (C-65/14) Rosselle.

ECLI:EU:C:2015:339.

- *Charlotte Rosselle v Institut national d’assurance maladie-invalidité (INAMI) and Union nationale des mutualités libres (UNM)*.
- Request for a preliminary ruling from the Tribunal du travail de Nivelles (Labour Court, Nivelles, Belgium).
- (Directive 92/85 on women’s occupational health): EU law precludes a Member State from refusing maternity benefit to a worker on the ground that, as a civil servant who has been taken leave of absence for private reasons, she has not been able to take leave as an employed person in the context of that activity as an employee. the minimum contribution period required to be eligible for this maternity benefit. In this case, the worker must be recognized for the time she has contributed as a civil servant in order to enable her access to maternity benefit as an employee.

2015 06 11 (E-189/14), Chain.

ECJ Judgment of 11 June 2015, Chain.

ECLI:EU:C:2015:432.

- *Bogdan Chain vs. Atlanco LTD*.
- Request for a preliminary ruling from the Eparchiako Dikastirio Lefkosias.
- Social Security coordination regulations. Determination of the national law applicable to workers in different Member States.

2015 07 09 (C-177/14), Regojo Dans.

ECJ Judgment of 9 July 2015 (C-177/14), Regojo Dans.

ECLI:EU:C:2015:450.

- *María José Regojo Dans v. Council of State*.
- Request for a preliminary ruling from the Supreme Court.
- (Directive 1999/70/, temporary): Non-discrimination between permanent and temporary staff: temporary staff of the administration.
- It is discriminatory to deny three-year terms to these personnel while comparable career civil servants are recognized.
- In the case: temporary personnel of trust whose relationship ends when the authority for which they perform their functions ceases; Fixed-term work is work whose termination is motivated “by objective conditions such as a specific date, the performance of a specific work or service or the production of a specific fact or event”.

2015 07 09 (C-229/14), Ender Balkalla.

ECJ Judgment of 9 July 2015 (C-229/14), Ender Balkalla.

ECLI:EU:C:2015:455.

- *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH*.
- Request for a preliminary ruling from the Arbeitsgericht Verden of Germany.
- Collective redundancies: a “worker” is a member of the management of a capital company who carries out his activity under the direction and control of another body of the company, who receives remuneration in exchange for his activity and who does not himself own any shareholding in that company.
- Collective dismissals: a “worker” is someone who carries out internship work, to acquire knowledge or deepen it or to follow vocational training, without receiving remuneration from the employer but financial aid from the public body responsible for promoting employment.

2015 07 16 (E-83/14) CHEZ-Razpredelenie Bulgaria.

ECJ Judgment of 16 July 2015 (C-83/14) CHEZ-Razpredelenie Bulgaria.

ECLI:EU:C:2015:480.

- *CHEZ Razpredelenie Bulgaria AD vs. Komisia za zashtita ot diskriminatsia*.
- Request for a preliminary ruling from the Administrativen sad Sofia-grad (Bulgaria).
- (Directive 2000/43/EC, non-discrimination): discrimination on the basis of ethnic origin exists when all the electricity meters in a neighbourhood inhabited mainly by people of Roma origin are installed on overhead power line poles at a height of six to seven metres, while in the other neighbourhoods the meters are located at a height of less than two me-

tres, That concept applies irrespective of whether that collective measure affects persons who have a specific ethnic origin or those who, without having that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure.

2015 07 16 (E-222/14), Maïstrellis.

ECJ Judgment of 16 July 2015 (C-222/14), Maïstrellis.
ECLI:EU:C:2015:473.

- *Konstantinos Maïstrellis vs. Ypourgos Dikaïosynis, Diafaneias kai Anthropinon Dikaïomaton.*
- Question referred by the Symvoulío tis Epikrateias (Greece).
- It contradicts Directives 2006/54/EC and 96/34/EC (parental leave), a national legislation which makes the use by an official of parental leave conditional on the mother working or being unable to care for the child due to serious illness or illness.

2015 09 08 (E-105/14), Taricco.

ECJ Judgment of 8 September 2015 (C-105/14), Taricco.
ECLI:EU:C:2015:555.

- *Criminal proceedings brought against Ivo Taricco and Others.*
- Request for a preliminary ruling from the Tribunale di Cuneo (Italy).
- Possibility that national legislation setting absolute limitation periods that may lead to impunity for VAT offences will collide with EU law.
- Obligation incumbent on the national court to disapply all provisions of domestic law which may be contrary to the obligations imposed on Member States by EU law.

2015 09 09 (C-20/13), Unland.

ECJ Judgment of 9 September 2015 (C-20/13), Unland.
ECLI:EU:C:2015:561.

- *Daniel Unland v. Land Berlin.*
- Request for a preliminary ruling from the Verwaltungsgericht Berlin.
- National legislation which defines the modalities for the promotion of judges already appointed before the entry into force of that legislation under a new remuneration system and which provides that from a certain step onwards judges who had reached a certain age on the reference date set for the transition to the new system benefit from a faster rate of increase in remuneration than expected for judges who were youn-

ger on the reference date set for the transition to the new system, in so far as the difference in treatment entailed by that legislation can be justified in the light of Article 6(1) of that directive.

2015 09 09 (E-160/14), Ferreira da Silva.

ECJ Judgment of 9 September 2015 (C-160/14), Ferreira da Silva e Brito and others.

- *ECLI:EU:C:2015:565.*
- João Filipe Ferreira da Silva e Brito and Others v Portuguese State.
- Question referred for a preliminary ruling by the Varas Cíveis de Lisboa.
- There is a transfer of company when a charter company is dissolved whose majority shareholder (air transport company) assumes the position of the former in the aircraft and flight lease contracts, keeping some workers and using small equipment from the dissolved company.
- The maintenance of activity does not refer to the specific organization, but to the functional link of interdependence and complementarity between the various factors of production.

2015 09 10 (E-266/14), TYCO.

ECJ Judgment of 10 September 2015 (C-266/14), Tyco.

ECLI:EU:C:2015:578.

- *Federation of Private Services of the trade union Comisiones Obreras (CC.OO.) against Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA.*
- Request for a preliminary ruling from the Audiencia Nacional.
- In the case of a company that dispenses with its physical workplace, working time is the time spent travelling by technical assistance and maintenance workers from their home to that of the first company-customer of the day, as well as the time spent returning from the last one.

2015 09 15 (E-67/2014), Alimanovic.

ECJ Judgment of 15 September 2015 (C-67/14), Alimanovic.

ECLI:EU:C:2015:597.

- *Jobcenter Berlin Neukölln vs. Nazifa Alimanovic and others.*
- Question referred by the Bundessozialgericht (Germany).

- A non-contributory subsistence allowance for the long-term unemployed is not equivalent to financial support for job search, which makes it possible to exclude it for non-nationals.

2015 10 01 (C-290/14), Skerdjan Celaj.

ECJ Judgment of 1 October 2015 (C-290/14), Skerdjan Celaj.

ECLI: EU:C:2015:640.

- *Criminal proceedings against Skerdjan Celaj.*
- Reference for a preliminary ruling from the Tribunal de Firenze (Italy).
- Legislation of a Member State may impose a custodial sentence where the foreign national, after having returned to his or her country of origin in the context of a previous return procedure, re-enters the territory of a Member State, thereby violating the entry ban.

2015 10 06 (C-203/14), Consorci Sanitari del Maresme.

ECJ Judgment of 6 October 2015 (C-203/14) Consorci Sanitari del Maresme.

ECLI:EU:C:2015:664.

- *Consorci Sanitari del Maresme v Corporació de Salut del Maresme i la Selva.*
- Request for a preliminary ruling from the Catalan Public Sector Contract Court.
- In order to assess (positively) the nature of the referring body as a “court or tribunal”, within the meaning of Article 267 TFEU, which depends solely on EU law, the ECJ takes into account a number of circumstances, such as the legal origin of the body, its permanence, the mandatory nature of its jurisdiction, the inter partes nature of the procedure, the application by the organ of legal norms and its independence.
- (Directive 2004/18/EC, Award of public contracts): for EU law, “economic operators” are public administrations that can participate in public tenders to the extent that they are authorised to offer services on the market for consideration.

2015 10 15 (C-352/14 and C-353/14), Iglesias Gutiérrez.

ECJ Judgment of 15 October 2015 (C-352/14 and C-353/14), Iglesias Gutiérrez.

ECLI:EU:C:2015:691.

- *Juan Miguel Iglesias Gutiérrez and Elisabet Rion Bea v. Bankia, S.A., and others.*
- Requests for a preliminary ruling from the Juzgado de lo Social n.º 2 de Terrassa.
- (Articles 107 and 108 TFEU): financial aid to Bankia requires that the severance pay be close to the legal minimum, although there is a certain margin of flexibility.

2015 11 11 (E-219/14), Greenfield.

ECJ Judgment of 11 November 2015 (C-219/14), Greenfield.

ECLI:EU:C:2015:745.

- *Kathleen Greenfield v The Care Bureau Ltd.*
- Request for a preliminary ruling from the Employment Tribunal Birmingham (United Kingdom).
- (Directive 2003/88/EC, working time): paid annual leave to which the worker is entitled in the event of an increase in working hours.
- It is not necessary for the holidays already accrued (and eventually taken) to be recalculated a posteriori, depending on the new pace of work of that worker. But a new calculation must be made for the period during which the working day has increased.
- Interpretation of the pro rata temporis principle.

2015 11 11 (E-422/14), Pujante Rivera.

ECJ Judgment of 11 November 2015 (C-422/14), Pujante Rivera.

ECLI:EU:C:2015:743.

- *Christian Pujante Rivera against Gestora Clubs Dir, S.L., and the Wage Guarantee Fund.*
- Question referred for a preliminary ruling by Juzgado de lo Social n.º 33 de Barcelona.
- (Collective dismissal): for the purposes of sizing the workers “habitually employed”, those of fixed duration are counted. But their termination on the scheduled date does not count for the purposes of dismissal.
- Strict concept of dismissals that can be counted to reach the threshold of “at least five” (assimilated dismissals do not count).
- “Dismissal” is the termination caused by a substantial modification of working conditions, as well as, in principle, any termination of the contract not desired by the worker and, consequently, without his consent.
- Scope of collective dismissal: necessary attention to the workplace and not only to the company.

2015 11 17 (E-115/14), RegioPost

ECJ Judgment of 17 November 2015 (C-115/14), RegioPost.

ECLI:EU:C:2015:760.

- *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz*.
- Request for a preliminary ruling from the Oberlandesgericht Koblenz (District Court, Koblenz) (Germany).
- (Directive 2004/18 on the award of public contracts): EU law does not preclude a regional rule from requiring tenderers and their subcontractors to pay a minimum wage set by that regulation.
- Nor does EU law preclude the exclusion from the award process of an undertaking that does not submit such a commitment, in the circumstances described.
- (Landau City Council tenders biannual public contract for municipal postal services, including the obligation to pay certain minimum wages to those who work for contractors or subcontractors; RegioPost is excluded from the contest for not assuming this commitment).

2015 11 26 (C-509/14) Aira Pascual.

ECJ Judgment of 26 November 2015 (C-509/14), Aira Pascual and others.

ECLI:EU:C:2015:781.

- *Administrator of Railway Infrastructures (ADIF) against Luis Aira Pascual and others*.
- Question referred for a preliminary ruling by the High Court of Justice of the Autonomous Community of the Basque Country.
- There is a transfer of a company when ADIF entrusts a third party with the operation of an intermodal freight service (making the necessary infrastructures and equipment available to it) and subsequently decides to resume such activity to carry it out with its own staff.
- The fact that the essential elements to carry out such an activity have always belonged to ADIF does not affect the validity of such doctrine.

2015 12 17 (C-407/14), Arjona Camacho.

ECJ Judgment of 17 December 2015 (C-407/14), Arjona Camacho.

ECLI:EU:C:2015:831.

- *María Auxiliadora Arjona Camacho y Securitas Seguridad España, S.A.*
- Question referred for a preliminary ruling by the Labour Court No. 1 of Córdoba.

- (Directive 2006/54 on gender equality at work): in order for the damage suffered as a result of discrimination on grounds of sex to be effectively compensated or compensated in a dissuasive and proportionate manner, States opting for compensation must provide compensation that fully covers the damage suffered by the person discriminated against.
- This total reparation of the damage caused as a deterrent does not require the introduction of the concept of punitive damages into the legal system.

2016

2016 01 21 (E-453/14), Knauer.

ECJ Judgment of 21 January 2016, Knauer.
ECLI:EU:C:2016:37.

- *Vorarlberger Gebietskrankenkasse and Alfred Knauer v. Landeshauptmann von Vorarlberg.*
- Request for a preliminary ruling from the Verwaltungsgerichtshof.
- Social Security coordination regulations. Assimilation of conditions.

2016 02 23 (C-179/14) Commission v. Hungary.

ECJ judgment of 23 February 2016 (C-179/14) Commission v. Hungary.
ECLI:EU:C:2016:108.

- *European Commission v. Hungary.*
- Appeal for failure to fulfil obligations.
- Freedom of establishment and freedom to provide services; conditions for issuing tax-advantageous vouchers granted by employers to their employees and usable for accommodation, leisure and/or food purposes.

2016 02 25 (E-292/14), Elliniko Dimosio.

ECJ Judgment of 25 February 2016 (C-292/14), Elliniko Dimosio.
ECLI:EU:C:2016:116.

- *Elliniko Dimosio vs. Stefanos Stroumpoulis and others.*
- Request for a preliminary ruling from the Symvoulío tis Epikrateias (Greece).
- Assumption (business insolvency): residents and contractors in the State (“A”) where the company has its real domicile, being in a third State (“B”) the legal domicile, working on a cruise ship flying the flag of B and referring to the legislation of B the employment contract concluded.

- Regulation: if the company is declared insolvent in B, they must benefit from the protection provided by the Directive for unpaid wage claims that they have against that company.
- The Greek wage guarantee institution has jurisdiction in a case involving Greek seamen resident in Greece, employed in Greece by a Maltese company, but with its actual seat in Greece, to work on a ship flying the Maltese flag, even though the contracts include a clause stating that they are governed by Maltese law.

2016 02 25 (C-299/14), *García-Nieto*.

ECJ Judgment of 25 February 2016, *García-Nieto*.

ECLI:EU:C:2016:114.

- *Vestische Arbeit Jobcenter Kreis Recklinghausen v. Jovanna Garcia-Nieto and others*.
- Request for a preliminary ruling from the Landessozialgericht Nordrhein-Westfalen.
- Social Security coordination regulations. Access to non-contributory benefits for inactive EU citizens on temporary stay.

2016 03 03 (C-12/14), *Commission v. Malta*.

ECJ judgment of 3 March 2016, *Commission v. Malta*.

ECLI:EU:C:2016:135.

- *European Commission v. Republic of Malta*.
- Social Security coordination regulations. Value of Member States' declarations.

2016 04 19 (E-441/14), *Dansk Industri*.

ECJ (Grand Chamber) of 19 April 2016 (C-441/14), *Dansk Industri*.

ECLI:EU:C:2016:278.

- *Dansk Industri (DI) v Succession Karsten Eigil Rasmussen*.
- Request for a preliminary ruling from the Højesteret.
- (Directive 2000/78/EC): A regulation under which a worker cannot receive severance pay if he or she is entitled to a retirement pension paid by his or her employer under a pension scheme to which he or she has joined before the age of 50, regardless of whether he or she chooses to remain in the labour market or to retire, is discriminatory.
- The national court must assess whether it is possible to interpret the discriminatory rule in conformity with EU law or whether it must opt out of the discriminatory rule. Neither the principles of legal certainty

and the protection of legitimate expectations nor the possibility for an individual who considers himself injured by the application of a national rule contrary to the EUD to claim liability from the Member State concerned for an infringement of the EUD can call into question the judicial obligation in question.

2016 06 07 (E-47/15), Affum.

ECJ (Grand Chamber) of 7 June 2016 (C-47/15), Affum.
ECLI:EU:C:2016:408.

- *Sélina Affum against Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai.*
- Request for a preliminary ruling from the Cour de cassation (Cour de cassation) (France).
- In judicial proceedings for return due to irregular stay, each State must regulate the right of defence of the affected person, and must respect the principles of equivalence and effectiveness.
- EU law precludes legislation that allows the imprisonment of a third-country national for the mere fact of illegal entry through an internal border triggering an irregular situation when the return procedure envisaged for that national has not yet been completed.

2016 06 14 (C-308/14), Commission v United Kingdom.

ECJ judgment of 16 June 2016 (C-308/14), Commission v. United Kingdom.
ECLI:EU:C:2016:436.

- *Commission v. United Kingdom of Great Britain and Northern Ireland.*
- EU law does not preclude a State from making the receipt of non-contributory benefits conditional on a requirement of legal residence.
- This requirement, although it penalises third-country nationals indirectly, is proportionate as it is justified by the objective of preserving national finances.

2016 06 16 (C-351/14), Rodríguez Sánchez.

ECJ Judgment of 16 June 2016 (C-351/14), Rodríguez Sánchez.
ECLI:EU:C:2016:447.

- *Estrella Rodríguez Sánchez vs. Consum Sociedad Cooperativa Valenciana.*
- Request for a preliminary ruling from the Labour Court no. 33 of Barcelona.

- It takes into consideration the requests for a change in working hours of a worker member upon return from maternity leave and together with the reduction of working hours due to legal guardianship. Inadmissibility of the preliminary ruling.
- The role entrusted to the ECJ is to contribute to the administration of justice in the Member States and not to formulate advisory opinions on general or hypothetical issues.
- The justification for a question referred for a preliminary ruling does not lie in the formulation of those opinions, but in the necessity inherent in the effective resolution of a dispute. A request made by a national court may be rejected only where it is quite obvious that the interpretation of EU law sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the ECJ does not have before it the factual or legal material necessary to give a useful answer to the questions referred.

2016 06 16 (E-159/15), Lesar.

ECJ Judgment of 16 June 2016 (C-159/15), Lesar.

ECLI:EU:C:2016:451.

- *Franz Lesar v. Beim Vorstand der Telekom Austria AG eingerichtetes Personalamt.*
- Request for a preliminary ruling from the Verwaltungsgerichtshof.
- National legislation which, for the purposes of granting entitlement to a pension and calculating the amount of an official's retirement pension, precludes taking into account periods of apprenticeship and work completed by an official before reaching the age of 18, in so far as such legislation is intended to ensure a uniform determination, is not discriminatory. in the context of a civil servants' pension scheme, the age eligible for that scheme and the age for eligibility for retirement benefits granted therein.

2016 06 21 (E-122/15), C.

ECJ Judgment 2 June 2016 (C-122/15), C.

ECLI:EU:C:2016:391.

- *Proceedings brought by C.*
- Request for a preliminary ruling from the Korkein hallinto-oikeus.
- National legislation relating to an additional tax on income from occupational pensions does not fall within the material scope of Directive

2000/78 or, consequently, within that of Article 21(1) of the Convention on the Functioning of the European Union.

2016 06 28 (C-423/15), Kartzer.

ECJ Judgment of 28 July 2016 (C423/15), Kartzer.

EU:C:2016:604.

- *Nils-Johannes Kratzer vs. R+V Allgemeine Versicherung AG.*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Germany).
- (Non-discrimination Directives): EU law does not protect anyone who applies for a job but does not seek to obtain it, but only the formal status of candidate for the sole purpose of claiming compensation; The case does not fall within the concept of “access to employment or occupation” within the meaning of those provisions and may be classified as an abuse of rights.

2016 06 30 (E-178/15), Sobczyszyn.

ECJ Judgment of 30 June 2016 (C-178/15), Sobczyszyn.

ECLI:EU:C:2016:502.

- *Alicja Sobczyszyn vs. Szkoła Podstawowa w Rzeplinie.*
- Request for a preliminary ruling from the Sąd Rejonowy dla Wrocławia-Śródmieścia we Wrocławiu X Wydział Pracy i Ubezpieczeń Społecznych (Poland).
- (Directive 2003/88/EC, working time): periods of rest due to convalescence are not equivalent to annual leave.
- EU law requires that if the period of leave in a centre overlaps with a period of convalescence, the person concerned has the right to a new and specific date marking.
- The purpose of paid annual leave as rest time is not irrelevant if it is taken at a later period in the case of a period of convalescence; The national court alone has jurisdiction to interpret whether deferred leave fulfils its purpose.

2016 07 14 (C-335/15), Ornano.

ECJ Judgment of 14 July 2016 (C-335/15), Ornano.

ECLI:EU:C:2016:564.

- *Maria Cristina Elisabetta Ornano y Ministero della Giustizia, Direzione Generale dei Magistrati del Ministero.*

- Question referred for a preliminary ruling by the Consiglio di Stato (Council of State, Italy).
- National legislation providing for compensation for ordinary judges corresponding to the burdens they bear in the exercise of their professional activity, which is impossible to receive by ordinary judges who have taken compulsory maternity leave: valid if during that period they received income of an amount at least equivalent to the benefit they would have received in the event of interruption of their professional activities for health reasons.
- The loss of remuneration suffered by a judge for not receiving a certain remuneration during maternity leave does not imply a contravention of either Directive 92/85/EEC or Directive 2006/54/EC, since the only remuneration guarantee established during maternity leave is what would have been received in respect of illness.

2016 07 20 (E-341/15), Hans Maschek.

ECJ Judgment of 20 July 2016 (C-341/15), Hans Maschek.

ECLI:EU:C:2016:576.

- *Hans Maschek and Magistratsdirektion der Stadt Wien v Personalstelle Wiener Stadtwerke.*
- Question referred for a preliminary ruling by the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria).
- Holidays, retirement and entitlement to financial compensation: a worker who has not had the opportunity to take paid annual leave will be entitled to financial compensation in respect of paid annual leave not taken, even if he or she is the one who has terminated that relationship of his or her own free will by applying for retirement.

2016 09 14 (C-596/14), by Diego Porras I.

ECJ Judgment of 14 September 2016 (C-596/14), De Diego Porras I.

ECLI:EU:C:2016:683.

- *Ana de Diego Porras v. Ministry of Defense.*
- Reference for a preliminary ruling from the High Court of Justice of Madrid.
- EU law guarantees equal “working conditions” between permanent and temporary workers, including end-of-contract compensation.
- EU law is opposed to article 49.1.c SW, which does not recognize any compensation for the termination of contract to the worker with an in-

terim contract, while allowing the granting of such compensation to comparable permanent workers.

2016 09 14 (C-184/15 and 197/15), Vitoria City Council.

ECJ Judgment of 14 September 2016 (C-184/15 and 197/15), Vitoria City Council.

ECLI:EU:C:2016:680.

- *Florentina Martínez Andrés and Juan Carlos Castrejana López against the Basque Health Service and Vitoria City Council.*
- Requests for a preliminary ruling from the High Court of Justice of the Basque Country. Temporary temporary statutory staff and municipal architect who, after having been hired under the employment regime, are appointed interim civil servants.
- Abuse in fixed-term contracts and absence of effective measures to sanction the successive use of administrative relationships.
- Possible transfer to the administrative field of the construction of non-permanent permanent contracts.

2016 09 14 (E-16/15), SMS.

ECJ Judgment of 14 September 2016 (C-16/15), SMS.

ECLI:EU:C:2016:679.

- *María Elena Pérez López v. Madrid Health Service (Community of Madrid).*
- Request for a preliminary ruling from the Contentious-Administrative Court of Madrid.
- Abuses in temporary contracts: temporary statutory contracts of public health.
- EU law precludes the practice of successive appointments for permanent and stable needs without any obligation to create structural posts.

2016 09 21 (E-614/15), Popescu.

ECJ Order of 21 September 2016 (C-614/15), Popescu.

ECLI:EU:C:2016:726.

- *Rodica Popescu v. Direcția Sanitar Veterinară și pentru Siguranța Alimentelor Gorj.*
- Request for a preliminary ruling from the Curtea de Apel Craiova (Romania).
- Abuses in fixed-term contracts (Veterinary Inspection).

- The renewal of contracts in the public sector cannot be based solely on budgetary reasons.
- The renewal of temporary contracts until the conclusion of the selection processes is contrary to EU law if it ends up generating an abusive situation.

2016 09 21 (E-631/15), Álvarez Santirso.

ECJ Order of 21 September 2016 (C-631/15), Álvarez Santirso.
ECLI:EU:C:2016:725.

- *Carlos Álvarez Santirso v Ministry of Education, Culture and Sport of the Principality of Asturias.*
- Request for a preliminary ruling from the Administrative Court of Oviedo.
- Non-discrimination between permanent and temporary teachers: interim civil servant teachers (ESO).
- It is discriminatory to reserve, without there being objective justification, participation in the Teaching Function Evaluation Plan and the incentive derived from it, in the event of a positive evaluation, only to career civil servants, excluding interim civil servant teachers.

2016 10 18 (E-135/15), Nikiforidis.

ECJ Judgment of 18 October 2016 (C-135/15), Nikiforidis.
ECLI:EU:C:2016:774.

- *Republik Griechenland vs. Grigorios Nikiforidis.*
- Question referred for a preliminary ruling by the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (In relation to a salary reduction in the Greek public sector and a teacher in a Hellenic school located in Germany): in order to determine the temporal scope of application of the Rome I Regulation, an employment contract may be understood to have been concluded as of 17 December 2009 when there is an amendment agreed between the parties to such an entity that can be considered the creation of a new legal relationship that replaces a previous contract.
- Exhaustiveness of the list of cases in Article 9 of the Rome I Regulation.

2016 10 24 (C-269/15), Hoogstad.

ECJ Judgment of 26 October 2016 (C-269/15), Hoogstad.
ECLI:EU:C: 2016:802.

- *Rijkstendienst voor Pensioenen vs. Willem Hoogstad.*

- Request for a preliminary ruling from the Hof van Cassatie (Belgium).
- Although the supplementary pension benefit scheme does not constitute “legislation” within the meaning of Regulation EEC/1408/71, the provision establishing the levy on supplementary entitlements directly and specifically affects the financing of certain branches of social security, falling within Community coordination.

2016 10 27 (E-465/14), Wieland.

ECJ Judgment of 27 October 2016, Wieland.

ECLI:EU:C:2016:820.

- *Raad van bestuur van de Sociale verzekeringsbank v. F. Wieland and H. Rothwangl.*
- Request for a preliminary ruling from the Centrale Raad van Beroep.
- Social Security coordination regulations. Austrian sailors in the Netherlands, lack of affiliation before accession. Scope of equal treatment on grounds of nationality.

2016 11 10 (C-548/15), Lange.

ECJ Judgment 10 November 2016 (C-548/15), Lange.

ECLI:EU:C:2016:850.

- *J.J. de Lange v. Staatssecretaris van Financiën.*
- Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).
- A tax system, such as that at issue in the main proceedings, which allows, under certain conditions, persons under the age of 30 to deduct their vocational training expenses in full from their taxable income, is not discriminatory, whereas that right to deduct is limited to persons who have reached that age, in so far as, On the one hand, such a regime is objectively and reasonably justified by a legitimate objective relating to employment and labour market policies and, on the other, the means of achieving that objective are appropriate and necessary.

2016 11 15 (C-258/15), Salaberría Sorondo.

ECJ Judgment of 15 November 2016 (C-258/15), Salaberría Sorondo.

ECLI:EU:C:2016:873.

- *Gorka Salaberría Sorondo v Basque Police and Emergency Academy.*
- Request for a preliminary ruling from the High Court of Justice of the Basque Country.

- A national regulation which provides that candidates for posts as officers of a police force who perform all the operational or executive functions of that force must not have reached the age of 35 is not discriminatory.

2016 11 17 (E-216/15), Ruhrlandklinik.

ECJ Judgment of 17 November 2016 (C-216/15), Ruhrlandklinik.

ECLI:EU:C:2016:883.

- *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*.
- Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany).
- (Directive 2008/104/EC, temporary employment agencies): a true “economic activity” is carried out by a charitable and non-profit entity (Red Cross) that is dedicated to making nursing staff available to a clinic in exchange for a monthly remuneration paid in accordance with the usual criteria in the field of health services.
- Scope of Directive 2008/104/EC on temporary employment agencies: nursing staff without an employment contract made available to a health establishment by a non-profit association; concept of “worker”; concept of “economic activity”.
- What is relevant, in the case: services are offered in the market for the assignment of nursing staff to health establishments, for economic compensation, as if it were a temporary employment agency.

2016 11 24 (C-443/15), Parris.

ECJ Judgment of 24 November 2016 (C443/15), Parris.

ECLI:EU:C:2016:897.

- *David L. Parris v Trinity College Dublin and others*.
- Request for a preliminary ruling from the Labour Court (Ireland).
- (Directive 2000/78/EC, Equality): EU law allows the right of registered partners to receive a survivor’s benefit to be made subject to the condition that the common-law partner must have been registered before the insured person reaches the age of 60, even if in the specific case it is not permitted to form the common-law partnership before that age, without this being considered discriminatory on grounds of age or sexual orientation.
- If a measure does not constitute discrimination on any of the prohibited grounds when those grounds are taken separately, it cannot give rise to discrimination based on the combined effect of several of them (here, sexual orientation and age).

- (Affiliated to the Pension Plan requests that the survivor's benefit be granted to his same-sex partner. But they registered as a couple after they turned 60, which the Plan rules out as a causative event. Prior to registration, it was not allowed to form a civil partnership in Ireland).

2016 11 24 (C-454/15), Jürgen Webb-Sämann.

ECJ Judgment of 24 November 2016 (C454/15), Jürgen Webb-Sämann.
ECLI:EU:C:2016:891.

- *Jürgen Webb-Sämann vs. Christopher Seagon.*
- Request for a preliminary ruling from the Hessisches Landesarbeitsgericht.
- Article 8 of Directive 2008/94/EC (insolvency) does not require, in the event of the insolvency of the employer, to exclude from the bankruptcy estate withholding money converted into contributions to a pension plan of a former employee, which that employer should have paid into a pension account for the benefit of that employee.
- The rules on wage guarantees seek to reconcile the interests of wage earners with the needs of balanced economic and social development.

2016 12 01 (C-395/15), Daouidi.

ECJ Judgment of 1 December 2016 (C-395/15), Daouidi.
ECLI:EU:C:2016:917.

- *Mohamed Daouidi v Bootes Plus, S.L., and Others.*
- Question referred for a preliminary ruling by the Juzgado de lo Social n.º 33 de Barcelona.
- The fact that the person concerned is in a situation of temporary incapacity of uncertain duration does not mean, in itself, that the limitation of his capacity can be classified as “lasting”, according to the definition of “disability”.
- Anti-discrimination protection against disability extends to the aftermath of an accident at work.
- Indications for assessing whether such a limitation is “lasting” include, inter alia, the fact that, on the date of the allegedly discriminatory act, the incapacity of the person concerned does not have a well-defined prospect of its termination in the short term or that that incapacity may be significantly prolonged before that person is reinstated.
- (Case: kitchen assistant who slips while working and suffers an elbow injury, being dismissed by the company for poor performance, after having extended his temporary contract shortly before).

2016 12 13 (T-713/14), IPSO v ECB.

EGC Judgment of the European Union of 13 December 2016 (T-713/14), IPSO v ECB.

ECLI:EU:C: 2016:727.

- *Organisation des salariés auprès des institutions européennes et internationales en République fédérale d'Allemagne (IPSO) v European Central Bank.*
- Action for annulment.
- Annuls the Decision of the Executive Board of the European Central Bank (ECB) of 20 May 2014 limiting to two years the maximum period during which the ECB may rely on the benefits of the same worker made available to it by a temporary agency to perform administrative and secretarial tasks.

2016 12 14 (C-238/15), Linares Verruga.

ECJ Judgment of 14 December 2016, Linares Verruga.

ECLI:EU:C:2016:949.

- *Maria do Céu Bragança, Linares Verruga and others v. Ministre de l'Enseignement supérieur et de la recherche.*
- Request for a preliminary ruling from the Tribunal administratif (Luxembourg).
- Free movement of workers. Access to social benefits.

2016 12 21 (E-76/15), Vervloet.

ECJ Judgment of 21 December 2016 (C-76/15), Vervloet.

EU:C:2016:975.

- *Paul Vervloet and Others v Ministerraad.*
- Request for a preliminary ruling from the Grondwettelijk Hof (Constitutional Court, Belgium).
- Where aid granted by a Member State serves to strengthen the position of an undertaking vis-à-vis other undertakings competing with it in trade between Member States, such trade must be regarded as affected by the aid.

2016 12 21 (E-201/15), AGET Iraklis.

ECJ Judgment of 21 December 2016 (C-201/15), AGET Iraklis.

ECLI:EU:C:2016:972.

- *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) vs. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis.*

- Request for a preliminary ruling from the Symvoulío tis Epikrateias (Council of State, Greece).
- (Directive 98/59/EC, collective redundancies): freedom of establishment precludes the application of national rules in such a way as to prevent collective redundancies even if the company is experiencing serious difficulties.
- The concept of establishment presupposes a real establishment of the company in question in that State and the exercise of an effective economic activity in that State.
- EU law does not preclude the national rule according to which, in the absence of agreement, the labour authority can prevent collective redundancies (after assessing the labour market, the situation of the company and the interests of the national economy) but it does preclude a systematic action that leads to the exclusion of any collective redundancies.
- A serious economic crisis and a particularly high unemployment rate do not deprive Directive 98/59/EEU of its effectiveness or exclude the application of Article 49 TFEU (freedom of establishment).

2016 12 21 C (539/15), Bowman.

ECJ 21 December 2016 (C-539/15), Bowman.

ECLI:EU:C:2016:278.

- *Daniel Bowman v Pensionsversicherungsanstalt*.
- Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria).
- A collective labour agreement under which an employee whose periods of schooling are taken into account for the purposes of classification at the corresponding salary level is subject to an extension of the promotion period from the first salary level to the second salary level is not discriminatory, since that extension of the period applies to all employees whose periods of schooling are taken into account, including, retroactively, those who have already reached the following levels.

2017

2017 02 01 (C-430/15), Tolley.

ECJ Judgment of 1 February 2017 (C-430/15), Tolley.

ECLI:EU:C:2017:74.

- *Secretary of State for Work and Pensions v. Tolley*.

- Request for a preliminary ruling from the Supreme Court of the United Kingdom.
- (Regulation 1408/71, Social Security): the accrual of a contributory retirement pension does not prevent the legislation of the Member State from subsequently becoming applicable to the pensioner.

2017 02 09 (E-443/16), Polytechnic University.

ECJ Order of 9 February 2017 (C-443/16), Polytechnic University.

ECLI:EU:C:2017:109.

- *Francisco Rodrigo Sanz v Polytechnic University of Madrid.*
- Reference for a preliminary ruling requested by the Contentious Court No. 8 of Madrid.
- Non-discrimination between permanent and temporary employees: temporary university school professors.
- It is discriminatory to concentrate restructuring measures (reducing half a day to those who do not have a PhD) on interim workers (comparable career civil servants are left out).

2017 02 16 (E-503/15) Margarit Panicello.

ECJ Judgment of 16 February 2017 (C-503/15), Margarit Panicello.

ECLI:EU:C:2017:126.

- *Ramon Margarit Panicello vs. Pilar Hernandez Martinez.*
- Request for a preliminary ruling submitted by the Judicial Secretary (LAJ) of the Single Court of Violence against Women of Terrassa.
- The Registrar of the Administration of Justice is not considered a “national court” in the context of the so-called swearing of accounts procedure, as it is an administrative, not a jurisdictional, procedure.
- The LAJ does not comply with the requirement of independence of the court, considered in its external aspect (absence of hierarchical link or subordination), and in any case the executing judge has jurisdiction to refer the question for a preliminary ruling.

2017 02 16 (E-578/16), C.K.

ECJ Judgment of 16 February 2017 (C-578/16), C.K.

ECLI:EU:C:2017:127.

- *C.K. and Others v Republika Slovenija.*
- Request for a preliminary ruling from the Vrhovnosodišve Republike Slovenije (Slovenianis).

- Reference for a preliminary ruling – Area of freedom, security and justice – Borders, asylum and immigration – Dublin system – Regulation (EU) No 604/2013 – Article 4 of the Convention on the Functioning of the European Union; inhuman or degrading treatment.
- Transfer of a seriously ill asylum-seeker to the State responsible for examining his or her application. Lack of substantial grounds for fearing that there are certain systemic deficiencies in that Member State. Obligations on the Member State to make the transfer.

2017 03 02 (C-245/15), Noastră House.

ECJ Judgment of 2 March 2017 (C-245/15), Noastră House.
ECLI:EU:C:2017:156.

- *SC Casa Noastră SA v. Ministerul Transporturilor - Inspectoratul de Stat pentru Controlul în Transportul Rutier (ISCTR).*
- Request for a preliminary ruling from the Judecătoria Balv – Județul Olt (District Court, Balv, Romania).
- (Regulation 561/2006, road transport): the service of transporting workers between home and workplace, organised by their employer and whose service distance does not exceed 50 km, is excluded from Regulation n.o 561/2006.

2017 03 02 (E-97/16), Pérez Retamero.

ECJ Judgment of 2 March 2017 (C-97/16), Pérez Retamero.
ECLI:EU:C:2017:158.

- *José María Pérez Retamero and TNT Express Worldwide Spain, S.L., Last Mile Courier, S.L., and the Wage Guarantee Fund (Fogasa).*
- Request for a preliminary ruling from the Juzgado de lo Social No 3 de Barcelona.
- Rejection of a question referred for a preliminary ruling by a court of the ECJ if it is clear that EU law cannot be applied either directly or indirectly.
- In the case: application of Working Time Directives to a self-employed person (carrier) who claims against his dismissal.

2017 03 09 (E-406/15), Milkova.

ECJ Judgment of 9 March 2017 (C-406/15), Milkova.
ECLI:EU:C:2017:198.

- Petya Milkova contra Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol.
- Question referred by Varhoven administrativen sad of Bulgaria.

- Directive 2000/78 allows legislation of a Member State which confers special ex ante protection against dismissal on workers with certain disabilities, without granting such protection to officials with the same disabilities.
- That applies unless there is a finding of an infringement of the principle of equal treatment, which must be verified by the referring court. If unequal treatment is found, the situation must be corrected by equalizing the discriminated group.

2017 03 14 (E-157/15), Achbita.

ECJ (Grand Chamber) of 14 March 2017 (C-157/15), Achbita.

ECLI:EU:C:2017:203.

- *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding contra G4S Secure Solutions NV.*
- Request for a preliminary ruling from the Hof van Cassatie (Court of Cassation) of Belgium.
- A company's internal regulations that prevent workers from wearing visible signs of a political, philosophical or religious nature in the workplace do not involve direct or indirect discrimination (in this case, Islamic headscarf).
- Validity of a business rule prohibiting external signs of conviction to ensure the correct application of a neutrality regime, provided that such a regime is actually pursued in a consistent and systematic manner.
- Reference to the ECJ of 10 March 2009, Hartlauer, C169/07, EU:C:2009:141, paragraph 55, and of 12 January 2010, Petersen, C341/08, EU:C:2010:4, paragraph 53.

2017 03 14 (E-188/15), Bougnaoui.

ECJ (Grand Chamber) of 14 March 2017 (C-188/15), Bougnaoui and ADDH/Micropole.

ECLI:EU:C:2017:204.

- *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA.*
- Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France).
- The requirement of a third party (client) is not an essential and determining professional requirement (Directive 2000/78/EC) for the con-

tracted services not to be provided by a worker wearing an Islamic veil.

- What must constitute an essential and determining occupational requirement (excluding discriminatory nature) is not the ground on which the difference in treatment is based, but a characteristic related to that ground.

2017 03 24 (C-269/16), Barba Giménez I.

ECJ Order of 24 March 2017 (C-269/16), Barba Giménez I.

ECLI:EU:C:2017:263.

- *Elena Barba Giménez vs. Francisca Carrión Lozano*.
- Request for a preliminary ruling from Juzgado de lo Social No 2 de Terrassa (Barcelona).
- Acceptance of the request to close the preliminary ruling raised by the Legal Counsel for the Administration of Justice (LAJ) in view of the doctrine coined in the ECJ judgment of 16 February 2017 (C-503/15), Margarit Panicello.

2017 04 06 (E-336/15) Unionen.

ECJ Judgment of 6 April 2017 (C-336/15) Unionen.

ECLI:EU:C:2017:276.

- *Unionen contra Almega Tjänsteförbunden e ISS Facility Services AB*.
- Request for a preliminary ruling from the Arbetsdomstolen (Sweden).
- When there has been a transfer of company, if more than a year later a surrogate worker is dismissed, the seniority carried over by said worker must be taken into account, even for the purpose of calculating the duration of the notice required.

2017 04 06 (E-668/15), Jyske Finans.

ECJ Judgment of 6 April 2017 (C-668/15), Jyske Finans.

ECLI:EU:C:2017:278.

- *Jyske finans A/S vs ligebehandlingsnævnet*.
- Request for a preliminary ruling from the Vestre Landsret (Denmark).
- (Directive 2000/43/EC, equality by race or ethnicity): EU law does not preclude the practice of a credit institution imposing an additional identification requirement on a customer whose driving licence indicates a country of birth that is not a Member State of the European Union or the European Free Trade Association, consisting of the provision of a copy of their passport or residence permit.

2017 04 27 (C-620/15), A-Pink.

ECJ Judgment of 27 April 2017, A-Rosa.

ECLI:EU:C:2017:309.

- *A-Rosa Flussschiff GmbH v Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales d'Alsace (Urssaf) and Sozialversicherungsanstalt des Kantons Graubünden.*
- Request for a preliminary ruling from the Cour de cassation (Cour de cassation) (France).
- Social Security coordination regulations. Posting of workers. Value of portable A1 documents.

2017 04 27 (C-680/15 and C-681/15) Asklepios Kliniken.

ECJ Judgment of 27 April 2017 (C-680/15) Asklepios Kliniken.

ECLI:EU:C:2017:317.

- *Asklepios Kliniken Langen-Seligenstadt GmbH vs. Ivan Felja and Asklepios Dienstleistungsgesellschaft mbH vs. Vittoria Graf.*
- Questions referred by the Bundesarbeitsgericht (Germany).
- In the case of a transfer of an undertaking, subrogation extends to the contractual clause under which the employment relationship is governed not only by the collective agreement in force but also by agreements subsequent to that transfer supplementing, amending or replacing it, where national law provides for the transferee to be adapted, both by mutual agreement and unilaterally.

2017 05 10 (E-133/15), Chavez Vilchez.

ECJ Judgment of 10 May 2017 (C-133/15), Chávez Vilchez.

ECLI:EU:C:2017:354.

- *H.C. Chávez-Vilchez et al. v. Raad van bestuur van de Sociale verzekeringsbank et al.*
- Request for a preliminary ruling from the Centrale Raad van Beroep (Central Court of Appeal, Netherlands).
- In order to determine whether a child should leave the EU because his or her parent is refused residence in the EU, it is necessary, in the best interests of the child, to take into account all the circumstances of the individual case (including family benefits and social assistance) and, in particular, the child's age, physical and emotional development, the intensity of his or her emotional relationship with the Union citizen parent and with the parent of a child. third country and the risk that separating it from the latter would entail for the balance of the child.

2017 05 16 (E-682/15), Berlioz Investment Fund.

ECJ Judgment of 16 May 2017 (C-682/15), Berlioz Investment Fund.
ECLI:EU:C:2017:373.

- *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes*.
- Request for a preliminary ruling from the Cour administrative (Luxembourg).
- (Art. 47 of the Convention on the Functioning of the European Union): a taxpayer who has been fined for failing to comply with an administrative decision requiring him to provide information in the context of an exchange of information between national tax administrations may challenge the legality of that decision.
- In addition to the jurisdiction to amend the penalty imposed, the national court has jurisdiction to review the legality of that decision to injunction.

2017 05 18 (E-99/16), Lahorgue.

ECJ Judgment of 18 May 2017 (C-99/16), Lahorgue.
ECLI:EU:C:2017:391.

- *Jean-Philippe Lahorgue v Ordre des avocats du barreau de Lyon and Others*.
- Request for a preliminary ruling from the Tribunal de grande instance de Lyon (Lyon, France).
- It is against EU law to refuse to hand over a device connecting to the virtual private network of lawyers to those who are registered in the Bar Association of another State, unless the law imposes the obligation to act in agreement with another lawyer.
- Only exceptionally can such a refusal be legitimized, if it is necessary to protect consumers and achieve a good administration of justice and is proportionate.

2017 06 13 (E-258/14), Florescu.

ECJ Judgment of 13 June 2017 (C-258/14), Florescu.
ECLI:EU:C:2017:448.

- *Eugenia Florescu and Others v Casa Judeveanv de Pensii Sibiu and Others*.
- Request for a preliminary ruling from the Curtea de Apel Alba Iulia (Romania).

- A Memorandum of Understanding between the EU and Romania can be interpreted by the ECJ.
- The Memorandum does not require the incompatibility between income from the public sector and a retirement pension of a value greater than a certain amount.
- The difference in treatment between persons with a term of office whose duration is provided for in the Constitution and professional judges does not fall within the scope of Directive 2000/78.

2017 06 15 (E-249/16), Kareda.

ECJ Judgment of 15 June 2017 (C-249/16), Kareda.

ECLI:EU:C:2017:472.

- *Saale Kareda vs. Stefan Benkö.*
- Question referred for a preliminary ruling by the Oberster Gerichtshof (Supreme Court, Austria).
- Concept of contractual matters for the purposes of the Brussels Ia Regulation: a loan agreement is a contract for the provision of services.

2017 06 21 (E-449/16), Martínez Silva.

ECJ Judgment of 21 June 2017 (C-449/16), Martínez Silva.

ECLI:EU:C:2017:485.

- *Kerly Del Rosario Martinez Silva v. Istituto nazionale della previdenza sociale (INPS) and Comune di Genova.*
- Request for a preliminary ruling from the Corte d'appello di Genova (Italy).
- EU law precludes the holder of a single permit (work and residence) from being barred from receiving a benefit such as the subsidy for nuclear families with at least three minor children.

2017 06 22 (C-20/16), Bechtel.

ECJ Judgment of 22 June 2017 (C-20/16), Bechtel.

ECLI:EU:C:2017:488.

- *Wolfram Bechtel and Marie-Laure Bechtel vs. Finanzamt Offenburg.*
- Request for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany).
- (Art. 45 TFEU, freedom of movement): EU law precludes a taxpayer who resides in one State and works for the public administration of another State from being able to deduct from personal income tax the contributions withheld from his salary, whereas otherwise would be the

case if his employer were the State of residence. In this case, the Double Taxation Convention provides that wages cannot be taxed in the Member State in which the worker resides and only increases the tax rate applicable to other income.

2017 06 22 (C-126/16) *Smallsteps BV*.

ECJ Judgment of 22 June 2017 (C-126/16) *Federatie Nederlandse Vakvereniging and others*.

ECLI:EU:C:2017:489.

- *Federatie Nederlandse Vakvereniging and Others v Smallsteps BV*.
- Question referred by the Rechtbank Midden-Nederland.
- Business succession occurs when the transfer of the company occurs after a declaration of bankruptcy in the context of a pre-pack prior to and executed immediately after it.
- To determine whether there is a succession of companies, it is not possible to take into account the need to collect income, derived from the sale of the production unit, with which to meet the claims of the creditors of the company in liquidation.

2017 07 05 (C-190/16), *Fries*.

ECJ Judgment of 5 July 2017 (C-190/16), *Fries*.

ECLI:EU:C:2017:513.

- *Werner Fries v Lufthansa CityLine GmbH*.
- Request for a preliminary ruling from the Bundesarbeitsgericht (Germany).
- The rule prohibiting the piloting of commercial flights over 65 years of age does not violate the prohibition of discrimination.
- EU law does not preclude a holder of a pilot's licence who has reached the age of 65 from taking part as a pilot on empty flights or transfer flights, carried out in the course of an airline's commercial activity, in which no passengers, cargo or mail are carried, or to perform activities as an instructor and/or examiner on board an aircraft without being part of the flight crew.

2017 07 13 (E-89/16), *Szoja*.

ECJ Judgment of 13 July 2017 (C-89/16), *Szoja*.

ECLI:EU:C:2017:538.

- *Radosław Szoja v Sociálna poisťovňa and WEBUNG, s.r.o.*

- Request for a preliminary ruling from the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic).
- (Regulation 883/2004, Social Security): when a person simultaneously carries out activities as an employee and as a self-employed person, marginal activities must be excluded to determine the Social Security system to which he or she is attached.

2017 07 13 (E-354/16), Kleinsteuber.

ECJ Judgment of 13 July 2017 (C-354/16), Kleinsteuber.,
ECLI:EU:C:2017:539.

- *Ute Kleinsteuber v. Mars GmbH.*
- Request for a preliminary ruling from the Arbeitsgericht Verden (Germany).
- (Directive 97(1) on part-time): EU law does not prevent the contribution base of part-time work from being taken into account for the purposes of calculating the retirement pension.
- EU law does not prevent the employer's pension from being calculated by applying a uniform percentage to those who have alternated between full-time and part-time, provided that the pro rata temporis rule is respected.

2017 07 18 (C-566/15), Erzberger.

ECJ Judgment of 18 July 2017 (C-566/15), Erzberger.
ECLI:EU:C:2017:562.

- *Konrad Erzberger vs. TUI AG.*
- Question referred for a preliminary ruling by the Kammergericht (Higher Regional Court, Berlin, Germany).
- (Freedom of movement for workers): a (German) legislation restricting the right to vote in elections to workers' representatives on the supervisory board of a company (Co-determination Act) is valid to workers who actually provide services in workplaces located on the territory of the State legislature.

2017 07 19 (E-143/16), Abercrombie.

ECJ Judgment 19 July 2017 (C-143/16), Abercrombie.
ECLI:EU:C:2017:566.

- *Abercrombie & Fitch Italia Srl v. Antonino Bordonaro.*
- Request for a preliminary ruling from the Corte Suprema di Cassazione (Italy).

- Legislation which allows an employer to conclude a discontinuous employment contract with a worker under 25 years of age, whatever the nature of the services to be provided, and to dismiss that worker on the age of 25, is not discriminatory, since that provision pursues a legitimate employment policy objective and the means envisaged to achieve that objective are appropriate and necessary.

2017 07 20 (E-416/16) Piscarreta.

ECJ Judgment of 20 July 2017. C-416/16. Piscarreta Ricardo.
ECLI:EU:C:2017:574.

- *Luís Manuel Piscarreta Ricardo v Portimão Urbis EM SA and Others.*
- Question referred for a preliminary ruling by the Tribunal Judicial da Comarca de Faro (Portugal).
- There is a succession of companies when a municipal company is dissolved, its activity being redistributed between the City Council itself and another municipal company, provided that the identity of the company is subsequently maintained.
- The rights and obligations arising from an employment contract that is suspended (due to leave of absence) at the time of the transfer are transferred to the assignee.

2017 07 26 (C-175/16), Hälvä and others.

ECJ Judgment of 26 July 2017 (C-175/16), Hälvä and Others.
ECLI:EU:C:2017:617.

- *Hannele Hälvä and Others v SOS-Lapsikylä ry.*
- Request for a preliminary ruling from the Korkein oikeus (Supreme Court of Finland).
- (Directive 2003/88 on working time): limits on working hours cannot be applied to an activity as an employee consisting in taking care of children in conditions similar to those of a family, replacing the person principally responsible for such a task, where it is not established that the full working day has a duration previously measured or established or when it can be determined by the worker himself.
- In the case: activity carried out in the houses of a “children’s village” by the so-called “substitute fathers and mothers”, who are responsible for the assistance and education of the children housed there in conditions similar to those of a family, replacing the “titular parents”. The activity is carried out in continuous periods of 24 hours, which can be chained for several days, with the right to one day of rest per week and,

on average, two weekends off per month, in accordance with a list previously drawn up by the director of the establishment.

2017 09 07 (C-174/2016), H.

ECJ Judgment of 7 September 2017 (C-174/2016), H.

ECLI:EU:C:2017:637.

- *H. and Land Berlin*.
- Question referred for a preliminary ruling by the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany).
- A position in the public service that is subject to a previous period of internship that a candidate cannot carry out because she is enjoying parental leave.
- (Directive 2010/18: parental leave): it is for the referring court to determine, by disapplying the national legislation at issue in the main proceedings where necessary, whether, in circumstances such as those at issue in the main proceedings, the Land concerned, in its capacity as employer, was objectively unable to allow the person concerned to take up her job at the end of her parental leave.
- To this end, it must start from the principle of equal treatment in working conditions - and the right to reconcile family life - between civil servants and workers.

2017 09 07 (C-298/16), Ispas.

ECJ Judgment of 7 September 2017 (C-298/16), Ispas.

ECLI:EU:C:2017:843.

- *Teodor Ispas and AnduŃa Ispas v DirecŃia Generală a FinanŃelor Publice Cluj*.
- Request for a preliminary ruling from the Curtea de Apel Cluj (Romania).
- (General principle of EU law): The rights of the defence require that an individual has the possibility to access, if he or she so requests, the information and documents included in the administrative file on VAT review that the public authority has taken into consideration in adopting its decision, unless the restriction of access to the aforementioned information and documents is justified by objectives of general interest.

2017 09 13 (570/15), X.

ECJ Judgment of 13 September 2017, X.

ECLI:EU:C:2017:673.

- *X v. Staatssecretaris van Financiën*.
- Request for a preliminary ruling from the Hoge Raad der Nederlanden.
- Social Security coordination regulations. Determination of applicable law. A person employed in a Member State and who carries out part of his activities in the Member State of his residence.

2017 09 14 (E-168/16), Nogueira.

ECJ Judgment of 14 September 2017 (C-168/16), Nogueira.
ECLI:EU:C:2017:688.

- *Sandra Nogueira and Others v. Crewlink Ireland Ltd and Miguel José Moreno Osácar v. Ryanair Designated Activity Company*.
- Question referred for a preliminary ruling by the Cour du travail de Mons (Higher Labour Court, Mons, Belgium).
- Jurisdiction in the case of flight personnel: the place where the worker habitually carries out his work is not equivalent to the “base” within the meaning of aeronautical law (Regulation 3922/91), although it is significant for that purpose.
- Interpretation of the Rome I Regulation (Rome Convention) which, in the field of employment contracts, takes into account the provisions of the Brussels Ia Regulation (Brussels Convention).
- Competence rules tending to favour the worker, so that he or she can sue in the forum closest to his or her interests: nullity of contractual clauses attributing jurisdiction to a single State (the company’s registered office).
- A person whose contract has been suspended is a “worker”, provided that he or she is protected as such by national legislation.

2017 09 21 (E-149/16), Socha.

ECJ Judgment of 21 September 2017 (C-149/16), Socha.
ECLI:EU:C:2017:708.

- *Halina Socha et al. v. Szpital Specjalistyczny im. A. Falkiewicza we Wrocławiu*.
- Request for a preliminary ruling from the Sąd Rejonowy dla Wrocławia-wródmieścia (Poland).
- (Directive 98/59/EC, collective dismissal): contractual termination at the initiative of the employer is assimilated to dismissal.
- The consultation procedure (for collective dismissal) must be activated for a unilateral modification of working conditions and remuneration (calculation of seniority), agreed by the employer to the detriment of

the workers and which, in the event of rejection by them, entails the termination of the employment relationship.

- The concept of dismissal in the Directive includes substantial modification, whereas a non-substantial modification (such as that at issue in the main proceedings) cannot be classified as a dismissal; but the consequent termination of the contract is a termination at the initiative of the employer for reasons not inherent to the persons of the workers.

2017 09 21 (C-429/16), Ciupa.

ECJ Judgment of 21 September 2017 (C-429/16), Ciupa.

ECLI:EU:C:2017:711.

- *Małgorzata Ciupa and others v. II Szpital Miejski im. L. Rydygiera w Łodzi obecnie Szpital Ginekologiczno-Położniczy im dr L. Rydygiera Sp. z o.o. w Łodzi.*
- Request for a preliminary ruling from the Sąd Okręgowy w Łodzi.
- (Directive 98/59/EC, collective redundancies): EU law equates dismissals to “terminations of employment contracts produced at the initiative of the employer”, as is the case when there is a unilateral modification, by the employer, of the working conditions and remuneration (transitional reduction of 15%) to the detriment of the workers who, in the event of rejection by them, determines the termination of the employment contract.
- If the quantitative element is present, the employer is obliged to carry out the consultations typical of a collective dismissal.
- The concept of dismissal in the Directive includes substantial modification, as opposed to non-substantial modification; but the consequent termination of the contract is a termination at the initiative of the employer for reasons not inherent to the persons of the workers.

2017 10 18 (E-409/16), Maria-Eleni Kalliri.

ECJ Judgment of 18 October 2017 (C-409/16), Maria-Eleni Kalliri.

ECLI:EU:C:2017:767.

- *Ypourgos Esoterikon and Ypourgos Ethnikis paideias kai Thriskevmaton against Maria-Eleni Kalliri.*
- Request for a preliminary ruling from the Symvoulío tis Epikrateias (Council of State, Greece).
- (Directive 76/207/EEC, non-discrimination on the basis of gender): there is indirect discrimination on grounds of gender if an identical minimum height (1.70 m) is required to compete for the police force

and this is a disadvantage for a much greater number of women than men, without it being proven that the requirement is adequate or necessary to achieve the legitimate objective pursued.

2017 10 19 (C-531/15), Otero Ramos.

ECJ Judgment of 19 October 2017 (C-531/15), Otero Ramos.
ECLI:EU:C:2017:789.

- *Elda Otero Ramos v. Galician Health Service and National Social Security Institute.*
- Request for a preliminary ruling from the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia).
- The absence of an occupational risk assessment for breastfeeding for a given job constitutes direct discrimination on the basis of sex.
- It is for the worker concerned to establish facts capable of suggesting that the assessment of the risks in her job was not carried out in accordance with the requirements of Directive 92/85 and which may lead to the presumption of direct discrimination on grounds of sex.
- It will be for the defendant to demonstrate that that risk assessment was carried out in accordance with the requirements of that provision and that, therefore, the principle of non-discrimination was observed.

2017 10 19 (E-200/16), Securitas.

ECJ Judgment of 19 October 2017 (C-200/16), Securitas.
ECLI:EU:C:2017:780.

- *Securitas - Serviços e Tecnologia de Segurança SA v ICTS Portugal – Consultadoria de Aviação Comercial SA and others.*
- Request for a preliminary ruling from the Supreme Court of Justice (Portugal).
- A collective agreement that excludes from the “concept of transfer of an undertaking or business centre” the loss of a customer by an operator due to the award of the service to another operator is contrary to EU law.
- The infrastructure transferred and relevant to assess whether there is a succession of companies is the one that is essential and effectively used.

2017 11 09 (C-98/15), Espadas Recio.

ECJ Judgment of 9 November 2017 (C-98/15), Espadas Recio.
ECLI:EU:C:2017:833.

- *María Begoña Espadas Recio v. State Public Employment Service (SPEE).*

- Request for a preliminary ruling from the Labour Court No. 33 of Barcelona.
- (Directive 79/7/EEC; equal treatment in social security): unemployment of a vertical part-time worker (it being proven that the majority of people with this work regime are women).
- The unemployment regulation that excludes contribution periods corresponding to days not worked for the purposes of determining the duration of the benefit violates EU law.
- (Cleaner working from 1999 to 2013 but only two and a half hours on Mondays, Wednesdays and Thursdays of each week and four hours on the first Friday of each month).

2017 11 09 (E-499/16), AZ.

ECJ Judgment of 9 November 2017 (C-499/16), AZ.

ECLI:EU:C:2017:846.

- *AZ v. Minister Finansów*.
- Request for a preliminary ruling from the Naczelny Sąd Administracyjny (Poland).
- EU law does not preclude a regulation which makes the application of the reduced rate of VAT to fresh pastry and pastry products subject to a single criterion, that of their “best-before date” or “use-by date”.

2017 11 09 (E-306/16), Maio Marqués Da Rosa.

ECJ Judgment of 9 November 2017 (C-306/16), Maio Marqués Da Rosa.

ECLI:EU:C:2017:844.

- *António Fernando Maio Marques da Rosa vs. Varzim Sol – Turismo, Jogo e Animação, SA*.
- Request for a preliminary ruling from the Tribunal da Relação do Porto (Portugal).
- (Directive 2003/88/EC, working time): the minimum uninterrupted weekly rest period of 24 hours, to which every worker is entitled, does not need to be granted no later than the day following a period of six consecutive days of work.
- EU law requires that weekly rest be taken within the corresponding period, although states can activate two-week reference periods.

2017 11 29 (E-214/16), King.

ECJ Judgment of 29 November 2017 (C-214/16), King.

ECLI:EU:C:2017:914.

- *Conley King v. The Sash Window Workshop Ltd and Richard Dollar*.
- Request for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division).
- (Directive 2003/88/EC, working time): at the end of a long provision of falsely commercial services, the worker is entitled to financial compensation for the holidays not taken.
- Exercise of the right to enjoy holidays and the possibility of claiming cumulatively, via financial compensation, periods not taken. EU law precludes the worker from having to take leave before knowing whether he or she is entitled to paid leave.
- When the employer has prevented the enjoyment of paid vacation, he must face the consequences of this: there is no statute of limitations, nor does the intra-annual nature of the rest operate.
- The worker cannot be required to take annual leave before it can be known whether it will be paid.

2017 12 05 (E-42/17). M.A.S.

ECJ Judgment of 5 December 2017 (C-42/17), M.A.S.

ECLI:EU:C:2017:936.

- *Criminal proceedings brought against M.A.S. and M.B.*
- Request for a preliminary ruling from the Corte costituzionale (Italy).
- (Art. 325 TFEU); EU law requires the national court not to apply, in the context of criminal proceedings relating to infringements relating to value added tax, domestic limitation provisions under national substantive law which prevent the imposition of effective and dissuasive criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union.
- This is the case unless the aforementioned non-application implies a violation of the principle of legality of crimes and penalties, due to the lack of precision of the applicable law or due to the retroactive application of legislation that imposes conditions for criminal liability more severe than those in force at the time of the commission of the offense.

2017 12 14 (C-243/16), Miravittles Ciurana.

ECJ Judgment of 14 December 2017 (C-243/16), Miravittles Ciurana.

ECLI:EU:C:2017:969.

- *Antonio Miravittles Ciurana and others v. Contimark, S.A., and Jordi Socias Gispert*.

- Request for a preliminary ruling from the Juzgado de lo Social No 30 de Barcelona.
- (Directives 2009/1010 and 2012/3003/88, companies): EU law does not confer on employees the right to demand liability from company directors before the same social court that hears their claims.

2017 12 20 (C-434/15), Elite Taxi (Uber).

ECJ Judgment of 20 December 2017 (C-434/15), Elite Taxi (Uber).
ECLI:EU:C:2017:364.

- *Asociación Profesional Élite Taxi v. Uber Systems Spain, S.L.*
- An intermediation service which connects, by means of a smartphone application, for remuneration, non-professional drivers using their own vehicle with persons wishing to make an urban journey is inextricably linked to a transport service and must therefore be classified as a “transport service”, for the purposes of EU law.

2017 12 20 (E-102/16), Vaditrans.

ECJ Judgment of 20 December 2017 (C-102/16).
ECLI:EU:C:2017:1012.

- *Vaditrans BVBA v Belgische Staat (Council of State, Belgium).*
- Request for a preliminary ruling from the Raad van State.
- (Regulation 561/2006): EU law precludes a driver from enjoying the ordinary weekly rest [at least 45 hours] in his own vehicle.
- (The case: appeal against a Belgian regulation that provides for a fine of €1,800 for the driver of a truck who takes his normal weekly rest in the vehicle. The Spanish Government supported Vaditrans’s thesis).

2017 12 20 (E-158/16), Vega González.

ECJ Judgment of 20 December 2017 (C-158/16), Vega González.
ECLI:EU:C:2017:1014.

- *Margarita Isabel Vega González v. Ministry of Finance and Public Sector of the Government of the Principality of Asturias.*
- Request for a preliminary ruling from the Contentious-Administrative Court of Oviedo.
- Non-discrimination between permanent and temporary employees: interim civil servants.
- The concept of “working conditions” incorporates the recognition of the administrative status of special services.

- The absolute exclusion by national law of interim civil servants from the enjoyment of the special service status granted to career civil servants is discriminatory.

2017 12 20 (C-419/16), Simma Federspiel.

ECJ Judgment of 20 December 2017 (C-419/16), Simma Federspiel.
ECLI:EU:C:2017:997.

- *Sabine Simma Federspiel v Provincia autonoma di Bolzano and Equitalia Nord SpA.*
- Request for a preliminary ruling from the Tribunale di Bolzano v Landesgericht Bozen (Italy).
- (Articles 45 and 49 TFEU): EU law does not preclude the authority granting a grant for (medical) training abroad from requiring the beneficiary to carry out his or her professional activity (after the training) in its own territory and for a certain period of time (five years out of the following ten), otherwise requiring the repayment of part of the aid (up to 70% plus interest).
- There is justification for the above in the defence of the general interest (maintaining a balanced medical and hospital service), unless it is proven that this measure does not effectively contribute to the aim pursued.

2017 12 20 (E-434/16), Nowak.

ECJ Judgment of 20 December 2017 (C-434/16). Nowak.
ECLI:EU:C:2017:994.

- *Peter Nowak v. Data Protection Commissioner.*
- Request for a preliminary ruling from the Supreme Court.
- (Directive 95/46/Data Protection): the answers provided by an applicant during a professional examination and any notes made by the examiner relating to those answers are personal data.
- The concept of “data” must be understood in a broad sense: it is not limited to confidential or privacy-related information, but can include any type of information, both objective and subjective, in the form of opinions or assessments, as long as they are “about” the person.
- The exam, especially handwritten, contains personal data that must be processed with the guarantees required by law (access, rectification, cancellation).

2017 12 20 (E-442/16), Gusa.

ECJ Judgment of 20 December 2017 (C-442/16). Worm.

ECLI:EU:C:2017:1004.

- *Florea Gusa v. Minister for Social Protection and others.*
- Request for a preliminary ruling from the Court of Appeal (Ireland).
- (Regulation 1612/68 and related Directives, freedom of movement): a national of a Member State who, after residing and being self-employed in another Member State for about four years, abandons that activity due to lack of work (beyond his control) and registers as a jobseeker, remains a «worker».
- (In the case: Romanian who works as a freelance plasterer in Ireland, from 2008 to 2012, and, due to the economic crisis, cannot find commissions).

2018

2018 01 18 (C-279/16), Ruiz Conejero.

ECJ Judgment of 18 January 2018 (C-279/16), Ruiz Conejero.

ECLI:EU:C:2018:17.

- *Carlos Enrique Ruiz Conejero v. Ferroservicios Auxiliares, S.A.*
- Request for a preliminary ruling from the Labour Court No. 1 of Cuenca.
- (Directive 2000/78/EC, equal treatment at work): EU law precludes article 52(d) SW which allows a worker to be dismissed for absences from attendance, even justified but intermittent, when such absences are the result of illnesses attributable to the worker's disability, unless such legislation has the legitimate aim of combating absenteeism and does not go beyond what is necessary to achieve that purpose, This is a matter for the referring court to assess.
- It is for the national court to examine whether the SW has taken into account the relevant data on workers with disabilities.
- (Cleaner with a recognized disability [obesity, low back problem, complementary factors] who goes through several periods of IT due to related pathologies).

2018 01 25 (C-473/16), F.

ECJ Judgment of 25 January 2018 (C-473/16), F.

ECLI:EU:C:2018:36.

- *F contra Bevándorlási és Állampolgársági Hivatal.*
- Reference for a preliminary ruling from the Administrative and Labour Court of Szeged (Hungary).

- (CEFEU and Directive 2011/95, refugees): EU law precludes the carrying out and use of a psychological examination to provide a picture of the applicant's sexual orientation, based on projective personality questionnaires, in order to assess the credibility of the sexual orientation claimed by an applicant for international protection.

2018 02 06 (C-359/16), Altun and others.

ECJ Judgment of 6 February 2018 (C-359/16), Altun and others.
ECLI:EU:C:2018:63.

- *Criminal proceedings brought against Openbaar Ministerie.*
- Request for a preliminary ruling from Hof van Cassatie (Court of Cassation, Belgium).
- If the host State institution consults the issuer of the E-101 certificates (now PD A1, social security membership) in relation to specific information which leads it to consider that fraud has occurred, it is for the latter (principle of cooperation) to review ex officio, in the light of that information, the appropriateness of the issuance of the certificates and, where appropriate, annul them.
- The Criminal Judge may disregard E-101 certificates issued in another State if the authority that drew them up ignores the information provided by the host State institution on possible fraudulent acquisition.
- (The case: The Belgian Labour Inspectorate finds, in the framework of a judicial investigation, that a construction company subcontracts all its activity to Bulgarian companies that post workers to Belgium and that do not carry out significant activity in Bulgaria).

2018 02 07 (C-142 and 143/17), Maturi and others.

ECJ Order of 7 February 2018 (C-142 and 143/17), Maturi and others.
ECLI:EU:C:2018:68.

- *Manuela Maturi and Others v Fondazione Teatro dell'Opera di Roma, Fondazione Teatro dell'Opera di Roma v Manuela Maturi and Others and Catia Passeri v Fondazione Teatro dell'Opera di Roma.*
- Requests for a preliminary ruling from the Corte suprema di cassazione (Italy).
- (Directive 2006/54/EC on equal treatment in employment; art. 21.1 of the Convention on the Functioning of the European Union): the (Italian) law is discriminatory on grounds of sex, according to which public entertainment (dance) personnel who reach retirement age (45

years) may (if they choose within two years) continue to carry out their professional activity until the previous age limit for remaining in active employment (47 years for women and 52 years for men; a difference that is the opposite of the EU law).

2018 02 08 (C-181/17), Commission v. Spain.

ECJ judgment of 8 February 2018 (C-181/17), Commission v. Spain.
ECLI:EU:C:2018:75.

- *European Commission v. Kingdom of Spain.*
- Failure of the State.
- (Regulation 1071/2009, transport companies): Spain is in breach of EU law by imposing as a requirement for obtaining a public transport authorisation that companies have at least three vehicles.

2018 02 21 (E-518/15), Matzak.

ECJ Judgment of 21 February 2018 (C-518/15), Matzak.
ECLI:EU:C:2018:82.

- *Ville de Nivelles vs. Rudy Matzak.*
- Request for a preliminary ruling from the Cour du travail de Bruxelles (Higher Labour Court, Brussels, Belgium).
- (Directive 2003/88, working time): the Community concept of “working time” cannot be restricted and includes that of on-call at one’s own home (obligatory physical presence) with the need to report to the workplace within eight minutes (which greatly restricts the possibility of carrying out personal activities).
- The consideration of face-to-face home duty as working time does not require that period to be remunerated in a certain way, but it does require it to be computed for the purposes of the limiting regulations.
- The case: volunteer firefighter (non-professional, he has another job) assuming home guard; it is different from the case of localized guards with freedom of location.

2018 02 22 (E-103/16), Porras Guisado.

ECJ Judgment of 22 February 2018 (C-103/16), Porras Guisado.
ECLI:EU:C:2018:99.

- *Jessica Porras Guisado v. Bankia and others.*
- Request for a judicial decision submitted by the High Court of Justice of Catalonia.

- (Directive 92/85 on women's occupational health): EU law does not preclude a pregnant worker from being affected by a collective redundancy if the employer informs her in writing of the reasons and her appointment is based on objective criteria.
- EU law also does not preclude legislation that does not establish a priority of permanence or relocation in favour of pregnant women, who have given birth or are breastfeeding, although it allows it to be approved.
- EU law precludes legislation that does not preventively prohibit the dismissal of pregnant or breastfeeding workers and merely provides for its nullity when it is considered illegal.

2018 02 27 (E-64/16), Associação Sindical dos Juízes Portugueses.

ECJ Judgment (Grand Chamber) of 27 February 2018 (C-64/16), Associação Sindical dos Juízes Portugueses.

ECLI:EU:C:2018:117.

- *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*.
- Request for a preliminary ruling from the Supreme Administrative Court (Portugal).
- Judicial protection is a general principle of EU law and inherent in the rule of law; it requires the independence of judicial bodies.
- The principle of judicial independence (autonomy) requires that judges receive remuneration commensurate with the importance of their duties, but does not preclude them from being affected by general salary reduction measures, linked to imperative requirements for the elimination of excessive budget deficits and to an EU financial assistance programme.
- (In the case: general measures for the civil service, framed in the austerity effort necessary to reduce the budget deficit, which entail salary cuts for the members of the Court of Auditors).

2018 02 28 (E-46/17), John.

ECJ Judgment of 28 February 2018 (C-46/17), John.

ECLI:EU:C:2018:131.

- *Huberts John v. Freie Hansestadt Bremen*.
- Request for a preliminary ruling from the Regional Labour Court of Bremen (Germany).
- (Directive 2000/78, equal treatment): EU law does not preclude the rule that allows an agreement (between worker and employer) to tem-

porarily extend (without limits) the contract of a person who reaches retirement age.

- (Directive 1999/70, temporary contracts): EU law does not preclude the possibility of concluding successive temporary contracts to extend the activity of a person who has reached retirement age and is entitled to a pension.
- (In the case: Teacher who agrees with the employing City Council an extension after reaching retirement age, sees his request for a second one rejected and then claims against the termination of the temporary contract).

2018 03 01 (E-297/16), CMVRO.

ECJ Judgment of 1 March 2018 (C-297/16), CMVRO.

ECLI:EU:C:2018:141.

- *Colegiul Medicilor Veterinari din România (CMVRO) v Autoritatea Națională Sanitară Veterinară și pentru Siguranța Alimentelor.*
- Request for a preliminary ruling from the Curtea de Apel București (Romania).
- (Directive 2006/123/EC, Services in the internal market): EU law does not preclude national legislation which provides for exclusivity in the retail trade and use of biological products, special-purpose anti-parasitics and veterinary medicinal products for the benefit of veterinarians.
- EU law precludes the requirement that the share capital of establishments that retail veterinary medicinal products be held exclusively by one or more veterinarians.

2018 03 07 (E-494/16), Santoro.

ECJ Judgment of 7 March 2018 (C-494/16), Santoro.

ECLI:EU:C:2018:166.

- *Giuseppa Santoro against Comune di Valderice and Presidenza del Consiglio dei Ministri.*
- Request for a preliminary ruling from the Tribunale Civile di Trapani (District Court, Trapani, Italy).
- (Directive 1999/70 on temporary contracts): EU law does not preclude national law from penalising abuses of temporary recruitment in different ways in the public and private sectors, provided that such legislation is accompanied by an effective and dissuasive mechanism of sanctions, which is a matter for the referring court to verify.

- (Italian law: nullity of illegal temporary contracts, without becoming indefinite; responsibilities of managers; freezing of positions in the employing administration; payment of compensation to the worker between 2.5 and 12 months, as well as compensation for “loss of opportunities”).

2018 03 07 (E-651/16), DW.

ECJ Judgment of 7 March 2018 (C-651/16), DW.

ECLI:EU:C:2018:162.

- *DW and Valsts sociālais apdrošināšanas aģentūra.*
- *Request for a preliminary ruling from the Augstākā tiesa* (Supreme Court, Latvia).
- (Art. 45 TFEU, free movement of workers): EU law precludes the maternity base from being calculated by assimilating the time worked in a European institution to a period of unemployment, which substantially reduces the benefit.
- (In this case: the benefit is not calculated on the basis of actual contributions, which would be the case if he had continued to work in the same State, but on the basis of average contributions).

2018 03 14 (E-482/16), Stollwitzer.

ECJ Judgment of 14 March 2018 (C-482/16), Stollwitzer.

ECLI:EU:C:2018:180.

- *Georg Stollwitzer v ÖBB Personenverkehr AG.*
- Request for a preliminary ruling from Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck, Austria).
- (Directive 2000/78, non-discrimination): EU law does not preclude the elimination of discrimination on grounds of age (exclusive calculation of activity after the age of 18 for the purposes of promotion), which is abolished retroactively but only the experience acquired in companies in the same economic sector is taken into account.
- It is legitimate to reward the worker for the experience acquired in the field in question.

2018 03 15 (C-431/16), Blanco Marqués.

ECJ Judgment of 15 March 2018 (C-431/16), Blanco Marqués.

ECLI:EU:C:2018:189.

- *National Institute of Social Security (INSS) and General Treasury of Social Security (TGSS) against José Blanco Marqués.*

- Request for a preliminary ruling from the High Court of Justice of Castilla y León.
- (Regulations 1408/71 and 574/72): the receipt of 20% of Qualified IPT is compatible with a Swiss retirement pension.
- The suspension of a pension calculated exclusively under national legislation (without aggregation or pro-rata) is subject to the fulfilment of two conditions: a pension of an amount independent of the grace period (“type A”) and which is expressly mentioned in a specific Annex (Annex IV.D of Regulation 1408/71).

2018 03 15 (C-575/16), Commission v. Czech Republic.

ECJ judgment of 15 March 2018 (C-575/16), *European Commission v. Czech Republic*.

ECLI:EU:C:2018:186.

- *European Commission v. Czech Republic*.
- Appeal for non-compliance.
- (Art. 49 TFEU): EU law precludes the State from requiring a nationality requirement to access the profession of Notary, since freedom of establishment plays a role in it.
- (Review of notarial powers and conclusion: they do not entail the exercise of public authority).

2018 03 20 (C-537/16), Garlsson Real Estate and others.

ECJ (Grand Chamber) of 20 March 2018 (C-537/16), *Garlsson Real Estate and Others*.

ECLI:EU:C:2018:193.

- *Garlsson Real Estate SA (in liquidation), Stefano Ricucci, Magiste International SA and Commissione Nazionale per le Società e la Borsa (Consob)*.
- Request for a preliminary ruling from the Corte Suprema di Cassazione (Supreme Court of Cassation, Italy).
- (Art. 50 of the Convention on the Functioning of the European Union): EU law precludes the prosecution of an administrative sanctioning procedure for certain offences (market manipulation) if there is already a final criminal conviction against the taxpayer and the conviction is appropriate to punish the infringement in an effective, proportionate and dissuasive manner.

- The *ne bis in idem* principle (Article 50 of the Convention on the Functioning of the European Union) confers on individuals a directly applicable right.

2018 03 21 (E-551/16), Klein Schiphorst.

ECJ Judgment of 21 March 2018 (C-551/16), Klein Schiphorst.

ECLI:EU:C:2018:200.

- *J. Klein Schiphorst v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Labour Insurance Management Entity)*.
- Request for a preliminary ruling from the Centrale Raad van Beroep (Central Court of Appeal, Netherlands).
- (Regulation 883/2004, Social Security migrants): EU law does not preclude the denial of the extension of the export of unemployment from three months (period of export of the guaranteed benefit).
- But the reasons for refusing the extension (for example, the comparative volume of unemployment in the respective States) must be objectified for their eventual control.

2018 03 21 (C-133/17), Podilv and others.

ECJ Judgment of 21 March 2018 (C-133/17), Podilv and others.

ECLI:EU:C:2018:203.

- *DVnuv Podilv and Others v Societatea Națională de Transport Feroviar de Căminatori “CFR Căminatori” SA București*.
- Request for a preliminary ruling from the Court of Appeal of Cluj (Romania).
- (Framework Directive 89/391): EU law is compatible with the regulation according to which the courts cannot influence the classification of the dangerousness of activities used to calculate retirement pensions.

2018 03 22 (E-315/17), Centeno Meléndez.

ECJ Order of 22 March 2018 (C-315/17), Centeno Meléndez.

ECLI:EU:C:2018:207.

- *Pilar Centeno Meléndez v University of Zaragoza*.
- Request for a preliminary ruling from the Contentious-Administrative Court No 2 of Zaragoza.
- (Directive 1999/70, Temporary jobs): EU law precludes the rule that reserves the horizontal career (and consequent economic promotion) to career civil servants and permanent staff, excluding in particular interim civil servants.

- “Working conditions” are the rules on professional promotion and there is no room for different treatment on the basis of temporality, unless there are “objective reasons”.
- (The case: an interim civil servant at the University of Zaragoza who requests to join the horizontal career system, based on assessing seniority and, subsequently, the performance evaluation of those who exceeded five years of service).

2018 04 10 (C-320/16), Uber France.

ECJ (Grand Chamber) of 18 April 2018 (C-320/16), Uber France.

ECLI:EU:C:2018:221.

- *Criminal proceedings brought against Uber France, with the intervention of Nabil Bensalem.*
- Request for a preliminary ruling from the Tribunal de Grande Instance de Lille (District Court, Lille, France).
- (Directives 98/34 on the information society and 2006/123 on internal market services): discussion on criminal law sanctioning anyone who organises a system of connection between customers and persons who provide road transport services for persons for consideration with vehicles with fewer than ten seats, without having authorisation to do so.
- The activity in question is to be classified as a “service in the field of transport” for the purposes of EU law, and is excluded from the rules on the freedom to provide services.

2018 04 12 (C-432/16), Minayo Luque.

ECJ Order of 12 April 2018 (C-432/16), Minayo Luque.

ECLI:EU:C:2018:277.

- *Carolina Minayo Luque v. Quitxalla Stars, S.L., and others.*
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of Catalonia.
- The preliminary ruling is closed when the proposing Court withdraws it in view of the doctrine coined in the ECJ Judgment of 22 February 2018 (C-103/16), Porras Guisado.

2018 04 17 (C-195/17 and others), Krüsemann and Others.

ECJ Judgment of 17 April 2018 (C-195/17 and others), Krüsemann and others.

ECLI:EU:C:2018:258.

- *Helga Krüsemann and Others v TUIfly GmbH.*

- Requests for a preliminary ruling from Amtsgericht Hannover and Amtsgericht Düsseldorf.
- (EC Regulation No. 261/2004, air passenger rights): massive and spontaneous absences from work in response to the company's announcement of restructuring do not amount to "extraordinary circumstances" that exempt passengers from compensation.
- The absences of the staff (89%) as a measure of spontaneous protest ("wildcat strike") must be considered inherent to the normal exercise of air activity and do not escape the control of the Company (this is confirmed by their dismissal after the subsequent collective agreement).

2018 04 17 (E-414/16), Egenberger.

ECJ (Grand Chamber) of 17 April 2018 (C-414/16), Egenberger.

- *Vera Egenberger vs. Evangelisches Werk für Diakonie und Entwicklung e.V.*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Germany).
- (Directive 2000/78, non-discrimination; Charter of Fundamental Rights): EU law does not preclude an Evangelical Foundation from rejecting a job application on the grounds that religious convictions are an essential occupational requirement.
- Possible direct application of the CEFEU on certain issues, such as non-discrimination.
- The national court must use the content of a directive when it implements the relevant rules of its law, but without reaching an interpretation *contra legem*, although this does not arise from the fact that national case-law is incompatible with EU law.
- The requirement of harmony with the ideology is valid if it refers to an essential activity (important for the employing organization), is legitimate (does not extend to neutral jobs), is justified (the need must be accredited) and is proportional (not exceeding what is necessary); judicial control over all of this is possible.
- (Evangelical entity that seeks a qualified person to direct a study on ethnic discrimination, asks to belong to the Christian or Protestant Churches and the candidate states that she does not belong to either).

2018 04 19 (C-525/16), Meo-Serviços de Comunicações e Multimédia.

ECJ Judgment of 19 April 2018 (C-525/16), Meo-Serviços de Comunicações e Multimédia.

ECLI:EU:C:2018:270.

- *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*.
- Request for a preliminary ruling from the Tribunal da Concorrência, Regulação e Supervisão (Portugal).
- (Article 102 TFEU, competitive disadvantage): on the fee that television companies must pay to the copyright management company.
- There is a “competitive disadvantage” if the dominant company applies discriminatory prices to trading partners and this distorts competition.

2018 06 05 (C-210/16), Wirtschaftsakademie Schleswig-Holstein.

ECJ (Grand Chamber) of 5 June 2018 (C-210/16), Wirtschaftsakademie Schleswig-Holstein.

ECLI:EU:C:2018:388.

- *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*.
- Request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Court, Germany).
- (Directive 95/46, Personal data): under EU law, the administrator of a fan page hosted on a social network (Facebook) is a “data controller”.
- If a company established outside the EU has branches in several of the Member States, the Authority of the State in which one of them is located (even if only for commercial matters) has data protection powers.
- (An entity that offers training services through a fan page hosted on Facebook and that does not disclose that, through cookies, it stores and processes personal data of visitors).

2018 06 05 (C-574/16), Grupo Norte Facility.

ECJ Judgment (Grand Chamber) of 5 June 2018 (C-574/16), Grupo Norte Facility.

ECLI:EU:C:2018:390.

- *Ángel Moreira Gómez v. Grupo Norte Facility, S.A.*
- Request for a preliminary ruling from the High Court of Justice of Galicia.
- (Directive 1999/70, Temporary work): EU law does not preclude the compensation for the end of the relief contract from being lower than that due when other temporary contracts end or when there is a dismissal for objective reasons.

- Objective dismissal in a permanent contract and the end of a temporary contract due to its planned termination are magnitudes developed in a “significantly different context”; in the second case a “term” known from the conclusion of the contract operates, and in the first there is “advent of circumstances”.
- Spanish law does not have “any difference in treatment” between fixed-term work and permanent work with respect to objective dismissal.
- (Cleaning laborer hired in November 2012 as a reliever, until the retirement, in September 2015, of the relieved worker, at the time her own mother).

2018 06 05 (E-677/16), Montero Mateos.

ECJ (Grand Chamber) of 5 June 2018 (C-677/16), Montero Mateos.
ECLI:EU:C:2018:393.

- *Lucía Montero Mateos v. Madrid Social Care Agency of the Ministry of Social Policies and Family of the Community of Madrid.*
- Request for a preliminary ruling from the Juzgado de lo Social n.º 33 de Madrid.
- (Directive 1999/70 on temporary work): EU law does not preclude the regulation according to which there is no right to compensation when an interim contract ends due to a vacancy, while permanent workers do receive it on the occasion of the termination of their employment contract for an objective reason.
- Without prejudice to the foregoing, “it is for the referring court to examine whether, in view of the unpredictability of the termination of the contract and its unusually long duration, it is necessary to reclassify it as a permanent contract”.
- (After a brief replacement contract, in February 2008 the worker began to fill a vacant position, affecting the call for job consolidation for hospitality assistants activated in October 2009; in July 2016 the process ended unfavourably for the worker and she was dismissed at the end of September).

2018 06 06 (C-250/17), Tarragó da Silveira.

ECJ Judgment of 6 June 2018 (C-250/17), Tarragó da Silveira.
ECLI:EU:C:2018:398.

- *Virgílio Tarragó da Silveira v. Massa Insolvente da Espírito Santo Financial Group, S.A.*

- Request for a preliminary ruling from the Supreme Court of Justice (Portugal).
- EU law (Regulation 1346/2000, Insolvency proceedings) prescribes that when proceedings are opened for a claim for payment (in the First State) against a person who has already been declared insolvent (in respect of all his assets) by a court of another Member State (Second), the effects are those provided for by the legislation of the First State.
- (Professional, domiciled in London, who claims before the courts of Portugal his bill from the Bank, the corporate insolvency proceedings being open in Luxembourg, where the registered office is located).

2018 06 21 (C-1/17), Petronas Lubricants Italy.

ECJ Judgment of 1 June 2018 (C-1/17), Petronas Lubricants Italy.
ECLI:EU:C:2018:478.

- *Petronas Lubricants Italy SpA v. Livio Guida*.
- Request for a preliminary ruling from the Corte di Appello di Torino (Italy).
- (Regulation 44/2001, judicial jurisdiction): EU law allows the defendant company in the country where the contract was concluded (Italy) to agree in this procedure, claiming from its employee the payment of a significant amount of money allegedly defrauded in the State where he has been stationed (Poland).
- (Italian manager moved to run Polish subsidiary and dismissed 18 years later; dismissal claim in Italy; company counterclaims for restitution of large amounts).

2018 06 26 (E-451/16), MB.

ECJ Judgment (Grand Chamber) of 26 June 2018 (C-451/16), MB.
ECLI:EU:C:2018:492.

- *MB v. Secretary of State for Work and Pensions*.
- Request for a preliminary ruling from the Supreme Court of the United Kingdom.
- (Directive 79/7, Equal treatment in Social Security): EU law precludes a transsexual (male) person from having to meet the requirement of not being married to another person of his or her new sex (female) in order to qualify for a retirement pension under the (most advantageous) conditions legally applied to persons (women) of the acquired sex.

- The situation of a person who has changed sex after marriage is comparable to the situation of a person who has retained his or her sex at birth and is married. Discrimination against them must be avoided.
- (The case: after living as a man and marrying a woman, years later he changes sex but does not dissolve his marriage; retirement as a woman is of interest, which determines the age of access).

2018 06 27 (C-246/17), Diallo.

ECJ Judgment of 27 June 2018 (C-246/17), Diallo.

ECLI:EU:C:2018:499.

- *Ibrahima Diallo against the Belgian State.*
- Request for a preliminary ruling from the Conseil d'État (acting as Supreme Court, Belgium).
- (Directive 2004/38/EC, free movement): EU law requires that the application for a residence permit for a family member be adopted and notified within six months. However, exceeding the deadline cannot lead to the granting of the permit without verifying that its requirements are met.
- The judicial annulment of the decision rejecting the permit does not reopen a period of six months.
- (A Guinean who is the father of a Dutch child and resident in Belgium applies for family reunification).

2018 06 28 (C-2/17), Crespo Rey.

ECJ Judgment of 28 June 2018 (C-2/17), Crespo Rey.

ECLI:EU:C:2018:511.

- *National Institute of Social Security v. Jesús Crespo Rey.*
- Request for a preliminary ruling from the High Court of Justice of Galicia.
- (Regulation 883/2004, Social Security migrants; EU-Switzerland Agreement): EU law precludes migrant workers (returnees) who sign a special agreement with Social Security from only being able to contribute for the minimum base, without the possibility of opting for a higher base.
- This conclusion derives from the fact that the Spanish regulation is detrimental to the calculation of the regulatory base (retirement) since Regulation 883 provides that for the time contributed in another State, the contribution base in Spain that is closest to that is taken and that leads to the one applied for the special agreement signed after the return.

- (Worker who contributed in Spain from 1965 to 1980; in Switzerland from 1984 to 2007; again in Spain [with special agreement] from 2007 to 2014, date of retirement).

2018 06 28 (E-57/17), Czech Honored.

ECJ Judgment of 28 June 2018 (C-57/17), Checa Honrado.

ECLI:EU:C:2018:512.

- *Eva Soraya Checa Honrado v. Wage Guarantee Fund.*
- Request for a preliminary ruling from the High Court of Justice of the Valencian Community.
- (Directive 2008/94/EC, Employer insolvency): for the purposes of FOGASA, compensation for termination at the request of the transferred worker must be treated in the same way as those arising from objective dismissal.
- Workers whose employment relationship has been terminated pursuant to Article 40 of the SW are in a situation comparable to that of workers whose contract has been terminated for one of the objective reasons provided for in Articles 50 to 52 of the SW.
- (Terra Mítica cleaner transferred to Madrid theme park; part of the compensation of €7,454 is not paid by the company, declared insolvent; the Fund rejects its payment ex art. 33 SW because the contract has been terminated by the worker's will).

2018 07 10 (E-25/17), Jehovah todistajat.

ECJ (Grand Chamber) of 10 July 2018 (C-250/17), Jehovan todistajat.

ECLI:EU:C:2018:551.

- *Tietosuojavaltuutettu with the intervention of Jehovah todistajat — uskonnollinen yhdyskunta.*
- Request for a preliminary ruling from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland).
- (Directive 95/46/EC, Personal Data): For EU law, the collection carried out by Jehovah's Witnesses in their home apostolate does not constitute the processing of personal data.
- For EU law, a "file" is the set of data of the apostolate carried out (names, address) if they can be easily retrieved for later use.
- The Religious Organization is responsible for the processing of personal data by its members in connection with their door-to-door apostolate, even if it has not given written instructions on the subject.

2018 07 11 (C-356/15), Commission v Belgium.

ECJ judgment of 11 July 2018 (C-356/15), Commission v. Belgium.
ECLI:EU:C:2018:555.

- *European Commission v. Kingdom of Belgium.*
- Appeal for non-compliance.
- The Belgian law that lays down conditions different from those of Regulation 883 with regard to the validity of certificates issued by the competent institution in the field of social security is contrary to EU law.

2018 07 11 (C-60/17), Somoza Hermo and Ilunion Seguridad.

ECJ Judgment of 11 July 2018 (C-60/17), Somoza Hermo and Ilunion Seguridad.
ECLI:EU:C:2018:559.

- *Ángel Somoza Hermo v. Ilusión Seguridad, S.A., Esabe Vigilancia, S.A. and Fondo de Garantía Salarial (Fogasa).*
- Request for a preliminary ruling from the High Court of Justice of Galicia.
- (Directive 2001/23, Transfer of undertakings): the EU subrogation regime applies when the surveillance contractor company changes and the new one takes over (under the mandate of the agreement) an essential part of the workforce.
- The solution set out above is conditional on the transaction being accompanied by the transfer of an economic entity between the two companies concerned.
- (Guard of the Compostela Museum to whom the outgoing company owes certain amounts that the incoming company does not recognize, under the protection of the collective agreement).

2018 07 25 (E-679/16), A (Aid for Persons with Disabilities).

ECJ Judgment of 25 July 2018 (C-679/16), A (Aid for people with disabilities).
ECLI:EU:C:2018:601.

- *A with the intervention of Espoon kaupungin sosiaali- ja terveystalouden yksilöasioiden jaosto.*
- Request for a preliminary ruling from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland).
- (Regulation 883/2004): The payment of expenses incurred by the day-to-day activities of a severely disabled person who does not carry out any economic activity, in order to enable him or her to pursue higher

education, does not fall under the concept of “sickness benefit” for the purposes of EU law.

2018 07 25 (E-96/17), Vernaza Ayovi.

ECJ Judgment of 25 July 2018 (C-96/17), Vernaza Ayovi.

ECLI:EU:C:2018:43.

- *Gardenia Vernaza Ayovi v. Consorci Sanitari de Terrassa*).
- Request for a preliminary ruling from the Juzgado de lo Social No 2 de Terrassa (Barcelona).
- (Directive 1999/70, temporary jobs): EU law does not preclude the unfair disciplinary dismissal of a permanent public employee from leading to reinstatement (art. 96.2 EBEP), without this occurring when he or she is temporary or indefinite non-permanent (art. 56.1 SW).
- The requirements of Spanish public employment (equality, merit, ability), the employer’s predicate qualifications (impartiality, efficiency, independence) and its better accommodation with a stable job justify the different regime.
- That inequality is justified by the existence of precise and concrete elements which characterise the working condition in question, in the specific context in which it is framed and in accordance with objective and transparent criteria.
- (Non-permanent indefinite nurse, dismissed when she refused part-time employment after her leave of absence).

2018 07 25 (E-338/17), Guigo.

ECJ Judgment of 25 July 2018 (C-338/17), Guigo.

ECLI:EU:C:2018:605.

- *Virginie Marie Gabrielle Guigo v Substance “Garantirani vzemania na rabotnitsite i služhitelite”*.
- Request for a preliminary ruling from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria).
- (Directive 2008/94/EC, insolvency): EU law is compatible with a law that does not guarantee wage claims when the employment contract has been terminated more than three months before the decision to open the employer’s insolvency proceedings was registered in the Commercial Register.
- The financial capacity of States and the need to preserve the financial balance of guarantee institutions must be taken into account.

2018 08 07 (C-472/16), Colino Sigüenza.

ECJ judgment of 7 August 2018 (C-472/16), Colino Sigüenza.

ECLI:EU:C:2018:646.

- *Jorge Luís Colino Sigüenza v. City Council of Valladolid.*
- Request for a preliminary ruling from the High Court of Justice of Castilla y León.
- (Assumption: the concessionaire of the management of the Municipal School of Music ends it two months before the end of the academic year, dismisses the staff and returns the material means to the City Council, which makes a new award for the following academic year, providing the new awardee with the same infrastructure).
- (Directive 2001/23/EC, transfer of undertaking): in these circumstances (material means are essential) there could be a transfer of undertaking, since the paralysis of the activity for a few months does not mean that the economic unit as such has disappeared.
- In this case, collective dismissal may be admitted (for economic, technical, organisational or production reasons) provided that the circumstances that have caused it and the delay in the appointment of a new contractor are not part of a fraudulent scheme.

2018 08 07 (E-61/17 and others), Bichat.

ECJ Judgment of 7 August 2018 (C-61, 62 and 72/17), Bichat.

ECLI:EU:C:2018:653.

- *Miriam Bichat and Others v. APSB (Aviation Passage Service Berlin GmbH & Co. KG).*
- Requests for a preliminary ruling from Landesarbeitsgericht Berlin (Regional Labour Court, Berlin-Brandenburg, Germany).
- (Directive 98/59/EC, collective redundancies): it is the “undertaking exercising control over the employer” which may exercise a decisive influence over its decision-making bodies and compel it to examine or plan collective redundancies.
- To determine whether a company controls another, it is possible to take into account its participation in the share capital or its decisive influence on decisions (even if it does not have a majority), but it is not enough to look at the factual circumstances.

(In the case: a service company, for an airport manager, changes ownership and undertakes labor restructuring after suffering losses).

2018 08 07 (E-123/17), Yün.

ECJ Judgment of 7 August 2018 (C-123/17), Yün.

ECLI:EU:C:2018:632.

- *Nefiye Yön v. Landeshauptstadt Stuttgart*.
- Request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany).
- Making family reunification in favour of third-country nationals conditional on the obtaining of a visa may be justified by the need to control migratory flows only if proportionality is respected (without going beyond what is necessary to achieve the objective pursued).
- (Turkish baker who works legally in Germany; his wife, of the same nationality, applies for a residence permit after having entered the country irregularly and without proving knowledge of German).

2018 08 21 (C-212/17), Rodríguez Otero.

ECJ Order of 21 August 2018 (C-212/17), Rodríguez Otero.

ECLI:EU:C:2018:690.

- *Simón Rodríguez Otero against Televisión de Galicia and the Public Prosecutor's Office*.
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of Galicia.
- The question referred for a preliminary ruling was closed when the proposing Court withdrew it in view of the doctrine coined in the ECJ (Grand Chamber) of 5 June 2018 (C-574/16), Grupo Norte Facility.

2018 09 06 (C-527/16), Alpenrind and others.

ECJ Judgment of 6 September 2018 (527/16), Alpenrind and others.

ECLI:EU:C:2018:669.

- *Salzburger Gebietskrankenkasse and Bundesminister für Arbeit, Soziales und Konsumentenschutz v Alpenrind GmbH and Others*.
- Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).
- (Regulations 883/2004 and related regulations, Social Security for migrants): EU rules on Social Security are binding on both the managing institutions and the Courts.
- A1 certificates are binding as long as they are not invalidated or withdrawn by the issuing authority, including with respect to their retroactive effects.

- If a posted worker is replaced by another who is posted by a different company, he or she cannot continue to be subject to the legislation of the State of origin.
- (Austrian company employing successively posted workers by Hungarian company for temporary periods; Austrian Social Security considers that they should be included in its System).

2018 09 06 (C-17/17), Hampshire.

ECJ Judgment of 6 September 2018 (17/17), Hampshire.

ECLI:EU:C:2018:674.

- *Grenville Hampshire v. The Board of the Pension Protection Fund*.
- Request for a preliminary ruling from the Court of Appeal (England and Wales, Civil Division).
- (Directive 2008/94/EC, insolvency of the employer): EU law requires that, in the event of the insolvency of the employer, each employee receives at least 50% of his or her acquired rights in a supplementary pension scheme.
- This guarantee can be invoked judicially by the worker (direct effect).
- (Dismissed after 27 years of service, retired early and affected by the subsequent insolvency of the business parent).

2018 09 11 (E-68/17), IR.

ECJ (Grand Chamber) of 11 September 2018 (68/17), IR.

ECLI:EU:C:2018:696.

- *GO AGAINST JQ*.
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 2000/78/EC and Bill of Rights, non-discrimination): it may be contrary to EU law to dismiss a Catholic doctor who works (Director of Service) in a Caritas hospital (attached to the Archbishopric) and enters into a civil marriage after divorce.
- The national court must disapply any rule that is contrary to the full effectiveness of non-discrimination on grounds of religion or belief.
- Virtuality of the CDEU in the area of non-discrimination; primacy of EU law and enforcement in conformity.
- If the church or company with an ideology imposes religious demands on its managerial workers, that decision can be judicially controlled to guarantee non-discrimination.

- Special religious attunement may be required of senior staff only if, given the nature of the professional activities in question or the context in which they are carried out, religion or belief constitutes an essential, legitimate and justified professional requirement in relation to the ethics of the church or organization concerned and in accordance with the principle of proportionality.

2018 09 19 (E-41/17), González Castro.

ECJ Judgment of 19 September 2018 (41/17), González Castro.
ECLI:EU:C:2018:736.

- *Isabel González Castro v. Mutua Univale, Prosegur España S.L. and INSS.*
- Request for a preliminary ruling from the High Court of Justice of Galicia.
- (Directive 92/85/EEC, on occupational safety for pregnant women): EU law on occupational safety for pregnant or breastfeeding women applies to shift workers and with a third of their activity at night.
- (Directive 2006/54 on non-discrimination in employment): the absence of an occupational risk assessment for breastfeeding for a given job constitutes direct discrimination on grounds of sex.
- It is for the worker concerned to establish facts capable of suggesting that the assessment of the risks in her job was not carried out in accordance with the requirements of Directive 92/85 and which may lead to the presumption of direct discrimination on grounds of sex.
- It will be for the defendant to demonstrate that that risk assessment was carried out in accordance with the requirements of that provision and that, therefore, the principle of non-discrimination was observed.

2018 09 19 (E-312/17), Bedi.

ECJ Judgment of 19 September 2018 (312/17), Bedi.
ECLI:EU:C:2018:734.

- *Surjit Singh Bedi v. Bundesrepublik Deutschland and Bundesrepublik Deutschland in Prozessstandschaft für das Vereinigte Königreich von Großbritannien und Nordirland.*
- Request for a preliminary ruling from the Landesarbeitsgericht Hamm.
- (Directive 2000/78, non-discrimination): EU law precludes the collective agreement which provides (for former employees of the Allied Forces in Germany) for the termination of transitional aid (resulting from dismissal, compatible with work) intended to be linked to the retirement pension when the beneficiary is able to receive an early retirement pension provided for severely disabled persons.

2018 09 20 (E-466/17), Motter.

ECJ Judgment of 20 September 2018 (466/17), Motter.

ECLI:EU:C:2018:758.

- *Chiara Motter v. Autonomous Province of Trento.*
- Request for a preliminary ruling from the Tribunale di Trento (Italy).
- (Directive 1999/70, fixed-term work): EU law does not preclude previous previous service rendered, through temporary contracts, from being taken into account for remuneration purposes and after access to civil service through merit-based selection, in full up to the fourth year, but only partially (maximum of 2/3) beyond this limit.
- In order not to undervalue the opposition, a rule such as the one set out above is admissible, despite the fact that it involves different treatment between temporary workers and those who are already civil servants.
- (Secondary school teacher with eight successive contracts, who accesses the civil service and is recognized as previous service 80 months, instead of the 96 worked).

2018 09 26 (E-513/17), Baumgartner.

ECJ Judgment of 19 September 2018 (513/17), Baumgartner.

ECLI:EU:C:2018:772.

- *Proceedings brought by the Bundesamt für Güterverkehr and Staatsanwaltschaft Köln.*
- Request for a preliminary ruling from Amtsgericht Köln (District Court, Cologne, Germany).
- (Regulation 561/2006, road transport): EU law empowers the authorities of a Member State (Germany) to sanction a company or manager for (unsanctioned) infringements discovered in its territory but committed in the State where the company has its registered office (Austria).
- (German traffic control discovers that tachograph has not been activated and its data has not been transferred to the company).

02018 10 02 (C-207/16), Public Prosecutor's Office.

ECJ Judgment (Grand Chamber) of 2 October 2018 (207/16), Public Prosecutor's Office.

ECLI:EU:C:2018:788.

- *Proceedings initiated by the Public Prosecutor's Office.*
- Request for a preliminary ruling from the Audiencia Provincial de Tarragona.

- (Directive 2002/58/EC, data processing; Charter of Fundamental Rights): EU law does not prevent public authorities (Judicial Police) from accessing SIM card data and identifying SIM card holders for the purpose of prosecuting or preventing crime.
- The reference crimes do not need to be “serious”.
- (Violent robbery of a citizen and subsequent use of his phone with several SIM cards; Court denies the evidence because the crime is not serious enough).

2018 10 04 (C-12/17), Dicu.

ECJ Judgment (Grand Chamber) of 4 October 2018 (12/17), Dicu.
ECLI:EU:C:2018:799.

- *Tribunalul Botoșani and Ministerul Justiției v. Maria Dicu.*
- Request for a preliminary ruling from the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania).
- (Directive 2003/88, working time): EU law allows parental leave not to be counted as a period of actual work for determining entitlement to paid annual leave.
- (Magistrate who is on maternity leave until 3 February; parental leave from 4 February to 16 September; holidays from 17 September to 17 October; claims the other 5 days that would normally correspond to her).

2018 10 25 (C-260/17), Anodiki.

ECJ Judgment of 25 October 2018 (260/17), Anodiki.
ECLI:EU:C:2018:864.

- *Anodiki Services EPE v. G.N.A. O Evangelismos – Ofthalmiatreio Athinon – Polykliniki and others.*
- Request for a preliminary ruling from Symvoulío tis Epikrateias (Council of State, Greece).
- (Directive 2014/24/EU, public procurement): EU law on public procurement excludes from its scope employment contracts that are held individually for a certain period of time with persons selected on the basis of objective criteria.
- The principles of equal treatment, transparency and proportionality are not applicable when public hospitals enter into employment contracts to perform certain tasks (catering, cleaning).
- Notwithstanding the foregoing, the right to appeal must be guaranteed by an economic operator who is interested in participating in a con-

tract with the same purpose as the aforementioned employment contracts.

- (Impossibility of calling for staff positions due to anti-crisis regulations, so short-term regulations authorized emergency labor hiring).

2018 10 25 (E-331/17), Sciotto.

ECJ Judgment of 25 October 2018 (331/17), Sciotto.

ECLI:EU:C:2018:859.

- *Martina Sciotto v. Fondazione Teatro dell'Opera di Roma.*
- Request for a preliminary ruling from the Corte d'appello di Roma (Court of Appeal, Rome, Italy).
- (Directive 1999/70, temporary contracts): EU law precludes (artistic) activity in opera and symphonic foundations from being excluded from the rules on the conversion of abusive temporary contracts into permanent contracts if there is no other effective measure to sanction such abuses.
- (Dancer of the Roman Opera, hired temporarily and successively extended for performances from 2007 to 2011).

2018 10 25 (E-426/17), Barba Giménez II.

ECJ Order of 25 October 2018 (426/17), Barba GiménezII.

ECLI:EU:C:2018:858.

- *Elena Barba Giménez vs. Francisca Carrión Lozano.*
- Request for a preliminary ruling from Juzgado de lo Social No 2 de Terrassa (Barcelona).
- Lack of jurisdiction of the ECJ to determine whether it is consistent with Article 47 of the Convention on the Functioning of the European Union for the worker to be required to pay a fee to appeal in the context of a compulsory enforcement procedure in order to obtain a judicial declaration of insolvency of the employer and thus have recourse to FOGASA.

2018 10 25 (E-451/17), Walltopia.

ECJ Judgment of 25 October 2018 (451/17), Walltopia.

ECLI:EU:C:2018:861.

- *Walltopia AD contra Direktor na Teritorialna direktsia na Natsionalnata agentsia za prihodite – Veliko Tarnovo.*
- Request for a preliminary ruling from Administrativen sad Veliko Tarnovo (Bulgaria).

- (Regulation 987/2009, Social Security migrants): EU rules on free movement (and subjection to the Social Security system of the State of origin) cover those who reside in the base State and are hired to be posted, even if they were previously unaffiliated and registered.
- (A Bulgarian company that enters into a contract with a national of that country and also resident in Bulgaria, to move him the next day to Switzerland and shortly afterwards to the United Kingdom).

2018 11 06 (C-569/16 and 570/16), Bauer.

ECJ (Grand Chamber) of 6 November 2018 (569/16 and 570/16), Bauer. ECLI:EU:C:2018:871.

- *Stadt Wuppertal v. Volker Willmeroth als Inhaber der TWI Technische Wartung; Instandsetzung Volker Willmeroth e. K. against Maria Elisabeth Bauer and Martina Broßonn.*
- Requests for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 2003/88, working time and art. 31.2 of the Convention on the Functioning of the European Union): EU law precludes the termination of the worker's right to unused leave without financial compensation for his or her heirs.
- The heirs of the worker can claim this compensation because it is a transferable right mortis causa.
- (Primacy of EU law): The above prevails over any national regulation as it follows from Directive 2003/88 (for public employers) and the Charter of Fundamental Rights (for private employers).
- Relevance of the CEFEU because even a clear, precise and unconditional provision of a directive cannot be applied as such in the context of a dispute between individuals.
- (Widow of a municipal employee who claims payment for the 25 days of vacation not taken by her husband).

2018 11 06 (E-619/16), Kreuziger.

ECJ Judgment (Grand Chamber) of 6 November 2018 (619/16), Kreuziger.

ECLI:EU:C:2018:872.

- *Sebastian W. Kreuziger v. Land Berlin.*
- Request for a preliminary ruling from Oberverwaltungsgericht Berlin-Brandenburg (Federal Court of Appeal, Berlin-Brandenburg, Germany).

- (Directive 2003/88, working time): EU law precludes the revocation of the right to leave on the ground that it has not been requested before the end of the employment relationship; unless there is an express decision (deliberate, conscious) to the contrary.
- If the employer does not demonstrate the necessary diligence to enable the worker to have taken his holidays (informing him adequately), he should not be deprived of the financial compensation for those not taken.
- The employer must ensure the effective enjoyment of the vacations, having the burden of proving that this has been the case.
- (*Trainee lawyer, in the service of the Administration, for two years; decides not to take holidays and only when his activity ends does he request his economic equivalent*).

2018 11 06 (C-684/16), Max-Planck-Gesellschaft zur Förderung der Wissenschaften.

ECJ (Grand Chamber) of 6 November 2018 (684/16), Max-Planck-Gesellschaft zur Förderung der Wissenschaften.

ECLI:EU:C:2018:874.

- *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. against Tetsuji Shimizu.*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 2003/88, working time; art. 31.2 of the CFEU): EU law precludes the revocation of the right to leave when it has been omitted to request it within the period of enjoyment and it is not proven that the employer facilitated its exercise.
- Unless the employer proves the diligence necessary to enjoy the holidays (proactive attitude), the worker must not be deprived of his financial compensation by equivalence.
- If the employer proves that the worker deliberately refrained from taking his or her annual leave even though he or she could have done so, EU law does not preclude the loss of the right (including the monetary equivalent).
- (Temporary contract from 2001 to 2013; on 23 October the employer urges him to take holidays, but he only enjoys two days; after the termination he claims the amount of the 51 days not taken in 2012 and 2013).

2018 11 13 (E-33/17), *vepelnik*.

ECJ Judgment (Grand Chamber) of 13 November 2018 (33/17), *vepelnik*.
ECLI:EU:C:2018:896.

- *vepelnik d.o.o. vs. Michael Vavti (Austria)*.
- Request for a preliminary ruling from Okrajno Sodišve Pliberk (District Court, Bleiburg, Austria).
- (Directive 2006/123, services in the internal market): EU law precludes a State, in order to guarantee the collection of an administrative sanction of a social nature, from requiring the owner of a work to withhold (or guarantee) payment to the infringing contractor who is established in another State.
- Such a measure may deter nationals from entrusting services to third-State companies. It is disproportionate that it is applied before the administrative authority has imposed the sanction for non-compliance.
- (Slovenian company that builds housing in Austria and the Inspectorate detects possible breaches of local labour legislation: it does not have payslips in German and has not reported the activity of two posted workers).

2018 11 14 (C-18/17), *Danieli & C. Officine Meccaniche and others*.

ECJ judgment of 14 November 2018 (18/17), *Danieli & C. Officine Meccaniche and others*.
ECLI:EU:C:2018:904.

- *Danieli & C. Officine Meccaniche SpA and Others v Arbeitsmarktservice Leoben*.
- Request for a preliminary ruling from Verwaltungsgerichtshof (Austria).
- (Directive 96/71 posting of workers; Articles 56 and 57 TFEU): EU law does not allow State A (Austria) to require a work permit from nationals of B (Croatia) when they have been placed at the disposal of an undertaking of C (Italy) by another company of the same group and domicile, in order to provide services in A (Austria).

2018 11 15 (C-457/17), *Maniero*.

ECJ Judgment of 15 November 2018 (457/17), *Maniero*.
ECLI:EU:C:2018:912.

- *Heiko Jonny Maniero vs. Studienstiftung des deutschen Volkes e.V.*

- Request for a preliminary ruling from the Bundesgerichtshof (Supreme Court, Germany).
- (Directive 2000/43/EC, non-discrimination): EU law projects its requirements of non-discrimination in the field of education on grants for further studies abroad, the obtaining of which is linked to subsequent participation in research projects.
- It is not discriminatory that scholarships awarded by a private foundation are limited to those who have passed a law examination in the State where it is domiciled.
- (An Italian born and raised in Germany, he obtained a law degree from the University of Armenia; he applied for a scholarship for further studies and the rules required passing the first German state legal examination, Erste Juristische Staatsprüfung, when his Armenian degree was equivalent to the second state legal examination, Zweite Juristische Staatsprüfung).

2018 11 20 (E-147/17), Sindicatul Familia Constanva.

ECJ Judgment of 21 November 2018 (147/17), Sindicatul Familia Constanva.

ECLI:EU:C:2018:926.

- *Sindicatul Familia Constanva and others v. Direcția Generală de Asistență Socială și Protecția Copilului Constanva.*
- Request for a preliminary ruling from Curtea de Apel Constanva (Court of Appeal, Constanța, Romania).
- (Directive 2003/88 on working time): EU law on working time does not apply to the activity of professional foster carers.
- These are people who have an employment relationship with a public administration and who welcome and integrate a minor into their home, continuously ensuring their harmonious development and education.
- (Professional foster parents, in their own home, of minors whose parents are deprived of their custody).

2018 11 21 (E-619/17), by Diego Porras II.

ECJ Judgment of 21 November 2018 (619/17), De Diego Porras II.

ECLI:EU:C:2018:936.

- *Ministry of Defense against Ana de Diego Porras.*
- Request for a preliminary ruling from the Supreme Court.
- (Directive 1999/70/EC, temporary contracts): EU law does not preclude the absence of compensation at the end of an interim contract

because it arises in a “significantly different context” (initial knowledge of the date or event of termination) than that of the objective dismissal (unforeseen nature, frustration of legitimate expectations).

- Compensation under 49.1.c SW: the SC must decide whether it is a measure to prevent abuse in temporary employment (“abusive use of successive contracts”) or an equivalent measure, although it does not seem so (“at first glance”) because it is paid outside of abuses.
- (Only if the previous answer has been affirmative): That there is no compensation of 12 days in interim (and there is in other temporary ones) is in accordance with EU law “unless there is no other effective measure in the national legal system to prevent and sanction abuses with respect to the latter workers”.

2018 11 21 (C-245/17), *Viejobueno Ibáñez and de la Vara González*.

ECJ Judgment of 21 November 2018 (245/17), *Viejobueno Ibáñez and de la Vara González*.

ECLI:EU:C:2018:934.

- *Pedro Viejobueno Ibáñez and Emilia de la Vara González v. Ministry of Education of Castilla-La Mancha*.
- Request for a preliminary ruling from the High Court of Justice of Castilla-La Mancha.
- (Directive 1999/70, temporary jobs): EU law does not preclude the dismissal of temporary teachers at the end of the academic year (as there are no “reasons of necessity and urgency to which their appointment was subject”), while the indefinite employment relationship of teachers who are career civil servants is maintained.
- (Directive 2003/88, working time): EU law does not preclude the dismissal of temporary teachers at the end of the academic year, even if this deprives them of holidays, provided that they are compensated for this concept.

2018 12 04 (C-378/17), *Minister for Justice and Equality and Commissioner of the Garda Síochána*.

ECJ (Grand Chamber) of 4 December 2018 (378/17). *Minister for Justice and Equality and Commissioner of the Garda Síochána*.

ECLI:EU:C:2018:979.

- *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission*.

- Request for a preliminary ruling from the Supreme Court.
- Each State is competent to determine how to review the validity of domestic laws and to declare their non-application in general.
- But EU law (primacy) requires that any body (judicial or administrative) may disapply the national rule (whatever its rank) that contradicts it, without the need to wait for a general declaration on the matter.
- (Directive 2000/78, non-discrimination): EU law precludes the State from setting up a specific body to ensure its application and not conferring on it competence to decide on the non-application of contrary national rules.
- (Aspiring police officers who complain to the competent administrative body, because they have been excluded because of their age).

2018 12 06 (C-675/17), Preindl.

ECJ Judgment of 6 December 2018 (675/17), Preindl.

ECLI:EU:C:2018:990.

- *Ministero della Salute v. Hannes Preindl*.
- Request for a preliminary ruling from Consiglio di Stato (Italy).
- (Directive 2005/36 on the recognition of diplomas): EU law requires the automatic recognition of evidence of education and training awarded in another State (Austria) after completion of partially concomitant training, even if the third State (Italy) prohibits simultaneous enrolment in them and requires exclusive dedication to take them.
- EU law precludes the host State from verifying whether the substance (curriculum, duration) of the qualification obtained abroad is comparable to that of its own degrees.
- (Italian studying Dentistry and Medicine in Austria, having lasted 15 months in the second degree, compared to 6 years in Italy).

2018 12 13 (E-385/17), Hein.

ECJ Judgment of 13 December 2018 (385/17). Hein.

ECLI:EU:C:2018:1018.

- *Torsten Hein v. Albert Holzkamm GmbH & Co.*
- Request for a preliminary ruling from Arbeitsgericht Verden (Labour Court, Verden, Germany).
- (Directive 2003/88, working time; art. 31.2 of the Convention on the Functioning of the European Union): EU law does not preclude the

duration of holidays from being reduced in proportion to the time during which the work has not been performed (reduction or suspension of working hours) for business reasons.

- EU law requires that the remuneration of guaranteed holidays (those proportional to the time actually worked) is not affected by the previous reduction in working time motivated by business needs. This rule cannot be derogated from by means of a collective agreement.
- The remuneration for the guaranteed holiday period should only include overtime when it is very foreseeable and habitual.
- The temporal effects of the judgment (although it contradicts national jurisprudence) cannot be limited by invoking legal certainty or legitimate expectations in the authorities.
- (Inactive formwork during half of the year, for business reasons).

2019

2019 01 15 (C-258/17), E.B.

ECJ Judgment (Grand Chamber) of 15 January 2019 (C-258/17). E.B.
ECLI:EU:C:2019:17.

- *E.B. v. Versicherungsanstalt öffentlich Bediensteter BVA*.
- Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).
- From 3 December 2008 (end of transposition period), Directive 2000/78 (non-discrimination) applies to the future effects of a final and previous penalty.
- After the entry into force of the Directive, it is not possible to review the previous firm and discriminatory disciplinary sanction, but it is possible to review the reduction of the amount of the retirement pension, in order to neutralise discrimination on the grounds of sexual orientation.
- A pension is considered a “working condition” if it is based on the time worked and the salary received, linked to the employer and not to the social protection system.
- (Male policeman who proposes sexual relations to two underage men and is forcibly retired, at the age of 33, applying rules that penalize this behavior more severely than when it is lesbian or heterosexual).

2019 01 22 (E-193/17), Cresco Investigation.

ECJ Judgment (Grand Chamber) of 22 January 2019 (C-193/17). Cresco Investigation.

ECLI:EU:C:2019:43.

- *Cresco Investigation GmbH v. Markus Achatzi*.
- Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Contentious Court, Austria).
- (Directive 2000/78, non-discrimination; art. 21 CFEU): EU law precludes the Good Friday only from being released (or receiving a substitute supplement) by those who belong to certain Christian Churches (four minority confessions), without requiring them to practice a religious practice in accordance with it.
- Existence of discrimination on religious grounds that is not necessary (or proportionate) to protect the rights of a minority.
- Combined play of the Directive and the CFEU: mandatory and directly applicable principle of non-discrimination; interpretation of national law in conformity with the law.
- EU law requires that those who do not belong to the Churches of reference enjoy the same benefits, thus neutralizing direct discrimination on the grounds of religion, even if the employer is private.
- (An employee who does not belong to one of the minority churches in Austria, whose faithful are exempted from working on Good Friday or are paid a supplementary salary if they have to; he actually works on that day and requests €109 as compensation).

2019 01 23 (E-272/17), Zyla.

ECJ Judgment of 23 January 2019 (C-272/17), Zyla.

ECLI:EU:C:2019:49.

- *K.M. Zyla v. Staatssecretaris van Financiën*.
- Request for a preliminary ruling from Hoge Raad der Nederlanden (Supreme Court of the Netherlands).
- (Art. 45 TFEU, free movement of workers): EU law does not preclude proportionality from being applied to determine the annual reduction applicable to personal income tax and social security contributions, taking into account only the time of affiliation in the competent State, excluding the time of residence in another Member State.
- (Polish worker who is active in the Netherlands from 1 January to 21 June and then moves to Poland; she must pay taxes and contributions in respect of what she has worked during that period; it is disputed whether the general reduction for inactivity should be applied in the light of the time spent in Poland).

2019 01 24 (C-477/17), Balandin.

ECJ Judgment of 24 January 2019 (C-477/17), Balandin.

ECLI:EU:C:2019:60.

- *Raad van bestuur van de Sociale verzekeringsbank v D. Balandin and Others.*
- Request for a preliminary ruling from Centrale Raad van Beroep (Central Court of Appeal, Netherlands).
- (Regulation 1231/2010, extending the scope of application of Regulations 883/2004 and 987/2009, Social Security migrants): third-country nationals who work and reside temporarily in different Member States for an employer established in one Member State, may invoke the Community coordination rules to determine the applicable Social Security legislation, provided that they remain and work legally in the territory of the Member States.
- EU provisions should be interpreted and applied in a uniform manner, in the light of the existing versions in all the languages of the Union. In the event of divergence, the general structure and purpose of the regulations in which it is integrated must be taken into account.
- (Ice skaters, not EU nationals, hired by a Dutch company; after a few weeks of training and preparation in the Netherlands, they tour several countries).

2019 02 07 (E-322/17), Bogatu.

ECJ Judgment of 7 February 2019 (C-322/17), Bogatu.

ECLI:EU:C:2019:1026.

- *Eugen Bogatu v. Minister for Social Protection.*
- Request for a preliminary ruling from the High Court (Ireland).
- (Regulation 883/2004, Social Security): in order for a person to be able to receive family benefits in the competent Member State, it is not required either that person to carry out an activity as an employee in that Member State or that person to receive a cash benefit for the fact or as a consequence of that activity.
- (Romanian citizen working in Ireland from 2003 to 2009; two minor children reside in Romania; loses work and exhausts contributory unemployment; when receiving welfare benefit is refused child benefit).

2019 02 07 (C-49/18), Escribano Vindel.

ECJ Judgment of 7 February 2019 (C-49/18), Notary Vindel.

ECLI:EU:C:2019:106.

- *Carlos Escribano Vindel v. Ministry of Justice*.
- Request for a preliminary ruling from the High Court of Justice of Catalonia.
- (Directive 2000/78, non-discrimination; art. 21 of the Convention on the Functioning of the European Union): EU law does not prevent reductions in the remuneration of the judiciary even if, in a context of crisis and restriction of public spending, they affect lower categories more in percentage, generally with younger age and seniority.
- Judicial protection is a general principle of EU law, inherent in the rule of law, and which requires the independence of judicial bodies.
- (Art. 19.1 TEU): the principle of judicial independence (autonomy) requires that judges receive remuneration commensurate with the importance of their functions, but does not preclude them from being affected by general salary reduction measures, linked to imperative requirements for the elimination of excessive budget deficits.
- (Labour Magistrate who challenges his 2011 payslips, as it entails a considerable decrease with respect to the remuneration of the previous year and affects unequally the various categories: 7.16, 6.64 or 5.90%). The Plenary of the Constitutional Court had previously rejected the question of unconstitutionality.

2019 02 14 (E-345/17), Buivids.

ECJ Judgment of 14 February 2019 (C-345/17), Buivids.

ECLI:EU:C:2019:122.

- *Sergejs Buivids with the participation of Datu valsts inspekcija (State Data Protection Agency, Latvia)*.
- Request for a preliminary ruling from the Augstākā tiesa (Supreme Court, Latvia).
- Scenario: video recording of police officers in a police station, during a statement, and posting the video on a website where users can send, view and share them.
- The case falls within the scope of Directive 95/46/EC (processing of personal data).
- This may constitute the processing of personal data for journalistic purposes only, if the only aim is to disclose information, opinions or ideas to the public, which must be verified by the referring court.

2019 02 14 (E-154/18), Horgan and Keegan.

ECJ Judgment of 14 February 2019 (C-154/18), Horgan and Keegan.
ECLI:EU:C:2019:113.

- *Thomas Horgan and Claire Keegan v. Minister for Education & Skills.*
- Request for a preliminary ruling from the Labour Court (Ireland).
- (Directive 2000/78/EC, non-discrimination): under EU law there is no discrimination (indirect, on the basis of age) when teachers recruited after a certain date are integrated at a lower salary and professional level than that previously applied.
- The objective pursued (structural cost reduction) justifies the measure, even if the group affected is mostly under 25 years of age.
- Validation of a “criterion, which makes the application of the new rules depend only on the date of incorporation as an objective and neutral element”.
- (Teachers incorporated after 1 January 2011, with remuneration 10% lower than those received by those who joined earlier; in addition, they are integrated into the first salary step, while those who joined before that date accessed step 2 or 3. “Double salary scale”, in usual terminology).

2019 02 28 (E-579/17), Gradbeništvo Korana.

ECJ Judgment of 14 February 2019 (C-154/18), Gradbeništvo Korana.
ECLI:EU:C:2019:162.

- *BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse and Gradbeništvo Korana d.o.o.*
- Request for a preliminary ruling from the Arbeits und Sozialgericht Wien (Labour and Social Court, Vienna, Austria).
- Regulation 1215/2012 (jurisdiction and enforcement of judicial decisions) applies to the claim recognised in favour of a public body that claimed contributions (holiday pay supplement) from a company arising from the transnational posting of its employees.
- The jurisdiction of reference does not preclude the competent court from reviewing the origin of the data on which the finding of the aforementioned credit is based.

2019 03 13 (E-437/17), Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach.

ECJ Judgment of 13 March 2019 (C-437/17), Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach.
ECLI:EU:C:2019:193.

- *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH vs. EurothermenResort Bad Schallerbach GmbH*.
- Request for a preliminary ruling from Oberster Gerichtshof (Supreme Court, Austria).
- (Art. 45 TFEU and Regulation 492/2011; freedom of movement and non-discrimination on grounds of nationality): EU law does not preclude the fact that in order to determine the right to an increase in leave (by one week) for having 25 years of professional experience, only a maximum of five years of that provided in companies other than the current one is taken into account.
- It is not proven that the reference rule is more detrimental to those who do not have Austrian nationality (absence of discrimination on the basis of nationality), nor is the treatment worse for those who have changed companies by going to another State (absence of an obstacle to freedom of movement).
- (The case: collective dispute in an Austrian company, in the tourism sector, for which several people work, generally with previous professional activity in other EU countries).

2019 03 14 (E-134/18), Vester.

ECJ Judgment of 14 March 2019 (C-134/18), Vester.

ECLI:EU:C:2019:212.

- *Maria Vester vs. Rijksinstituut voor ziekte- en invaliditeitsverzekering*.
- Request for a preliminary ruling from Arbeidsrechtbank Antwerpen (Labour Court, Antwerp, Belgium).
- (Articles 45 and 48 TFEU, freedom of movement): EU law precludes a worker who has been incapacitated for work for one year and who is recognised by the State of residence as disabled (although without entitlement to a pension) from being required by the competent State (even if totalled) to be required by an additional period of one year of incapacity for work in order to recognise his or her disabled status and to grant him or her a benefit of prorated disability, without receiving benefit in the meantime.
- (Dutch woman who works in her country from 1997 to 2015, lives in Belgium and begins to collect unemployment there; Belgium grants her benefit for incapacity for work, totaling, and the condition of disabled; he then applies for a permanent disability pension in the Netherlands).

2019 03 19 (C-293/18), CCOO.

ECJ Order of 19 March 2019 (C-293/18). CCOO.

ECLI:EU:C:2019:224.

- *National Union of CC. OO. of Galicia against UGT, CIG and University of Santiago de Compostela.*
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of Galicia.
- (Directive 1999/70, temporary jobs): EU law on non-discrimination in fixed-term employment applies to university staff linked by pre-doctoral contracts.
- EU law is compatible with Spanish legislation, which does not provide for the payment of any compensation to workers with pre-doctoral contracts at the end of the term, although it is granted to permanent workers on the occasion of the termination of their employment contract for an objective reason.
- (Collective dispute seeking compensation for the end of predoctoral contracts, despite being formative and provided for in art. 49.1.c SW that they lack it).

2019 03 21 (C-465/17), Falck Rettungsdienste and Falck.

ECJ Judgment of 21 March 2019 (C-465/17), Falck Rettungsdienste and Falck.

ECLI:EU:C:2019:234.

- *Falck Rettungsdienste GmbH and Falck A/S v Stadt Solingen.*
- Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany).
- (Directive 2014/24, Public procurement): EU law on public procurement exempts the activity of urgent and medically assisted medical transport (ambulance with qualified personnel).
- This exception seeks to preserve the special nature of non-profit organizations, preventing them from being subject to general bidding procedures; but the exception must not go beyond what is strictly necessary.
- The fact that a State configures certain associations as civil protection and defence organisations does not equate them with “non-profit” organisations contemplated by EU law.

2019 04 04 (E-699/17), Allianz Vorsorgekasse.

ECJ Judgment of 11 April 2019 (C-699/17), Allianz Vorsorgekasse.

ECLI:EU:C:2019:290.

- *Proceedings brought by Allianz Vorsorgekasse AG.*

- Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).
- (Art. 49 TFEU, freedom of establishment; Art. 56 TFEU, freedom to provide services): EU law (equal treatment, non-discrimination, transparency) applies to the agreement between the public employer and the Company that is to manage the contributions through which the compensation for the termination of each employment contract will be paid, where appropriate, (“Austrian backpack”).
- The obligation of transparency requires the contracting authority to have an adequate degree of publicity in order to make it possible, on the one hand, to open up award procedures to competition and, on the other hand, to monitor their impartiality.
- These obligations do not disappear because the award requires the consent of the staff or the works council.
- (Assumption: several companies of a public group are affiliated to a certain manager of the aforementioned contributions, as required by law to all employers, but they do so without calling for a public tender).

2019 04 11 (C-483/17), Tarola.

ECJ Judgment of 11 April 2019 (C-483/17), Tarola.

ECLI:EU:C:2019:309.

- *Neculai Tarola v. Minister for Social Protection.*
- Request for a preliminary ruling from the Court of Appeal, Ireland. (Directive 2004/38, free movement): under EU law, an employee (for at least six months) who loses his or her job involuntarily after having worked for two weeks (on an indefinite contract) in the host State retains the status of employed person (for at least six months), provided that he or she registers as a jobseeker.
- The aim is to protect those who become involuntarily unemployed after having worked for less than a year under a contract that is not for a fixed term.
- (Romanian who works as an employee in Ireland and applies for welfare benefits after his or her dismissal).

2019 04 11 (E-603/17), Bosworth and Hurley.

ECJ judgment of 11 April 2019 (C-603/17), Bosworth and Hurley.

ECLI:EU:C:2019:310.

- *Peter Bosworth and Colin Hurley v. Arcadia Petroleum Limited and others.*

- Request for a preliminary ruling from the Supreme Court of the United Kingdom.
- Community concept of worker: a person who performs, for a certain period of time, in favour of and under the direction of another, certain services, in exchange for which he receives remuneration. Nexus of subordination appreciable in view of all the circumstances of the case.
- According to EU law, there is no subordination in the contract between the company and the director, so there is no individual employment contract, although the shareholders can terminate it, especially if the director has been able to draft it and controls both the day-to-day management of the company's affairs and his or her own functions.
- When there is an employment contract and the company wishes to sue its employee, it must do so in the State in which the employee resides.
- (Companies domiciled in England that claim damages from British directors, domiciled in Switzerland).

2019 04 11 (C-29/18), Charges for Auxiliary Services.

ECJ Judgment of 11 April 2019 (C-29/18; C-30/18; C-44/18), charges for auxiliary services.

ECLI:EU:C:2019:315.

- *Cobra Servicios Auxiliares, S.A., against FOGASA and others.*
- Requests for a preliminary ruling from the High Court of Justice of Galicia (Labour Chamber).
- (Directive 1999/70/EC, temporary contracts): EU law does not preclude the same event (termination of contract) from leading to the termination of contracts for works or services (for those of such a condition) or to collective dismissal (for permanent contracts), with the compensation specific to each case (lower for temporary contracts).
- The payment of the compensation under article 49.1.c SW at the end of temporary contracts is part of a context (from the time of their conclusion it is expected that they end at the end of the task) that is significantly different from that of a comparable permanent worker when there are causes of production, even if these two events have their origin in the same circumstance (the termination of the contract).
- (Fenosa terminates the meter reading contract and Cobra terminates the work or service contracts that had this purpose, while activating the collective dismissal of 72 permanent people. The validity of temporary contracts is not questioned).

2019 04 11 (C-254/18), Syndicat des cadres de la sécurité intérieure.

ECJ judgment of 7 May 2019 (C-254/18), Syndicat des cadres de la sécurité intérieure.

ECLI:EU:C:2019:318.

- *Syndicat des cadres de la sécurité intérieure against Premier ministre and others.*
- Request for a preliminary ruling from the Conseil d'État (Conseil d'État) (France).
- Case: in the French National Police, the duration of weekly working time may not exceed 48 hours on average during a six-month period of the calendar year. Doubt: whether it can be calculated in this way and not by reference periods of six months whose beginning and end vary according to the passage of time.
- (Directive 2003/88/EC, working time): EU law does not prevent (for the calculation of average weekly work) reference periods starting and ending on fixed dates, provided that the maximum average duration per week (48 hours) in each six-month period straddling two successive fixed reference periods is respected.

2019 05 02 (E-309/18), Lavorgna.

ECJ Judgment of 7 May 2019 (C-309/18), Lavorgna.

ECLI:EU:C:2019:350.

- *Lavorgna Srl v Comune di Montelanico and others.*
- Request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy).
- (Directive 2014/24/EU, public procurement): EU law allows the separate indication of the cost of labour to be required as a condition for tendering a contract.
- If the terms and conditions do not require the indication of such costs in the tenders, the correction may be allowed within the period set by the contracting authority.
- (Assumption: City Council announces a substantial tender without recalling the legal obligation to indicate the costs of labour; a company that has not indicated the costs is required to rectify it, which it does, being awarded; the second classified company contests what happened).

2019 05 07 (C-431/17), Monachos Eirinaios.

ECJ Judgment of 7 May 2019 (C-431/17), Monachos Eirinaios.

ECLI:EU:C:2019:368.

- *Monachos Eirinaios vs. Dikigorikos Syllogos Athinon*.
- Request for a preliminary ruling from the Symvoulío tis Epikrateias (Council of State, Greece).
- (Directive 98/5/EC, Legal Profession): EU law prevents a lawyer registered as such in the State of origin from being admitted to the host State from practising the profession, basing this restriction on the incompatibility with his status as a monk.
- (Monk from Petra who obtains the status of Lawyer in Cyprus and applies for membership in Greece; the Bar Association refuses it because both conditions are incompatible).

2019 05 08 (C-24/17), Österreichischer Gewerkschaftsbund.

ECJ judgment of 8 May 2019 (C-24/17), Österreichischer Gewerkschaftsbund.

ECLI:EU:C:2019:373.

- *Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst v Republik Österreich*.
- Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria).
- (Directive 2000/78/EC; art. 21 of the Convention on the Functioning of the European Union): EU law precludes the end of age discrimination (workers under 18 years of age) from being carried out by taking into account the remuneration received when it existed.
- The restoration of equality implies (for the future) the taking into account of the situation that would have been enjoyed without discrimination; also (in passing) the economic compensation for the damages caused.
- (Art. 45 TFEU; Regulation 492/2011, free movement): EU law precludes the capped calculation of prior services when there is no limit if they have been provided to certain EEA Public Entities.
- (On the Federal Law on Remuneration and Promotion of State Labor Personnel to put an end to a series of cases of discrimination on grounds of age).

2019 05 08 (E-396/17), Leitner.

ECJ Judgment of 8 May 2019 (C-396/17), Leitner.

ECLI:EU:C:2019:375.

- *Martin Leitner v Landespolizeidirektion Tyrol*.

- Request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Austria).
- Police who complain against the application of the new Civil Service Remuneration Law; It is of interest to calculate experience prior to 18 years of age and retroactive payment of the corresponding remuneration.
- (Directive 2000/78/EC; art. 21 CFEU): EU law precludes the end of age discrimination (against workers under 18 years of age) taking into account the remuneration received when it existed.
- The restoration of equality implies (for the future) the taking into account of the situation that would have been enjoyed without discrimination; also (in passing) the economic compensation for the damages caused.
- (Directive 2000/78/EC; art. 21 of the Convention on the Functioning of the European Union): direct discrimination occurs when, in order to eradicate age discrimination, services prior to the age of 18 are taken into account, but an extension of three years is established for the period necessary to be able to move from the first to the second level.

2019 05 08 (E-631/17), Inspecteur van de Belastingdienst.

ECJ Judgment of 8 May 2019 (C-631/17), Inspecteur van de Belastingdienst.

ECLI:EU:C:2019:381.

- *SF vs. Inspecteur van de Belastingdienst.*
- Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).
- (Regulation 883/2004, Social Security Coordination): the law of the Member State of residence (Latvia) applies to a seafarer (Latvian) who retains residence in his country and works for an undertaking of another State (Netherlands), on a ship flying the flag of a third country (Bahamas) and sailing outside the territory of the Union (North Sea).

2019 05 08 (C-161/18), Villar Láiz.

ECJ Judgment of 8 May 2019 (C-161/18), Villar Láiz.

ECLI:EU:C:2019:382.

- *Violeta Villar Láiz v. National Social Security Institute (INSS) and General Social Security Treasury (TGSS).*
- Request for a preliminary ruling from the High Court of Justice of Castilla y León (Labour Chamber).

- Examination of articles 247 and 248 LGSS (after STC 61/2013 and ECJ Elbal Moreno) on the part-time coefficient (% of the working day with respect to comparable full-time; determines the number of days that can be counted for pensions, after multiplying by 1.5) and the overall part-time coefficient (percentage of days worked part-time with respect to the total number of days worked).
- (Directive 79/7/EEC, gender equality in Social Security): EU law rejects the calculation of the regulatory base of the retirement pension using a factor that depends on the contribution period but indexed with the partiality coefficient “to the extent that this regulation particularly disadvantages female workers compared to male workers” and because it goes beyond what is necessary to guarantee proportionality.
- (The worker requests that the percentage applied to her regulatory base be calculated by assimilating the time worked part-time with the full-time time).

2019 05 08 (E-194/18), Dodiv.

ECJ Judgment of 8 May 2019 (C-194/18), Dodiv.

ECLI:EU:C:2019:385.

- *Jadran Dodiv vs. Banka Koper and Alta Invest.*
- Request for a preliminary ruling from the Vrhovno sodišče Republike Slovenije (Supreme Court, Slovenia).
- (Directive 2001/23/EC, transfer of undertakings): the transfer of intangible assets of customers can be classified as a business succession if such acceptance has been encouraged by the transferor and/or transferee, even if it depends on the will of the customers.
- In order to determine whether the economic unit in question retains its identity, it is necessary to weigh up all the circumstances (type of undertaking or business, transfer of tangible assets such as buildings or movable property, value of intangible assets, assumption of the workforce, transfer of customers, analogy of pre- and downstream activities or the duration of any suspension of those activities).
- Financial economic activity (investment services and activities, stock market intermediation) does not require significant material elements.
- The number, even a very high one, of customers actually transferred is not, in itself, decisive in shaping the “transfer”; The fact that the first company collaborates with the second (as a non-independent securities company) has no impact in principle.

- (Koper Bank is obliged to transfer financial instruments and other customer assets, accounting, investment and auxiliary services, etc., to Alta Ivest, provided that there is express or tacit acceptance of these; 91% of the customers accept, but Koper continues to operate as a securities company).

2019 05 08 (E-230/18), PI.

ECJ Judgment of 8 May 2019 (C-230/18), PI.

ECLI:EU:C:2019:383.

- *PI v. Landespolizeidirektion Tyrol.*
- Request for a preliminary ruling from the Landesverwaltungsgericht Tirol (Regional Administrative Court, Tyrol, Austria).
- Presupposition: prostitution is not prohibited in Tyrol, but it is subject to control and limitations in the public interest.
- (Art. 49 TFEU; arts. 15 and 16 CFEU; freedom of establishment and freedom to provide services): EU law prevents the immediate administrative closure of an establishment on suspicion of prostitution (lacking the required permit) and without the rule applied requiring reasons for doing so but requiring reasons to challenge that decision.
- (Bulgarian citizen who runs a massage center in which an Inspectorate detects that sexual services are offered and agrees to the immediate closure of the premises).

2019 05 08 (C-486/18), Praxair MRC.

ECJ Judgment of 8 May 2019 (C-486/18), Praxair MRC.

ECLI:EU:C:2019:379.

- *RE v. Praxair MRC.*
- Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France).
- (Directive 96/34/EC, parental leave): EU law precludes severance pay and unemployment benefit from being calculated taking into account the remuneration received by a person who takes part-time parental leave but has an indefinite and full-time contract.
- (Art. 157 TFEU, equal pay by gender): the above conclusion is also applicable because a considerably greater number of women than men decide to take part-time parental leave and the resulting difference in treatment cannot be explained by objective factors unrelated to any discrimination on grounds of sex.

2019 05 08 (E-494/17), Rossato.

ECJ Judgment of 8 May 2019 (C-494/17), Rossato.

ECLI:EU:C:2019:387.

- *Ministero dell'Istruzione, dell'Università e della Ricerca - MIUR v Fabio Rossato and Conservatorio di Musica F.A. Bonporti.*
- Request for a preliminary ruling from the Corte di Appello di Trento (Court of Appeal, Trento, Italy).
- (Directive 1999/70/EC, temporary contracts): EU law does not preclude the absence of compensation in favour of public teachers whose temporary contract becomes indefinite (with limited retroactive effect) if this is not uncertain, unforeseeable, or random and the partial weighting of previous services is a proportionate measure to sanction abuse.
- The transformation of the bond into a permanent one implies the sufficiently effective and dissuasive nature of the sanction applied.
- Neither the principle of full reparation for the damage suffered nor the principle of proportionality require the payment of punitive compensation.
- (Accordionist successively hired by the Conservatory; after complaining against his precariousness, he is converted into a tenured accordionist as a result of legislative reform).

2019 05 14 (C-55/18), CCOO and Deutsche Bank.

ECJ Judgment (Grand Chamber) of 14 May 2019 (C-55/18), CCOO.

ECLI:EU:C:2019:402.

- *Federation of Services of Workers' Commissions (CCOO) v. Deutsche Bank SAE.*
- Request for a preliminary ruling from the Audiencia Nacional (Labour Chamber).
- (Directive 2003/88/EC, working time; Directive 89/391/EEC, safety and health): EU law precludes legislation that (according to jurisprudential interpretation) does not impose on employers the obligation to establish a system (objective, reliable, accessible) that allows the daily working day worked by each worker to be calculated.
- Without such a system, it is not possible to objectively and reliably determine the number of hours of work performed by the worker or their distribution over time, nor the number of overtime.
- The effective protection of the safety and health of workers cannot be made subject to purely economic considerations.

- The requirement of interpretation in conformity with EU law includes the obligation on national courts to amend, where appropriate, well-established case-law if it is based on an interpretation of national law that is incompatible with the objectives of a directive.
- The general obligation to register does not suffer from the fact that there are specific specific provisions.

2019 05 16 (E-509/17), Plessers.

ECJ Judgment of 16 May 2019 (C-509/17), Plessers.

ECLI:EU:C:2019:424.

- *Christa Plessers vs. Prefaco NV and Belgische Staat*.
- Request for a preliminary ruling from the Arbeidshof te Antwerpen (Higher Labour Court, Antwerp, Hasselt Division, Belgium).
- Case: insolvent company, with the judicial awardee assuming the assigned infrastructure and 2/3 of the workforce, at its choice.
- (Directive 2001/23/EC, transfer of companies): EU law precludes anyone who is awarded an insolvent company, in court, from having the right to continue its operation (total or partial) by freely choosing the workers who remain.
- The transfer of an undertaking does not in itself constitute a ground for dismissal, although it does not prevent terminations that may occur for economic, technical or organisational reasons that imply changes in employment; but such circumstances must be accredited.

2019 06 12 (C-367/18), Aragón Carrasco and others.

ECJ Order of 19 March 2019 (C-367/18), Aragón Carrasco and others.

ECLI:EU:C:2019:487.

- *María Teresa Aragón Carrasco and others v. State Administration*.
- Request for a preliminary ruling from the Contentious Chamber of the Supreme Court.
- (Directive 1999/70, temporary jobs): EU law on non-discrimination in fixed-term employment is compatible with the fact that Spanish legislation does not attach compensation to the termination of temporary staff (who perform functions expressly described as trust or special advice), despite the provisions on objective dismissal.
- Unlike permanent staff, temporary staff cannot have a legitimate expectation about the stability of their employment relationship.
- (Temporary staff in the offices of the Presidency, Vice-Presidency and Members of the CGPJ).

2019 06 13 (E-664/17), Ellinika Nafpigeia.

ECJ Judgment of 13 June 2019 (C-664/17), Ellinika Nafpigeia.

ECLI:EU:C:2019:496.

- *Ellinika Nafpigeia AE v. Panagiotis Anagnostopoulos and others.*
- Request for a preliminary ruling from the Areios Pagos (Supreme Court, Greece).
- Assumption: public company (naval and railway) that (after 30 years) is privatized; a subsidiary is created that subsequently goes bankrupt and dismisses the entire workforce (160); The workers demand its continuity with the parent company.
- (Directive 2001/23/EC, transfer of undertakings): EU transfer law covers the case where the transferor is provided for to continue the economic activity, even if the transferee subsequently disappears if the unit concerned is not fully autonomous.
- The transferor and the transferee must not fraudulently and abusively benefit from the advantages that they could obtain from the transfer of the company.
- Subrogation occurs if the production unit has sufficient guarantees that allow it access to the factors of production of a third party so as not to depend on the economic decisions made by the latter unilaterally.

2019 06 13 (C-22/18), TopFit and Biffi.

ECJ Judgment of 13 June 2019 (C-22/18), TopFit and Biffi.

ECLI:EU:C:2019:497.

- *TopFit e.V. and Daniele Biffi vs. Deutscher Leichtathletikverband e.V.*
- Request for a preliminary ruling from the Amtsgericht Darmstadt (District Court, Darmstadt, Germany).
- (Articles 18, 21 and 165 TFEU; non-discrimination on grounds of nationality, freedom of movement, promotion of sport): EU law precludes non-nationals but residents from being excluded from national sports championships.
- Community freedoms are applicable to amateur sport.
- The restrictions imposed must be analysed to check whether they are justified, assessing this with restrictive criteria.
- (The German Athletics Federation admits the participation of non-nationals but without access to the victory, because the champion had to represent Germany in international championships).

2019 06 13 (E-317/18), Correia Moreira.

ECJ Judgment of 17 June 2019 (C-317/18), Correia Moreira.

ECLI:EU:C:2019:499.

- *Cátia Correia Moreira against Município de Portimão*.
- Request for a preliminary ruling from the Tribunal Judicial da Comarca de Faro (Portugal).
- (Directive 2001/23/EC, transfer of companies): EU law protects, in the event of a business transfer, the person who is linked to the employment relationship, even if it is through a bond of trust.
- EU law precludes the fact that, if the transferee of the transfer is an Administration (a City Council), the workers concerned are subject to a public selection procedure and are bound by a new relationship with the transferee (which would entail a prolonged reduction in remuneration).
- Such a conclusion cannot be challenged by the need to protect the fundamental structures (political and constitutional) of the Member States (Article 4 TEU).
- (Municipal company that is dissolved, dividing its assets between a pre-existing one and the Corporation itself; an activity that does not involve the exercise of public prerogatives).

2019 06 20 (E-72/18), Ustariz Aróstegui.

ECJ Judgment of 20 June 2019 (C-72/18), Ustariz Aróstegui.

ECLI:EU:C:2019:234.

- *Daniel Ustariz Aróstegui v. Department of Education of the Government of Navarre*.
- Request for a preliminary ruling from Juzgado de lo Contencioso-Administrativo n.º 1 de Pamplona.
- (Directive 1999/70/EC, fixed-term work): EU law precludes a salary supplement from being paid only to career civil servant teachers, excluding administrative contracts even if they meet the material requirements for it.
- (Administrative contract teacher who claims the grade supplement provided for the civil service; the supplement implies automatic increase in level after working 78 months with it).

2019 06 20 (E-404/18), Hakelbracht.

ECJ judgment of 20 June 2019 (C-404/18), Hakelbracht and others.

ECLI:EU:C:2019:523.

- *Jamina Hakelbracht and Others v WTG Retail BVBA*.
- Request for a preliminary ruling from the Arbeidsrechtbank Antwerpen (Labour Court, Antwerp, Belgium).
- (Directive 2006/54/EC, Equal treatment for men and women): EU law precludes only those who support a person who may be discriminated against on grounds of sex in the context of witness evidence from being protected from retaliation.
- Other support actions, formal or informal, even within the company, must benefit from non-discrimination by irradiation.
- Workers other than the person who has been discriminated against on grounds of sex must be protected to the extent that the employer may cause them harm by providing formal or informal support to the person.
- (HR employee who interviews and proposes for hiring a three-month pregnant woman; HR rejects the proposal because of the pregnancy, which the interviewer reproaches; the candidate complains and the interviewer is fired months later, under the cover of generic reasons).

2019 06 24 (C-619/18), Commission v Republic of Poland.

ECJ (Grand Chamber) of 26 June 2019 (C-619/18), Commission v Republic of Poland.

ECLI:EU:C:2019:531.

- *European Commission v. Republic of Poland*.
- Failure of the State.
- (Law lowering the retirement age for Supreme Court Justices from 70/72 to 65; admits two extensions of three years, but discretionary).
- It is up to the States to determine how they organise their administration of justice, but in compliance with the obligations imposed on them by EU law.
- Poland infringes Article 19(1) TEU (“Member States shall provide for the remedies necessary to ensure effective judicial protection in the areas covered by Union law”) by lowering the retirement age of Supreme Court Judges appointed before 3 April 2018 and giving the President of the Republic the discretionary power to extend their activity.
- The need for judicial independence is integrated into the essential content of the rights to effective judicial protection and to a fair trial, essential for the rule of law guaranteed by Article 2 TEU.

2019 06 26 (C-729/17), Commission v Hellenic Republic.

ECJ judgment of 26 June 2019 (C-729/17), Commission v. Hellenic Republic.

ECLI:EU:C:2019:534.

- *European Commission v. Hellenic Republic.*
- Failure of the State.
- (Directive 2006/123/EC, services in the internal market): Greece is in breach of EU law by requiring mediation training bodies to be non-profit companies jointly constituted by at least one Bar Association and at least one Greek Professional Chamber.
- (Directive 2005/36/EC on the recognition of professional qualifications): Greece is in breach of EU law by making the recognition of qualifications in mediation subject to additional (unjustified) requirements.

2019 07 04 (C-377/17), European Commission v. Federal Republic of Germany.

ECJ judgment of 7 July 2019 (C-377/17), *European Commission v. Federal Republic of Germany*.

ECLI:EU:C:2019:562.

- *European Commission v. Federal Republic of Germany.*
- Failure of the State.
- (Directive 2006/123/EC; services in the internal market): Germany is in breach of EU law by maintaining mandatory rates (minimum and maximum fees) for the provision of planning services by architects and engineers.

2019 07 04 (E-393/17), Kirschstein.

ECJ Judgment of 4 July 2019 (C-393/17), *Kirschstein*.

ECLI:EU:C:2019:563.

- *Openbaar Ministerie v. Freddy Lucien Magdalena Kirschstein and Thierry Frans Adeline Kirschstein.*
- Request for a preliminary ruling from the Hof van beroep te Antwerpen.
- (Court of Appeal of Antwerp, Belgium).
- (Directive 2005/29/EC, unfair commercial practices; Directive 2006/123/EC, Services in the internal market): EU law allows criminal punishment for those who, without having been previously authorised to do so by the competent authority, issue master's degrees, provided that the conditions to which the authorisation to issue such a degree is subject are compatible with Community freedoms.
- (Criminal action against those who award the master's degree without authorization to do so, to students who have completed the training

provided by the Antwerp branch of the United International Business Schools of Belgium BVBA).

2019 07 10 (C-410/18), Aubriet.

ECJ Judgment of 10 July 2019 (C-410/18), Aubriet.

ECLI:EU:C:2019:582.

- *Nicolas Aubriet v. Ministre de l'Enseignement supérieur et de la Recherche.*
- Request for a preliminary ruling from the tribunal administratif (Administrative Court, Luxembourg).
- (EU Regulation 492/2011): EU law precludes the regulation that makes a grant for non-resident students subject to the requirement that one of their parents has carried out a lucrative activity in the convening State for at least five years during the previous seven years.
- The national reference rule does not make it possible to properly assess the existence, if any, of a sufficiently significant connecting link with the labour market of the Member State.
- (Refusal by the Luxembourg authorities to grant financial aid, for the 2014/2015 academic year, for higher education in Strasbourg to the [non-resident] child of a frontier worker).

2019 07 11 (C-716/17), A.

ECJ Judgment of 10 July 2019 (C-716/17), A.

ECLI:EU:C:2019:598.

- *A (Danish worker domiciled in Sweden) v Tax Administration.*
- Request for a preliminary ruling from the Østre Landsret (Eastern Regional Court of Appeal, Denmark).
- (EU Regulation 2015/848, insolvency proceedings; Art. 45 TFEU, freedom of movement for workers): EU law precludes the competence rule that makes the discharge of debts subject to the condition that the debtor has his domicile or residence in that Member State.
- EU law precludes the application of the aforementioned residence requirement, regardless of whether the debt discharge procedure may affect claims belonging to individuals.
- (A. requests a judicial exoneration of debts contracted with Danish creditors, both under public law and individuals).

2019 07 29 (C-620/17), Hochtief Solutions Magyarországi Fióktelepe.

ECJ Judgment of 29 July 2019 (C-620/17), Hochtief Solutions Magyarországi Fióktelepe.

ECLI:EU:C:2019:630.

- *Hochtief Solutions AG Magyarországi Fióktelepe contra Fővárosi Törvényszék.*
- Request for a preliminary ruling from the Székesfehérvári Törvényszék (General Court, Székesfehérvár, Hungary).
- The liability of a State for damage caused by the decision of a national court that ultimately rules and infringes a rule of EU law arises if three conditions are met: (1) that the violated EU law is intended to confer rights on individuals; 2) that the violation of said rule is sufficiently serious; 3) that there is a direct causal relationship between this violation and the damage suffered by these individuals.
- The existence of such a breach of EU law must be assessed by the national court hearing the complaint.
- EU law precludes national legislation from generally excluding compensation for the costs incurred by the national court's prejudicial decision.
- EU law does not exclude a responsibility of the State under its own rules, if they are less restrictive.
- (Company unduly excluded from public tender, in accordance with the ECJ; exclusionary decision finally confirmed by the national Supreme Court).

2019 07 29 (C-659/17), Azienda Napoletana Mobilità (ANM).

ECJ judgment of 29 July 2019 (C-659/17), Azienda Napoletana Mobilità (ANM).

ECLI:EU:C:2019:633.

- *Istituto nazionale della previdenza sociale (INPS) v. Azienda Napoletana Mobilità SpA.*
- Request for a preliminary ruling from the Corte suprema di cassazione (Italy).
- (Art. 107.1 TFEU, aid for employment): EU law (State aid, reimbursement of undue aid) applies to a municipal company that provides local public transport services on an exclusive basis and that has benefited from aid contrary to competition law.
- (Sole proprietorship of the Neapolitan City Council, for comprehensive transport management; it benefits from exemptions and labour bonuses that are considered State aid by the Commission; it is required to return €9.7 million and the ANM questions the requirement).

2019 09 05 (C-417/18), AW and Others (Appels au 112).

ECJ judgment of 5 September 2019 (C-417/18), AW and others (Appels au 112).

ECLI:EU:C:2019:671.

- *AW and Others v. Lietuvos valstybų and Lietuvos valstybų*.
- Request for a preliminary ruling from Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania).
- (Directive 2002/22, electronic communications): EU law requires states, if feasible, to require operators to provide immediate information free of charge on the location of 112 callers, even if it is a mobile phone without a SIM card.
- (Kidnapped and raped woman who insistently calls 112, but the systems of the Emergency Call Center did not show the number of the mobile phone used, which prevented her from being located).

2019 09 10 (E-94/18), Chenchooliah.

ECJ (Grand Chamber) of 10 September 2019 (C-94/18), Chenchooliah.

ECLI:EU:C:2019:693.

- *Nalini Chenchooliah v. Minister for Justice and Equality*.
- Request for a preliminary ruling from the High Court, Ireland.
- (Directive 2004/38/EC, freedom of residence and movement): EU law applies to the expulsion of a third-country national married to an EU citizen who has left the host State and returned to the host State in order to serve a custodial sentence.
- (Mauritian woman who enters Ireland as a student, later marrying a Portuguese man living there; the man returns to Portugal to serve his sentence and the wife requests to remain in Ireland).

2019 09 11 (E-397/18), Nobel Plásticos Ibérica.

ECJ Judgment of 11 September 2019 (C-397/18), Nobel Plásticos Ibérica.

ECLI:EU:C:2019:703.

- *DW v. Nobel Plásticos Ibérica SA*.
- Request for a preliminary ruling from Juzgado de lo Social n.º 3 de Barcelona.
- (Directive 2000/78/EC, non-discrimination): EU law only considers a disability to be the state of health of a particularly sensitive person who is unable to perform a certain job (because it poses a risk to him or others) if it involves a limitation of capacity due to long-lasting (physical, mental or mental) ailments that, when interacting with various ba-

riers, may prevent their full and effective participation (on equal terms) in working life.

- A person “especially sensitive” to certain risks is not necessarily affected by disability, in the legal sense.
- The objective dismissal of a person chosen on the basis of apparently neutral criteria (lower productivity, less versatility, absenteeism) is indirectly discriminatory on the grounds of disability if the employer has not first made reasonable adjustments to guarantee equal treatment.
- (Worker hired in 2004; diagnosed with epicondylitis, as an occupational disease, in 2011; recognised as particularly sensitive; asks several times for the job to be adapted; is temporarily reassigned; in 2016 she is dismissed for objective reasons along with nine other people; she has reduced working hours for child care. In that year it had a weighted average productivity of 59.82%, very low versatility, absenteeism of 69.55%).

2019 09 12 (C-64/18 and others), Maksimovic.

ECJ Judgment of 12 September 2019 (C-64/18 and others), Maksimovic. ECLI:EU:C:2019:723.

- *Zoran Maksimovic and others v. Bezirkshauptmannschaft Murtal and Finanzpolizei.*
- Requests for a preliminary ruling from the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria).
- (Art. 56 TFEU, freedom to provide services): EU law precludes legislation which, in the event of non-compliance with labour law obligations relating to obtaining administrative authorisations and the retention of salary documents, provides for the imposition of excessive fines and payment of 20% of the costs of the proceedings.
- Subjecting the provision of services in a State other than the State of origin to an administrative authorisation restricts freedom of movement and must be sufficiently justified.
- It is not inherently disproportionate for the penalty for non-compliance to increase according to the number of people affected, but it may be disproportionate if there is no limit to it or if the minimum penalty is excessive.
- (Croatian company that is subrogated in the tasks performed, in Austria, by another of the same nationality; it is sanctioned for not having all the salary documentation of the staff).

2019 09 18 (E-222/18), VIPA.

ECJ Judgment of 18 September 2019 (C-222/18), VIPA. ECLI:EU:C:2019:751.

- *VIPA Kereskedelmi és Szolgáltató Kft. vs. Országos Gyógyszerészeti és Élelmezés-egészségügyi Intézet.*
- Request for a preliminary ruling from the Fvvárosi Közigazgatási és Munkaügyi Bíróság (Capital, Hungarian Administrative and Social Court).
- (Directive 2011/24/EU, cross-border healthcare): EU law does not preclude national rules from preventing the dispensing of medicines against prescriptions issued by a professional authorised to practise in another State.
- The national regulation on restrictions on the dispensation of medicines in such cases must be justified for reasons of protection of health and life, which are subject to judicial review.
- (Hungarian pharmacy sanctioned for having dispensed medicines prescribed in prescriptions issued by professionals practising in the United Kingdom and Austria, without the identity of the patient being recorded in them).

2019 09 18 (C-366/18), Ortiz Mesonero.

ECJ Judgment of 18 September 2019 (C-366/18), Ortiz Mesonero.

ECLI:EU:C:2019:757.

- *José Manuel Ortiz Mesonero v. UTE Luz Madrid Centro.*
- Request for a preliminary ruling from the Juzgado de lo Social n.º 33 de Madrid.
- (Directive 2006/54, gender equality at work; Directive 2010/18, parental leave; Charter of Fundamental Rights): EU law does not extend to the regulation of the SW that requires a reduction in working hours (and wages) in order to adapt working time for reasons of legal guardianship (art. 37.6 SW).
- The right to adapt the organisation of working time without a reduction in working hours (art. 34.8 SW, wording prior to 2019) is alien to the EU regulation of parental leave, which omits the issue.
- (Employed in municipal lighting maintenance, working three shifts; requests to move to morning shift from Monday to Friday, his wife being a lawyer; children of 4 and 8 years old. It is mostly women who activate conciliation measures).

2019 09 19 (C-544/18), Daknėviciute.

ECJ Judgment of 19 September 2019 (C-544/18), Daknėviciute.

ECLI:EU:C:2019:761.

- *Her Majesty's Revenue & Customs v. Henrika Daknėviciute*.
- Request for a preliminary ruling from the Upper Tribunal (Administrative Appeals Chamber) (United Kingdom).
- (Art. 49 TFEU and Directive 2004/38, freedom of movement): under EU law, a self-employed person who ceases her activity due to physical limitations related to the last stages of her pregnancy and the period following childbirth retains her status as a self-employed worker, provided that she resumes that activity or finds another activity (self-employed or salaried) within a reasonable period of time after the birth of her child.
- The loss of the status of worker due to motherhood would discourage women from exercising free movement.
- There is a “comparable vulnerability” of self-employed and salaried workers.
- (Lithuanian beautician working in the United Kingdom, first salaried and then self-employed; subsidised motherhood; carrying out episodic marginal activity for a short time after childbirth; then, inactive, applying for child benefit).

2019 09 23 (E-63/18), Vitali.

ECJ Judgment of 23 September 2019 (C-63/18), Vitali Spa.
ECLI:EU:C:2021:787.

- *Vitali SpA v. Autostrade per l'Italia SpA*.
- Request for a preliminary ruling from the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy).
- (Directive 2014/24/EU, Public procurement): EU law precludes national legislation, such as that at issue in the main proceedings, which limits to 30% the part of the contract that the tenderer may subcontract to third parties.
- States can no longer limit subcontracting abstractly as a certain percentage.
- Other measures prevent access to public tenders for companies suspected of having links to criminal organizations.
- (Autostrade per l'Italia announces a tender to widen a motorway, for €85 million; Vitali is excluded because it exceeds the percentage of subcontracting provided for in Italian law).

2019 09 24 (C-507/17), Google (Portée territoriale du déréférencement).

ECJ (Grand Chamber) of 24 September 2019 (C-507/17), Google (Portée territoriale du déréférencement).

ECLI:EU:C:2019:772.

- *Google LLC v. Commission nationale de l'informatique et des libertés (CNIL)*.
- Request for a preliminary ruling from the Conseil d'État (Council of State, France).
- (Directive 95/46/EC and Regulation 2016/679, data protection): EU law requires that when the operator of a search engine considers a request to remove links to sensitive data, it does so in the versions of the search engine that correspond to all the Member States.
- That requires that internet users who search on the basis of the name of the data subject from one of the Member States be effectively prevented or, at the very least, seriously hindered from accessing, through the list of results obtained after that search, the links that are the subject of the takedown request.
- (The CNIL asks Google, following a request by a natural person to remove links to a series of web pages from the list of results obtained from a search on the basis of his or her name, to apply that deletion to all domain name extensions in its search engine.).

2019 09 24 (C-136/17), GC and Others (Déréférencement de données sensibles).

ECJ (Grand Chamber) of 24 September 2019 (C-136/17), GC and Others (Déréférencement de données sensibles).

ECLI:EU:C:2019:773.

- *GC and Others v Commission nationale de l'informatique et des libertés (CNIL)*.
- Request for a preliminary ruling from the Conseil d'État (Council of State, France).
- (Directive 95/46/EC and Regulation 2016/679 on data protection): EU law on restrictions on special categories of data applies to the operator of a search engine.
- The operator must consider requests for the removal of links addressed to websites containing personal data falling within the special categories.
- The operator who is requested to remove a link must assess whether its inclusion in the list of results obtained following a search carried out on the basis of the name of the data subject is strictly necessary to protect the freedom of information of internet users.

- (A number of people are asking Google to remove several links that appear when they type their names; these are news that hurt their professional or personal credit.).

2019 10 01 (E-673/17), Planet49.

ECJ (Grand Chamber) of 1 October 2019 (C-673/17), Planet49.

ECLI:EU:C:2019:801.

- *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v. Planet49 GmbH.*
- Request for a preliminary ruling from the Bundesgerichtshof (Federal Court, Germany).
- (Dispute between Consumer Associations and Planet49 GmbH, a company that offers online games; whoever participates in a game for promotional purposes consented to the transmission of his personal data to sponsors and cooperating companies of that company, the storage of information and access to information stored on his terminal equipment).
- (Directive 2002/58 and Regulation 2016/679, privacy and electronic communications): EU law prevents the consent given (to access information already stored on the terminal equipment through cookies) from being valid by means of a box marked by default from which the user must remove the mark in case they do not wish to give their consent.
- The information that the service provider must provide to the user of an Internet site includes the time during which the cookies will be active and the possibility for third parties to have access to them.

2019 10 02 (E-93/18), Bajratari.

ECJ Judgment of 2 October 2019 (C-93/18), Bajratari.

ECLI:EU:C:2019:809.

- *Ermira Bajratari v. Secretary of State for the Home Department.*
- Request for a preliminary ruling from the Court of Appeal in Northern Ireland, United Kingdom.
- (Directive 2004/38/EC, movement and residence): under EU law, a minor has sufficient resources not to become an undue burden on the social assistance of the host Member State during his or her period of residence, even if those resources come from the income obtained from the employment carried out illegally by his or her parent, a third-coun-

try national who does not have a residence and work permit in that Member State.

- (Albanian woman who loses her job in Ireland, where she lives with her husband and children; after her residence card expires, the man continues to work; the woman applies for her right of residence as she is the one who cares for her new child, a newborn and of Irish nationality).

2019 10 03 (C-18/18), Glawischnig-Piesczek.

ECJ Judgment of 3 October 2019 (C-18/18), Glawischnig-Piesczek.
ECLI:EU:C:2019:821.

- *Eva Glawischnig-Piesczek v Facebook Ireland Limited.*
- Request for a preliminary ruling from the Oberster Gerichtshof ((Supreme Court, Austria).
- (Directive 2000/31/EC, electronic commerce): EU law does not preclude the Courts from ordering FB to erase or block (even globally) data whose content has been declared unlawful.
- The absence of a general obligation to verify content contained in Article 15 of the aforementioned Directive is not a reason to prevent a court from ordering the removal of content that it considers unlawful.
- (Green MP asks an Austrian court to order Facebook to remove comments posted by a user; these are defamatory and offensive content.).

2019 10 03 (C-274/18), Schuch-Ghannadan.

ECJ Judgment of 3 October 2019 (C-274/18), Schuch-Ghannadan.
ECLI:EU:C:2019:828.

- *Minoo Schuch-Ghannadan vs. Medizinische Universität Wien.*
- Request for a preliminary ruling from the Arbeits und Sozialgericht Wien (Labour and Social Court, Vienna, Austria).
- (Directive 97/81/EC, part-time): EU law precludes the maximum duration of temporary contracts in universities from being longer for TTPs (6 versus 8 years), as is the case with its extension (10 versus 12 years).
- The objective reasons that could justify such different treatment do not amount to the economic difficulties of the employers.
- The pro rata temporis principle proclaimed with respect to the TTP does not apply to these cases.
- (Directive 2006/54/EC, gender equality at work): EU law precludes such regulation from a gender perspective, i.e. if it is shown to adversely affect a significantly higher percentage of female workers than

male workers and cannot be objectively justified by a legitimate aim or the means to achieve that aim are not adequate and necessary.

- (Ease of evidence:) the protection of gender equality does not require the injured person to submit, in order to prove a presumption of discrimination, statistics or specific facts if he or she lacks access to such statistics or facts or can only access them with great difficulty.
- (University researcher linked by several contracts, some of them TTP; she claims her permanent status for having reached the maximum duration allowed in cases of full-time contracting).

2019 10 07 (E-171/18), Safeway.

ECJ (Grand Chamber) of 7 October 2019 (C-171/18), Safeway.
ECLI:EU:C:2019:839.

- *Safeway Ltd v Andrew Richard Newton and Safeway Pension Trustees Ltd.*
- Request for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom).
- (Art. 157 TFEU, non-discrimination on the basis of gender): EU law precludes a pension scheme (to eliminate age discrimination) from bringing the ordinary retirement age retroactively and unfavourably into line with the ordinary retirement age for the period between the communication and the adoption of that measure, even if it is authorised by national law and the Plan Regulation.
- Discrimination contrary to the principle of equal pay cannot be corrected by retroactively abolishing the advantages enjoyed in a pension scheme by persons in the privileged category, even if pension rights are revocable under national law.
- (Pension plan that provides for retirement at 60 for women and 65 for men; this regulation was declared discriminatory, six years later the age of 65 was established for the entire group).

2019 10 10 (E-703/17), Krah.

ECJ Judgment of 10 October 2019 (C-703/17), Krah.
ECLI:EU:C:2019:850.

- *Adelheid Krah v Universität Wien.*
- Request for a preliminary ruling from the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria).
- (Art. 45 TFEU; Regulation 492/2011 on freedom of movement): EU law precludes university legislation which, in order to establish the sa-

lary category of the senior lecturer/postdoc, only takes into account a maximum of four years for previous periods completed in another Member State, if that activity was equivalent, or even identical, to that which that worker must carry out in the context of the function of senior lecturer/postdoc.

- EU law does not preclude such legislation if the previous activity in that other Member State was not equivalent but merely useful for the exercise of that function of senior lecturer/postdoc.
- (Dispute between the Professor and the University of Vienna concerning the calculation of the previous periods of relevant activity that she carried out at the University of Munich and at the University of Vienna itself, for the purpose of determining the amount of her remuneration).

2019 10 15 (C-439/18 and 472/18), AEAT (Seniority in discontinuous fixity).

ECJ Order of 15 October 2019 (C-439/18 and 472/18), AEAT (Seniority in discontinuous fixity).

ECLI:EU:C:2019:858.

- *OH and ER against the State Tax Administration Agency (AEAT).*
- Requests for a preliminary ruling from the High Court of Justice of Galicia.
- (Directive 97/81, part-time; Directive 2006/54, employment equality): EU law precludes the fact that for permanent discontinuous workers (vertical and cyclical TTP), for the purposes of the seniority supplement, only the time actually worked is counted.
- If the permanent worker is counted all the time of the employment relationship (including leave, vacations or suspensions due to illness), the discontinuous worker is also counted, unless there is objective and reasonable justification (which in this case does not exist).
- Proportionality (*pro rata temporis*) does not imply that only actual working time should be taken into account.
- There is indirect gender discrimination, as the problem affects many more women than men. (It takes into account data obtained by the TSJ from the Government's transparency pages).
- (Permanent discontinuous workers of the AEAT, for personal income tax campaigns; they demand the calculation of the entire time of employment relationship for the purposes of three-year periods; the collective agreement does not contemplate it; the people affected are mostly women).

2019 10 24 (C-35/19), Belgian State (Indemnité pour personnes handicapées).

ECJ judgment of 24 October 2019 (C-35/19), Belgian State (Indemnité pour personnes handicapées).

ECLI:EU:C:2019:894.

- *BU vs. État belge.*
- Request for a preliminary ruling from the Tribunal de première instance de Liège (District Court, Liège, Belgium).
- (Article 45 TFEU, freedom of movement): EU law precludes the state from applying a tax exemption to benefits for people with disabilities only if they are paid by a national body, excluding it if they are paid by another Member State.
- This restriction on the free movement of workers could be valid if it had sufficient justification (which is not appreciated in the case).
- (A national and resident of Belgium who receives disability benefits from the Netherlands, derived from an accident on the way to work on the way to work).

2019 10 24 (T-310/18), EPSU and Goudriaan v Commission.

EGC Judgment of 24 October 2019 (T-310/18), EPSU and Goudriaan v Commission.

ECLI:EU:C:2019:757.

- *European Federation of Public Service Unions (EPSU) and Jan Willem Goudriaan v. European Commission.*
- (Art. 155 TFEU, Social Dialogue): it is permissible for the Commission to refuse to submit a proposal for a decision to the Council even if it is jointly requested to do so by the signatories to an Agreement reached within the framework of the European Social Dialogue (aimed at extending the Directives on consultation and participation of workers to public employment) and even if the Agreement has been reached at the request of the Commission itself.
- EU law alone does not allow the conclusion that the Commission is required to submit a proposal for a decision to the Council when it receives a joint request from the signatories to an agreement adopted under Article 155 TFEU.
- The Commission, in its role of defending the EU's general interests, has the discretion to decide whether to make the proposal requested of it to the Council.

- (Dialogue between the social partners at Union level, adopting the Agreement entitled “General framework for the information and consultation of civil servants and public employees of administrations dependent on a central government”).

2019 11 05 (C-192/18), Commission v Poland (judicial independence).

ECJ (Grand Chamber) of 5 November 2019 (C-192/18), Commission v Poland (judicial independence).

ECLI:EU:C:2019:924.

- *European Commission v. Republic of Poland.*
- Failure of the State.
- (National law lowering the retirement age for judicial employment from 70 to 65/60 years for men/women, allowing the Minister of Justice to extend it).
- (Art. 157 TFEU; Directive 2006/54/EC on equal treatment in employment on grounds of gender): Poland has violated EU law by establishing a different retirement age for women and men who perform tasks in the Public Prosecutor’s Office or Judiciary (in ordinary courts).
- Poland infringes Article 19(1) TEU (“Member States shall provide for the remedies necessary to ensure effective judicial protection in the areas covered by Union law”) by regulating the manner in which to authorise or refuse the extension to exercise judicial functions in the ordinary courts once the new retirement age established has been reached.

2019 11 07 (E-396/18), Cafaro.

ECJ Judgment of 7 November 2019 (C-396/18), Cafaro.

ECLI:EU:C:2019:929.

- *Gennaro Cafaro vs. DQ.*
- Request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy).
- (Directive 2000/78/EC, Equality at Work): EU law allows for the compulsory retirement (at 60 years of age) of pilots, provided that this is necessary for reasons of public security and is proportionate. The assessment of whether such conditions are present is the responsibility of the national court.
- Measures to prevent air accidents by monitoring the fitness and physical abilities of pilots ensure public safety and may legitimize exceptions to non-discrimination on the basis of age.

- It is not required to apply the same rule to the pilot of aircraft who act in matters related to national security as to those who pilot commercial airlines.
- (After 14 years as an aircraft pilot in missions related to national security, the company informs him of his imminent forced retirement for turning 60; the affected person considers that there is illegal dismissal).

2019 11 13 (E-641/17), College Pension Plan of British Columbia.

ECJ Judgment of 13 November 2019 (C-641/17), College Pension Plan of British Columbia.

ECLI:EU:C:2019:960.

- *College Pension Plan of British Columbia v Finanzamt München Abteilung III.*
- Request for a preliminary ruling from the Finanzgericht München (Tax Court, Munich, Germany).
- (Articles 63 and 65 TFEU, free movement of capital): EU law precludes a (German) law according to which dividends distributed by a resident company to a resident pension fund have a different (more beneficial) tax regime than that applicable to non-resident pension funds.

2019 11 19 (C-585/18, C-624/18 and C-625/18), A.K. (Indépendance de la chambre disciplinaire de la Cour Suprême).

ECJ (Grand Chamber) of 19 November 2019 (C-585/18, C-624/18 and C-625/18), A.K. (Indépendance de la chambre disciplinaire de la Cour suprême).

ECLI:EU:C:2019:982.

- *A.K. and others v. Svd Najwyvszy.*
- Requests for a preliminary ruling from the Svd Najwyvszy (Supreme Court, Labour and Social Security Chamber, Poland).
- (Law lowering the retirement age for Supreme Court Justices from 70/72 to 65; admits two extensions of three years, but discretionary).
- (Art. 47 of the Convention on the Functioning of the European Union, right to an effective remedy and to an impartial trial): EU law precludes disputes in which it is invoked (non-discrimination) from falling within the exclusive competence of a body (Disciplinary Chamber of the Supreme Court) that is not independent and impartial.
- These guarantees (independence and impartiality) are projected on the composition of the body, the appointment, the duration of the mandate and the causes of abstention, recusal or dismissal.

- (Articles 2 and 19 TEU, Rule of Law and Effective Judicial Protection): EU law is infringed where the objective conditions in which the body in question was created, its characteristics and the manner in which its members have been appointed are likely to give rise to legitimate doubts as to its independence or neutrality and lack of appearance of independence or impartiality.
- The independence of the Council of the Judiciary from the legislative and executive branches is a condition for the legitimacy of the judicial bodies whose appointments it proposes.

2019 11 19 (C-609/17 and C-610/17), TSN.

ECJ Judgment (Grand Chamber) of 29 November 2019 (C-609/17 and C-610/17), TSN.

ECLI:EU:C:2019:981.

- *Terveys- ja sosiaalialan neuvottelujärjestö (TSN syndicate) ry v. Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v. Satamaoperaattorit ry.*
- Requests for a preliminary ruling from the Työtuomioistuin (Labour Court, Finland).
- (Worker who suspends vacation to undergo surgery; worker whose vacation is suspended due to illness. Refusal by the employer to postpone the enjoyment of the vacation days that the collective agreement adds to the legal ones).
- (Directive 2003/88/EC, working time): EU law allows the granting (national rules, collective agreements) of paid annual leave days exceeding the minimum period of four weeks; it is possible to exclude the carry-over of such additional days of leave in the event of illness.
- Leave above the minimum of Directive 2003/88 is not governed by that directive but by national law, although its minimum level of protection may not be indirectly lowered.
- The CEFEU (Art. 31, paid annual leave): it does not apply when it comes to the content of national regulations and collective agreements.

2019 11 20 (C-706/18), Belgische Staat (Régime de décision implicite d'acceptation).

ECJ Judgment of 20 November 2019 (C-706/18), Belgische Staat (Régime de décision implicite d'acceptation).

ECLI:EU:C:2019:993.

- *X vs. Belgische Staat.*

- Request for a preliminary ruling from the Raad voor Vreemdelingenbetwistingen (Council for Immigration Disputes, Belgium).
- (An Afghan woman asks to reside in Belgium, where she says her spouse resides as a refugee; eight months later she is denied for failing to prove the marriage bond.).
- (Directive 2003/86/EC, family reunification): EU law precludes the national authority from issuing a residence permit (unconditionally, without checking requirements) six months after the application for family reunification.
- Before authorising family reunification, the national authorities must verify the existence of links between the sponsor and the third-country national.

2019 11 27 (C-402/18), Tedeschi and Consorzio Stabile Istant Service.

ECJ judgment of 27 November 2019 (C-402/18), Tedeschi and Consorzio Stabile Istant Service.

ECLI:EU:C:2019:1023.

- *Tedeschi Srl and Consorzio Stabile Istant Service v C.M. Service Srl and Università degli Studi di Roma La Sapienza.*
- Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy).
- (Sapienza calls for a five-year cleaning of its facilities, for more than €46 million and awards it to a company that agrees to charge 31 million, including important subcontracting to cooperatives; another bidder challenges the result, for contravening prohibitions on subcontracting).
- (Directive 2004/18/EC, award of public contracts): EU law precludes (in Italian law) the part of the contract that the tenderer may subcontract to third parties being limited to 30%.
- Control of the type of subcontracting allowed can be carried out with less restrictive measures of competition (such as requiring identification when tendering).
- EU law precludes (Italian) legislation from allowing the prices applicable to subcontracted services to be reduced by more than 20% compared to the prices resulting from the award. The protection of contract staff cannot be addressed with such a restrictive measure of competition.

2019 12 05 (C-398/18), Bocero Torrico.

ECJ Judgment of 5 December 2019 (C-398/18 and 428/18), Bocero Torrico.

ECLI:EU:C:2019:1050.

- *Antonio Bocero Torrico and Jörg Paul Konrad Fritz Bode against INSS and TGSS.*
- Requests for a preliminary ruling from the High Court of Justice of Galicia.
- (In accordance with article 208.1.c LGSS, it is a requirement to access early retirement that “the amount of the pension to be received must be higher than the amount of the minimum pension that would correspond to the interested party due to his or her family situation at the age of sixty-five”).
- (Regulation No 883/2004, Coordination of Social Security Systems): EU law precludes the consideration of only the pension paid by Spain as a “pension to be received”.
- Requirements that fundamentally affect migrant workers, or that can be more easily fulfilled by nationals, or that may be particularly detrimental to migrant workers, are indirectly discriminatory.
- (Spanish worker who requests early retirement, also having the right to receive an equivalent German pension).

2019 12 11 (E-708/18), AsociaVia de Proprietari bloc M5A-ScaraA.

ECJ Judgment of 11 December 2019 (C-708/18), AsociaVia de Proprietari bloc M5A-ScaraA.

ECLI:EU:C:2019:1064.

- *TK v AsociaVia de Proprietari bloc M5A-ScaraA.*
- Request for a preliminary ruling from the Tribunalul Bucuresti (District Court, Bucharest, Romania).
- (Neighbor who protests against his Community of owners, which has installed a video surveillance system of common areas, under the Law that allows it).
- (Arts. 8 and 52 of the Convention on the Functioning of the European Union and Directive 95/46/EC; data protection): EU law requires three requirements for the processing of personal data to be lawful: 1) Legitimate interest (current, real) of the controller or of the third party to whom they are communicated. 2) (reasonable) necessity of the processing to achieve that legitimate interest. 3) Weighing of the rights and

interests in presence (privacy, health, security, integrity of property, etc.).

- EU law does not preclude the law that allows a video surveillance system to be installed in the common areas of a building (for the care and protection of people or property), without the consent of the data subjects, provided that the general guarantees regarding data processing are respected.

2019 12 12 (C-450/18), INSS (Mothers' Pension Supplement).

ECJ Judgment of 12 December 2019 (C-450/18), INSS (Pension supplement for mothers).

ECLI:EU:C:2019:1075.

- *WA v. National Social Security Institute.*
- Request for a preliminary ruling from Labour Court No 3 of Girona.
- Article 60.1 of the LGSS recognises “a pension supplement, for their demographic contribution to Social Security, to women who have had biological or adopted children and are beneficiaries in any scheme of the Social Security system of contributory retirement, widow’s or widower’s pensions or permanent disability”, set at a percentage (5, 10 or 15, according to the number of children) of the initial amount of the pension.
- (Directive 79/7, Equality in Social Security): EU law is opposed to the LGSS since men in the same situation do not have the right to the supplement and the male demographic contribution is as important as the female one; the care of children can fall on anyone.
- The benefit is not subject to actual care or leave of absence and the like (children’s education, periods of interruption of employment, etc.).
- It is not valid as a positive action because it does not provide any solution to the problems that women may have to face during their professional careers, nor does it compensate for the disadvantages to which they may be exposed.
- (W.A. agrees to absolute permanent disability and requests the same increase as if he had been a woman, taking into account that he is the parent of two children).

2019 12 18 (C-447/18), Generálny riaditeľ Sociálnej poisťovne Bratislava.

ECJ Judgment of 18 December 2019 (C-447/18), Generálny riaditeľ Sociálnej poisťovne Bratislava.

ECLI:EU:C:2019:1098.

- *UB v Generálny riaditeľ Sociálnej poisťovne Bratislava*.
- Request for a preliminary ruling from the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic).
- (Regulations 883/2004 and 492/2011, Social Security and Freedom of Movement): EU law precludes a benefit from only being granted to high-level athletes who have represented a Member State if they are nationals of the Member State.
- (Hockey player who won competitions with Czechoslovakia; chooses to be Czech but resides in Slovakia; applies for the athletes' benefit provided for in the Slovak Law of 2015).

2019 12 19 (C-16/18), Dobersberger.

ECJ (Grand Chamber) of 19 December 2019 (C-16/18), Dobersberger.
ECLI:EU:C:2019:1110.

- *Michael Dobersberger v. Magistrat der Stadt Wien*.
- Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).
- (Articles 56 TFEU and 57 TFEU, freedom to provide services; Directive 96/71/EC, posting of workers): EU law on posting of workers does not apply to the case under consideration because workers carry out a significant part of their activity on the territory of Hungary, where they start or end their service.
- Those who provide services on board international trains do not have a sufficient link with the territory of the Member State(s) through which they are travelling to be considered "posted".
- (Austrian Railways awards the service on board international trains to a local company, which subcontracts it to a Hungarian company; the service is provided by persons domiciled and insured in Hungary, in whose capital the journeys begin and end.).

2019 12 19 (E-168/18), Pensions-Sicherungs-Verein.

ECJ Judgment of 19 December 2019 (C-168/18), Pensions-Sicherungs-Verein.
ECLI:EU:C:2019:1128.

- *Pensions-Sicherungs-Verein VVaG v. Günther Bauer*.
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 2008/94, insolvency of the employer): EU law applies when the insolvent company cannot assume the reduction of the retirement

pensions introduced by the interprofessional entity that has been paying them.

- The minimum protection of the Directive may have direct effect when the private entity that pays retirement pensions can be assimilated to the State.

2019 12 19 (C-465/18), Comune di Bernareggio.

ECJ Judgment of 19 December 2019 (C-465/18), Comune di Bernareggio.

ECLI:EU:C:2019:1125.

- *AV and BU v Comune di Bernareggio*.
- Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy).
- (Art. 49 TFEU, freedom of establishment): EU law precludes the granting of a preferential and unconditional right of purchase to pharmacists employed in a municipal pharmacy transferred by means of a call for tenders.
- That national rule may dissuade pharmacists from other Member States from purchasing a pharmacy on Italian territory, and may even make such an acquisition impossible. It is a preference that does not find objective justification; The requirement that the successful bidder be a pharmacist already guarantees the quality of the service.
- (A municipality that tenders the sale of a municipal pharmacy, providing for its award to the best offer unless, in accordance with Law No 362/1991, one of its employees exercises the right of preferential acquisition; despite the existence of a higher bid, it is finally awarded to a pharmacist employed in the municipal company who had not participated in the tender but matches the offer).

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2020 01 20 (C-274/14), Economic-Administrative Court.

ECJ Judgment (Grand Chamber) of 20 January 2020 (C-274/14).

ECLI:EU:C:2020:17.

- *Banco de Santander v. Central Economic-Administrative Court (TEAC)*.
- Request for a preliminary ruling from TEAC (Spain).

- (Art. 267 TFEU, Question referred): Inadmissibility of the question because the TEAC “does not comply with the requirement of independence, in its internal aspect, which characterises the courts”.
- Despite this, these “Courts” must ensure the application of EU law when adopting their decisions, including by disapplying national provisions that conflict with rules with direct effect.
- Judicial appeals against the decisions of the TEAC guarantee the effectiveness of the preliminary ruling mechanism and the interpretative unity.

2020 01 22 (C-32/19), Austrian Pension Insurance.

ECJ Judgment of 22 January 2020 (C-32/19), Austrian Pension Insurance.
ECLI:EU:C:2020:25.

- *TA v. Austrian Pension Insurance Institution.*
- Request for a preliminary ruling from the Supreme Court, Austria.
- (Directive 2004/38/EC, movement and residence): EU law means that, in order to obtain permanent residence in the host State before the end of the required five-year uninterrupted period, the conditions of having pursued an activity in that State for at least the last twelve months and of having resided there continuously for more than three years are required of a person who, At the time of ceasing to work, they have reached the age set for accessing the retirement pension.
- (Romanian resident in Austria since August 2013 and who in January 2015 reaches retirement age; he receives a Romanian pension of €204 per month and an Austrian pension of €27, which he requests to supplement up to the minimum and is denied for not proving residence in the country).

2020 01 22 (C-177/18), Baldonado Martín.

ECJ Judgment of 22 January 2020 (C-177/18), Baldonado Martín.
ECLI:EU:C:2020:26.

- *Almudena Baldonado Martín v. Madrid City Council.*
- Request for a preliminary ruling from the Contentious-Administrative Court No. 14 of Madrid.
- (Directive 1999/70/EC, temporary work): EU law does not preclude the absence of compensation for interim or career civil servants when their employment relationship is terminated, although it is paid to permanent staff when their contract ends for objective reasons.

- (Articles 151 TFEU and 153 TFEU, fundamental social rights; Directive 1999/70): EU law does not preclude the absence of severance pay for interim civil servants, even if it is received at the end of a temporary employment contract.
- The termination of a temporary contract takes place in a context that is significantly different from that which arises at the end of a contract of indefinite duration (unforeseen nature of the breakdown and frustration of legitimate expectations of continuity).
- It is possible to see discriminatory differences between civil servants and workers, but only with regard to issues addressed by EU law, which is not the case with compensation for the end of employment.
- (Gardening Officer who temporarily vacates a position in a City Council; after almost eight years she is dismissed when the person who has obtained the position in ownership joins her; almost four years later she claims compensation for the end of her relationship).

2020 01 30 (E-395/18), Tim.

ECJ Judgment of 30 January 2020 (C-395/18), Tim.

ECLI:EU:C:2020:58.

- *Tim SpA - Direzione e coordinamento Vivendi SA v Consip SpA and Ministero dell'Economia e delle Finanze.*
- Request for a preliminary ruling from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy).
- (Directive 2014/24/EU, public procurement): EU law allows the contracting authority to exclude a tenderer who submits a tender that does not comply with requirements relating to subcontractors, provided that this has been verified.
- Respect for proportionality requires that the exclusion is not automatic, and it must be verified whether the tenderer could assume the assignment to which he aspires with the exclusive intervention of the subcontractors who do comply with the labour requirements.
- (Interministerial call for optical communication; TIM submits a bid involving the collaboration of three subcontractors, one of which does not comply with the rules on the employment of persons with disabilities. The tenderer understands that it should be allowed to replace the reference subcontractor or undertake the contract with the use of the other two).

2020 02 27 (C-298/18), Grafe and Pohle.

ECJ Judgment of 27 February 2020 (C-298/18), Grafe and Pohle.

ECLI:EU:C:2020:121.

- *Reiner Grafe and Jürgen Pohle v Südbrandenburger Nahverkehrs GmbH and OSL Bus GmbH*.
- Request for a preliminary ruling from the Arbeitsgericht Cottbus - Kammern Senftenberg (Labour Court, Cottbus, Chambers of Senftenberg, Germany).
- (Directive 2001/23/EC, transfer of undertaking): EU law does not prevent the case from being considered a transfer of undertaking if it is considered that the identity of the economic unit is maintained, which must be assessed by the national court.
- The fact that, due to legal, environmental and technical requirements imposed by the contracting authority, the new company does not acquire the significant resources necessary for the activity (ownership of the outgoing company) does not necessarily prevent a transfer of the company, provided that other factual circumstances (significant assumption of the workforce, continuation without interruption of the aforementioned activity) so denote.
- In the passenger transport sector, the acquisition of buses must not be regarded in abstracto as the sole determining factor in a transfer of an undertaking.
- (Public passenger transport service whose concession ends; the outgoing company agrees to dismissal subject to the incoming company not taking charge of the workforce; the new transferee does not take over either the vehicles [which do not meet environmental requirements and, in any case, should be replaced] or the depots and other facilities, but hires most of the drivers without recognising their seniority; the activity is provided without interruption).

2020 02 27 (C-773/18 to C-775/18), Land Sachsen-Anhalt and jugs.

ECJ judgment of 27 February 2020 (C-773/18 to C-775/18), Land Sachsen-Anhalt and jugs.

ECLI:EU:C:2020:125.

- *TK and Others v Land Sachsen-Anhalt*.
- Requests for a preliminary ruling from the Verwaltungsgericht Halle (Administrative Court, Halle, Germany).
- (Directive 2000/78, non-discrimination): EU law does not preclude the payment of supplementary remuneration (to judicial personnel) that depends in part on the age at which they were recruited, provided that it does not perpetuate a difference in treatment on grounds of age.

- The principle of effectiveness precludes a bimonthly limitation period for claiming damages caused by a discriminatory measure on grounds of age and which begins when a ECJ judgment is handed down, the knowledge of which by the affected persons is problematic.
- (Aftermath of the ECJ judgment of 8 September 2011, according to which the basic salary step of a public employee cannot be determined according to the age he or she is at the time of hiring).

2020 02 27 (C-836/18), Government Sub-delegation in Ciudad Real.

ECJ Judgment of 27 February 2020 (C-836/18), Sub-delegation of the Government in Ciudad Real.

ECLI:EU:C:2020:119.

- *Sub-delegation of the Government in Ciudad Real against RH.*
- Request for a preliminary ruling from the High Court of Justice of Castilla-La Mancha.
- (Directive 2004/38, freedom of movement and residence; Art. 20 TFEU, EU citizenship): EU law prevents refusing family reunification to a Moroccan married to a Spanish woman (who has neither exercised free movement nor can she prove sufficient resources) without analysing the repercussions of this (the Spanish woman might leave the EU and would not be able to effectively enjoy the rights of her citizenship) and all the circumstances of the case (they live with her father, who undertakes to maintain them).
- Article 20 TFEU precludes national measures, including decisions refusing residence to the family members of a Union citizen, which have the effect of depriving Union citizens of the effective enjoyment of the essence of the rights conferred by their status.
- In particular, the sufficiency of resources that must be accredited for reunification includes those from family members.
- But EU law does not imply that there is a relationship of dependency between the spouses so that the right to reside in Spain must be guaranteed to the Moroccan spouse.

2020 03 19 (C-103/18 and 429/18), Sánchez Ruiz and Fernández Álvarez.

ECJ Judgment of 19 March 2020 (C-103/18 and 429/18), Sánchez Ruiz and Fernández Álvarez.

ECLI:EU:C:2020:219.

- *Domingo Sánchez Ruiz and Berta Fernández Álvares v. Community of Madrid (Madrid Health Service).*

- Requests for a preliminary ruling from the Contentious-Administrative Courts No. 8 and 14 of Madrid.
- (Directive 1999/70, fixed-term work): successive interim appointments due to vacancies, without a vacancy, are abusive.
- Failure by the employer to comply with its legal obligation to organise a selection process within the established period.
- EU law prevents the successive renewal of appointments from being considered justified for generic reasons that end up concealing permanent and stable needs.
- EU law does not require appointments to be made permanent, but it does require that there be dissuasive and serious consequences.
- The definitive provision, access to the status of non-permanent indefinite or receiving compensation as unfair dismissal (or others) are appropriate measures to prevent and punish abuses.
- The abusive use of temporary appointments does not disappear because the public employee consents to them.
- The Directive does not require the disapplication of Spanish laws contrary to clause 5, which has no direct effect (conditional, imprecise). Conforming interpretation, but not *contra legem*.
- (Interim computer scientist for 17 years; Dentists 12 and 17 years old, with various appointments; they demand fixity).

2020 03 26 (C-344/18), ISS Facility Services.

ECJ Judgment of 26 March 2020 (C-344/18), ISS Facility Services.
ECLI:EU:C:2020:239.

- *ISS Facility Services NV v. Sonia Govaerts and Atalian NV*.
- Request for a preliminary ruling from the Arbeidshof te Gent (High Labour Court, Ghent, Belgium).
- (Directive 2001/23/EC): the rights and obligations are transferred to each of the transferees in proportion to the functions performed by the worker concerned, provided that the division of the employment contract resulting from this operation is possible and does not lead to a deterioration of working conditions or affect the maintenance of employment.
- If such division proves impossible or violates the rights of that worker, the eventual termination of the employment relationship is attributable to the transferee or assignees, even if it has occurred at the request of the worker.

- (Cleaning manager in a company awarded a municipal contract that is cut into three for subsequent award).

2020 04 02 (C-370/17 and C-37/18), CRPNPAC and Vueling.

ECJ Judgment (Grand Chamber) of 2 April 2020 (C-370/17 and C-37/18), CRPNPAC and Vueling.

ECLI:EU:C:2020:260.

- *Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) and Vueling Airlines SA against Vueling Airlines SA and Jean-Luc Poignant.*
- Requests for a preliminary ruling from the Tribunal de grande instance de Bobigny (District Court, Bobigny, France) and the Cour de cassation (Court of Cassation, France).
- (Regulations on Social Security coordination): the judicial body that hears proceedings against a company for alleged misuse of the E-101 certificate can only find fraud after hearing the institution that issued it and verifying that it does not respond or that it proceeds to cancel the certificate.
- EU law precludes a company from being ordered to compensate its employees as a result of their previous criminal conviction, for fraudulent use of the E-101, if it is contrary to the above requirements of EU law.
- (Vueling hires staff, obtains the E-101 certificate from the INSS, and transfers them to Paris airport; in criminal proceedings it is sanctioned for a crime against workers' rights; the Criminal Court admits the presumption of validity of the certificates, but proclaims competence to examine their fraudulent nature. Based on this conviction, the plaintiffs claim damages, as they were not affiliated to the French Social Security).

2020 04 02 (C-670/18), Comune di Gesturi.

ECJ Judgment of 2 April 2020 (C-670/18), Comune di Gesturi.

ECLI:EU:C:2020:272.

- *CO v. Comune di Gesturi.*
- Request for a preliminary ruling from the Tribunale Amministrativo Regionale per la Sardegna (Italy).
- (Directive 2000/78/C, non-discrimination): EU law does not preclude national legislation that prohibits public administrations from awarding study and advisory missions to retired people.

- Requirements: that a legitimate employment and labour market policy objective is pursued and, on the other hand, that the means applied to achieve that objective are appropriate and necessary.
- It is for the referring court to ascertain whether such circumstances are present.
- (City Council that announces a tender to award study and advice for the municipal recycling center, including requirements [Bachelor's Degree in Medicine and Surgery. Specialty in Hygiene. Accredited management experience at the Servizio Sanitario Nazionale for at least five years. Not be a retired worker in the private or public sectors]. He is a retiree who meets the rest of the requirements).

2020 04 02 (C-802/18), Caisse pour l'avenir des enfants (Enfant du conjoint d'un travailleur frontalier).

ECJ judgment of 2 April 2020 (C-802/18), Caisse pour l'avenir des enfants (Enfant du conjoint d'un travailleur frontalier).

ECLI:EU:C:2020:269.

- *Caisse pour l'avenir des enfants contra FV and GW.*
- Request for a preliminary ruling from the Conseil Supérieur de la Sécurité sociale (Higher Social Security Council, Luxembourg).
- (Article 45 TFEU and Directive 2004/38/EC, freedom of movement; Regulation 883/2004, Social Security Coordination): a family allowance linked to the exercise of a salaried activity by a cross-border worker is a "social advantage".
- The cross-border worker must receive the child allowance (linked to work) not only on the basis of his own children but also on the basis of those of his spouse if both support them.
- (Resident in France who works in Luxembourg; has two children in common with his wife; lives with them a son of the woman, the result of a previous relationship. Luxembourg law does not consider such minors to be a member of the family, but grants assistance for any minor resident in its territory and who is part of a worker's household).

2020 04 02 (C-830/18), Landkreis Südliche Weinstraße.

ECJ Judgment of 2 April 2020 (C-830/18), Landkreis Südliche Weinstraße.

ECLI:EU:C:2020:275.

- *Landkreis Südliche Weinstraße vs. PF e.a.*

- Request for a preliminary ruling from Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court, Rhineland-Palatinate, Germany).
- (Regulation 492/2011, freedom of movement): there is indirect discrimination against cross-border workers if the assumption of school transport for children is limited to those who reside in the territory of the competent regional administration (German Land), excluding cross-border workers.
- The practical difficulties connected with the efficient organisation of school transport in a territory do not constitute an overriding reason in the public interest which justifies a national measure classified as indirect discrimination.
- (German family resident in France; the mother's job and the child's school are in Germany and from a certain academic year the German administration only pays transport expenses to those who reside in its territory).

2020 04 22 (E-692/19), Yodel Delivery Network.

ECJ Order of 22 April 2020 (C-692/19), Yodel Delivery Network.

ECLI:EU:C:2020:288.

- *B v Yodel Delivery Network Ltd.*
- Request for a preliminary ruling from the Watford Employment Tribunal (United Kingdom).
- (Directive 2003/88, working time): EU law (on working time) does not consider as a worker someone who provides his activity under a self-employed contract (if the factual indications are real), can appoint substitutes or auxiliaries, reject or limit the employer's orders, work for competing companies and set availability time slots, charging according to the packages distributed.
- National competence to classify the type of link, but a detailed analysis of the case for the purposes of the Community concept.
- (Courier who makes deliveries for Yodel; National law that rules out their employment if there is no intuitu personae commitment).

2020 04 23 (E-507/18), Associazione Avvocatura per i diritti LGBTI.

ECJ Judgment (Grand Chamber) of 23 April 2020 (C-507/18), Associazione Avvocatura per i diritti LGBTI.

ECLI:EU:C:2020:289.

- *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford.*

- Request for a preliminary ruling from the Corte Suprema di Cassazione (Italy).
- (Directive 2000/78/EC; non-discrimination): EU law protects against statements made by a person during an audiovisual broadcast according to which his company would never hire members of the LGBTI community.
- Protection (access to employment) operates even if no personnel selection process is underway or scheduled, if the link between such declarations and the conditions of access to employment and professional practice within that company is not hypothetical.
- EU law does not preclude a Bar Association for the defence of LGBTI people from always having active standing to take action demanding compliance with anti-discrimination rules.
- Such standing is admissible even if there is no specific and identifiable injured person.
- (Well-known head of a law firm, interviewed by telephone; he states that he would never incorporate someone from the LGTBI collective into his Office).

2020 04 23 (C-710/18), Land Niedersachsen (Previous Activity Periods).

ECJ judgment of 23 April 2020 (C-710/18), Land Niedersachsen (Périodes antérieures d'activité pertinente).

ECLI:EU:C:2020:299.

- *WN vs. Land Niedersachsen*.
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Art. 45.1 TFEU, freedom of movement): EU law precludes the fact that in order to determine the initial remuneration of a teacher, only a total maximum of three years for her previous periods of activity for a different employer located in another Member State is taken into account when such activity is equivalent.
- Such a restriction may make freedom of movement less attractive and is only valid (being proportionate) if it pursues a fundamental objective or is based on overriding reasons in the public interest.
- (German who has been a high school teacher in France for 17 years. Shortly afterwards she was hired by Instituto in Germany. There are three levels of remuneration “from the start” and then you progress to 5).

2020 04 30 (C-211/19), Készenléti Rendvrség.

ECJ Judgment of 30 April 2020 (C-211/19), Készenléti Rendvrség.

ECLI:EU:C:2020:344.

- *UO v. Készenléti Rendőrség*.
- Request for a preliminary ruling from the Miskolci Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Miskolc, Hungary).
- (Directives 89/391 and 2003/88; safety and health; working time): EU law on the organisation of working time applies to security forces guarding the external borders.
- Such application lapses if exceptional events arise, the seriousness and magnitude of which require the adoption of measures essential for the protection of life, health and collective security and whose correct compliance would be compromised if the aforementioned rules were to be respected.
- The decision requires an examination of whether the missions carried out during the period in question were carried out in circumstances of exceptional gravity and magnitude that justified the application of the derogation; its temporal prolongation (several months) inclines to the negative response.
- (Member of the Rapid Intervention Police assigned to border surveillance, performing on-call duty of longer duration than the ordinary one; the Administration considers that the on-call time is equivalent to rest).

2020 05 07 (C-96/19), Certification of days without driving.

ECJ Judgment of 7 May 2020 (C-96/19), Prefettura Ufficio territoriale di Firenze.

ECLI:EU:C:2020:353.

- *VO v. the Administrative Authority of the District of Tulln*.
- Request for a preliminary ruling from the Regional Administrative Court of Lower Austria, Austria.
- (Regulation 165/2014, Control of road transport): where EU law provides that States shall not impose on drivers the obligation to produce documents attesting to their activities when they are not in the vehicle, it refers to something other than requiring the driver equipped with a digital tachograph to present as a means of subsidiary proof of their activities, in the absence of automatic and manual records in the tachograph, a certification of activities issued by your employer.
- (Driver of a vehicle equipped with a digital tachograph who does not provide, in relation to a number of days prior to being checked on the

road, a certification from his employer indicating that he did not drive during those days).

2020 05 14 (C-17/19), Bouygues travaux publics and others.

ECJ Judgment of 14 May 2020 (C-17/19), Bouygues travaux publics and others.

ECLI:EU:C:2020:379.

- *Criminal proceedings brought against Bouygues travaux publics and others.*
- Request for a preliminary ruling from the Cour de cassation (France).
- (Regulation 883/2004): certificates (E101 and A1) are binding on the competent institution and the courts of the host State in so far as they prove that they are subject to the social security system of the competent State.
- The reference certificates do not bind in respect of obligations other than social security, in particular those relating to the employment relationship between employers and workers (employment and working conditions).
- (Construction of nuclear reactor in France; the company in charge sub-contracts to companies in Cyprus and Romania, which send personnel from their countries).

2020 06 04 (C-588/18), FETICO and others.

ECJ (Grand Chamber) of 4 June 2020 (C-588/18), FETICO and others.

ECLI:EU:C:2020:420.

- *Federation of Independent Commerce Workers (Fetico), State Federation of Services, Mobility and Consumption of the General Union of Workers (FESMCUGT) and Federation of Services of Workers' Commissions (CCOO) against Grupo de Empresas DIA, S. A. and Twins Alimentación, S. A.*
- Request for a preliminary ruling from the Labour Chamber of the National High Court.
- (Directive 2003/88, Working time): EU law on weekly rest and holidays does not prevent leave superimposed on holidays or weekly rest from being taken without being taken.
- Paid leave requires that one of the typified events (hospitalisation, marriage, etc.) occurs and that the needs or obligations that justify it occur during a period of work.

- Leave is intended to allow absence from work to meet certain needs or obligations, so it is inextricably linked to working time.
- (Collective dispute with the interest that if any of the circumstances generating paid leave occur during the holidays or weekly rest, a specific date is set for its enjoyment).

2020 06 04 (C-610/18), AFMB and others.

ECJ (Grand Chamber) of 4 June 2020 (C-610/18), AFMB and others.
ECLI:EU:C:2020:565.

- *AFMB e.a. Ltd against Raad van bestuur van de Sociale verzekeringsbank*.
- Request for a preliminary ruling from the Centrale Raad van Beroep (Central Court of Appeal, Netherlands).
- (Regulation 1408/71, Social Security Coordination): EU law on the coordination of social security systems considers the employer of a carrier to be the one who exercises the effective management power (wage costs, disciplinary power) and not the formal employer.
- (Cypriot company enters into agreements with Dutch transport companies to manage its truck fleet in the Netherlands and hires drivers resident in the Netherlands. Identification of the employer as a prior issue to determine the Social Security regime).

2020 06 04 (E-828/18), Trendsetteuse.

ECJ Judgment of 4 June 2020 (C-828/18), Trendsetteuse.
ECLI:EU:C:2020:438.

- *Trendsetteuse SARL v. DCA SARL*.
- Request for a preliminary ruling from the Tribunal de commerce de Paris (Commercial Court, Paris, France).
- (Directive 86/653/EEC, self-employed commercial agents): EU law does not require that consideration as a commercial agent entails the power to change the prices of goods whose sale is commissioned on behalf of the entrepreneur.
- The protection of EU law for the commercial agent invites us not to interpret its scope restrictively.
- (Fashion and jewellery manufacturer linked to an entity that advertises its products in exchange for a commission on the sale price).

2020 06 25 (E-762/18 and 37/19), Varhoven kasatsionen sad na Republika Bulgaria.

ECJ judgment of 25 June 2020 (C-762/18 and 37/19), Varhoven kasatsionen sad na Republika Bulgaria.

ECLI:EU:C:2020:504.

- *QH and CV v. Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA*.
- Requests for a preliminary ruling from the Rayonen sad Haskovo (District Court, Haskovo, Bulgaria) and the Corte suprema di cassazione (Supreme Court of Cassation, Italy).
- (Directive 2003/88, Working time): EU law precludes national case-law that rejects the accrual of leave during the period from (unlawful) dismissal to reinstatement.
- EU law precludes the fact that, in such a case, if the employment contract is terminated after reinstatement, the worker is not paid an allowance in lieu of the paid annual leave not taken as a reference.
- In certain situations where the worker is unable to perform his or her duties (such as IT), the right to paid annual leave is not conditional on having actually worked (unless he or she has had another job).
- The unlawful conduct of the employer impedes the development of the work and this is decisive.
- (Workers dismissed, in individual or collective proceedings, and reinstated after a judgment declaring the illegality of such termination).

2020 07 16 (C-610/18), AFMB and others.

ECJ (Grand Chamber) of 4 June 2020 (C-610/18), AFMB and others.

ECLI:EU:C:2020:565.

- *AFMB e.a. Ltd against Raad van bestuur van de Sociale verzekeringsbank*.
- Request for a preliminary ruling from the Centrale Raad van Beroep (Central Court of Appeal, Netherlands).
- (Regulations 1408/71 and 883/2004, Social Security migrants): the employer of a driver of international transport vehicles is the company that exercises effective management power (it can dismiss him, bears his salary costs) and not the entity that appears as the formal employer.
- Community concepts (employer, staff) that seek material reality, over formal reality.
- Overcoming artifices that may render ineffective the rule on applicable legislation in the field of Social Security.
- (Cypriot company which enters into agreements with Dutch transport companies for the management of its fleet of lorries in the Netherlands; at the same time it hires drivers resident in the Netherlands, declaring Cypriot labour law applicable).

2020 07 16 (C-658/18), *Governo della Repubblica italiana (Statute of Italian Justices of the Peace)*.

ECJ Judgment of 16 July 2020 (C-658/18), *Governo della Repubblica italiana (Statute of Italian Justices of the Peace)*.

ECLI:EU:C:2020:572.

- *UX v. Governo della Repubblica italiana*.
- Request for a preliminary ruling from the Giudice di pace di Bologna (Justice of the Peace, Bologna, Italy).
- Previous: the Giudice di Pace is a “court of one of the Member States” (it has independence, it exercises jurisdiction).
- (Directive 2003/88/EC and the EU Charter of Fundamental Rights): a Justice of the Peace who, in the context of her duties, provides real and effective (not marginal) services, receiving compensation of a remunerative nature, may be included in the concept of “worker” for the purposes of working time and holidays.
- (Directive 1999/70/EC): the concept of “fixed-term worker” may cover a Justice of the Peace for the purposes of abusive temporary employment.
- On both issues: it leaves the decision in the hands of the referring body.
- (Justice of the Peace; during the 2017/2018 judicial year, she handed down 478 criminal sentences, 1,113 orders of dismissal in respect of identified suspects and 193 orders of dismissal in respect of unknown suspects; she held two hearings per week; during her holidays she was unpaid).

2020 09 09 (C-674/18 and 675/18), *TMD Friction*.

ECJ Judgment of 9 September 2020 (C-674/18 and 675/18), *TMD Friction*.

ECLI:EU:C:2020:682.

- *EM vs. TMD Friction GmbH and FL vs. TMD Friction EsCo GmbH*.
- Requests for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 2001/23, Transfer of undertakings): EU law allows the liability of the person who acquires an insolvent company to be excluded for the rights accumulated previously, if the contingency (retirement) is subsequent to the declaration of bankruptcy and the rights in question are protected at least as required by Directive 2008/94/EC (insolvency).

- EU law precludes the discarding of guaranteed protection in cases of insolvency on the grounds that the rights were not consolidated at the time of the declaration of bankruptcy.
- Direct effect: Article 8 of Directive 2008/94 (minimum protection of rights acquired or in the process of acquiring retirement benefits) can be invoked against the guarantee body provided that it can be assimilated to the State and, on the other hand, this mission is effectively extended to the types of retirement benefits for which protection is requested.
- (Transfers of businesses carried out by the insolvency practitioner after the opening of insolvency proceedings; the assignees assume both the employment contracts and the commitments arising from the supplementary occupational pension scheme applicable under a general company agreement).

2020 09 23 (E-777/18), Vas Megyei Kormányhivatal (Cross-border healthcare).

ECJ Judgment of 23 September 2020 (C-777/18), Vas Megyei Kormányhivatal (Cross-border healthcare).

ECLI:EU:C:2020:745.

- *WO vs. Vas Megyei Kormányhivatal*.
- Request for a preliminary ruling from the Szombathelyi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szombathely, Hungary).
- (Directive 2011/24, cross-border healthcare): EU law precludes the rule that excludes reimbursement of medical consultation expenses in another Member State (within the limits of coverage in the competent State) even if it has been impossible to apply for prior authorisation due to a vital emergency.
- EU law does not prevent national law from setting a 31-day period for granting prior authorisation for cross-border healthcare coverage.
- (A Hungarian citizen with eye problems that national medicine does not solve and chooses to go to Germany for consultation, where he is operated on).

2020 09 24 (C-223/19), NK (Pensions d’entreprise de personnel cadre).

ECJ Judgment of 29 September 2020 (C-223/19), NK (Pensions d’entreprise de personnel cadre).

ECLI:EU:C:2020:753.

- *YS vs. NK*.
- Request for a preliminary ruling from Landesgericht Wiener Neustadt (Regional Court, Wiener Neustadt, Austria).
- (Directives 2000/78/EC and 2006/54/EC, non-discrimination; Charter of Fundamental Rights): EU law does not prevent the withholding on or freezing of a pension from affecting more men than women, or more people who have reached a certain age, if this is based on objective factors.
- (Art. 47 CFEU): EU law does not require the State to establish an autonomous remedy to examine the conformity between it and national provisions, provided that there is the possibility of such an examination on an incidental basis.

2020 10 06 (E-181/19), Jobcenter Krefeld.

ECJ (Grand Chamber) of 6 October 2020 (C-181/19), Jobcenter Krefeld. ECLI:EU:C:2020:794.

- *Judgment of the Court (Grand Chamber) of 6 October 2020.*
- Jobcenter Krefeld - Widerspruchsstelle vs. JD.
- Request for a preliminary ruling from the Landessozialgericht Nordrhein-Westfalen (Regional Social Court, North Rhine-Westphalia, Germany). (Regulation 492/2011; Directive 2004/38 on movement and residence): EU law precludes a law under which a national of another Member State and his minor children are automatically excluded from the right to receive benefits intended to ensure their subsistence.
- The risk that the loss of employment will drag down the eruption of children's schooling must be averted. Refusal discriminates against nationals, especially since the unemployed worker has a right of residence.
- (A Pole living in Germany with his two youngest daughters, who attended school there; when he became unemployed, he was denied subsistence benefits.).

2020 10 08 (E-644/19), Universitatea “Lucian Blaga” Sibiu and others.

ECJ Judgment of 8 October 2020 (C-644/19), Universitatea “Lucian Blaga” Sibiu and others. ECLI:EU:C:2020:810.

- *FT v. Universitatea “Lucian Blaga” Sibiu and others.*
- Request for a preliminary ruling from the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia, Romania). (Directive 2000/78, non-dis-

crimination): EU law on equal treatment does not apply to the regulation on honorary university teaching staff (after retirement) according to which those who have achieved the degree of excellence (can supervise theses) have a higher status (indefinite contract, higher remuneration) than the rest (temporary employment, lower remuneration).

- (Directive 1999/70, temporary work): EU law on fixed-term work precludes such legislation if the situations are comparable and there is no justification (objective, reasonable).
- (Tenured Professor who reaches retirement age and sees his request for continuity denied, on the grounds that he does not have the qualification to supervise Doctoral Theses; from that moment on, he is hired temporarily and paid by the hour, performing tasks identical to those above).

2020 10 14 (C-681/18), KG (Successive assignments by ETT).

ECJ Judgment of 14 October 2020 (C-681/18), Successive assignments by temporary employment agencies.

ECLI:EU:C:2020:823.

- *H vs. KG*.
- Request for a preliminary ruling from the Tribunale ordinario di Brescia (Italy).
- (Directive 2008/104, temporary employment agencies): EU law allows successive assignments of the same worker to the user company, but requires the State to adopt measures to prevent compliance with the guarantees established in the directive from being evaded.
- Care must be taken to ensure that the “working and employment conditions” of those who provide their activity through temporary employment agencies are equated with those who make up the staff of the user company; The term “conditions” must be interpreted broadly and the exceptions to equalisation (equal pay and personal scope of collective agreements) must be interpreted strictly.
- It is an indication of abuse if successive missions involve a longer period of activity than can reasonably be described as “temporary”; the same happens with the absence of objective justification for the use of temporary employment agencies.
- (Worker hired by a temporary employment agency and assigned uninterruptedly to the same user, between March 2014 and November 2016, up to eight times and with seventeen extensions; requests fixity and nullity of the contracts of availability).

2020 10 28 (C-637/19), BY (Preuve photographique).

ECJ Judgment of 28 October 2020 (C-637/19), BY (Preuve photographique).

ECLI:EU:C:2020:863.

- *BY vs. CX.*
- Request for a preliminary ruling from the Svea hovrätt – Patent- och marknadsöverdomstole (Court of Appeal for Patents, Trademarks and Commercial Matters, Stockholm, Sweden).
- (Directive 2001/29, copyright): copyright (authorising or prohibiting any communication to the public of your works) does not include the presentation of a protected work as legal evidence.
- The right to an effective remedy would be seriously compromised if a rightholder could object to the production of evidence before a court on the sole ground that it contains an element protected by copyright.
- (In disputes between individuals, the defendant submits as evidence a copy of the plaintiff's website that contained a photograph.).

2020 10 29 (E-243/19), Veselības ministrija.

ECJ Judgment of 29 October 2020 (C-243/19), Veselības ministrija.

ECLI:EU:C:2020:872.

- *A contra Veselības ministrija.*
- Request for a preliminary ruling from the Augstākā tiesa (Sēdvts) (Supreme Court, Latvia).
- (Regulation 883/2004, Social Security): EU law does not preclude the State of residence from refusing authorisation for healthcare in another country when it has effective hospital treatment, but incompatible with the religious beliefs of the insured person.
- (Directive 2011/24, cross-border healthcare; Article 21 of the Convention on Religious Non-Discrimination): in cross-border cases, the refusal referred to must be particularly justified by a legitimate purpose other than the financial one (especially if the reimbursable expenditure is equivalent to the estimated cost of healthcare in the competent State), such as the maintenance of healthcare capacity or medical competence.
- (Latvian Jehovah's Witness requests surgery in Poland to avoid transfusion.).

2020 11 11 (C-300/19), Marclean Technologies.

ECJ Judgment of 11 November 2020 (C-300/19), Marclean Technologies.

ECLI:EU:C:2020:898.

- *UQ v. Marclean Technologies, S.L.U.*
- Request for a preliminary ruling from the Labour Court No 3 of Barcelona.
- (Directive 98/59 on collective redundancies): in order to assess whether the contested individual dismissal forms part of a collective redundancy, the reference period must be calculated by taking into account any period (of 30 or) 90 consecutive days in which that individual dismissal took place (whether such dates are earlier, later or overlapping).
- Counting only the days before or after the dismissal analysed is not in accordance with Directive 98/59 as it may restrict the rights of the persons concerned.
- The way in which the thresholds defining collective redundancies are calculated is not available to the Member States.
- (Worker unfairly dismissed on 31 May, with some 30 contractual terminations, attributable to the employer, between that date and 15 August).

2020 11 18 (E-463/19), Syndicat CFTC.

ECJ Judgment of 18 November 2020 (C-463/19), Syndicat CFTC.

ECLI:EU:C:2020:932.

- *Syndicat CFTC v. Caisse primaire d'assurance maladie de Moselle.*
- Request for a preliminary ruling from the Conseil de prud'hommes de Metz (Joint Labour Court, Metz, France).
- (Directive 2006/54, gender equality in the workplace; Directive 92/85 on occupational health and maternity): EU law is compatible with unpaid post-maternity leave (lasting up to 27 months), exclusively for female workers, if it seeks to protect against the consequences of pregnancy or maternity.
- Any discrimination must be examined in the light of the conditions of the right to leave, the modalities of its enjoyment and its duration, as well as the legal protection associated with the period of leave. It would be discriminatory if the mere condition of parent were taken into account.

- The objective of protecting the particular relations between the woman and her child is not, however, in itself, sufficient for the exclusion of parents from the additional period of leave.
- (A man requests the leave provided for in the applicable collective agreement only in favour of the worker who is raising her children and has completed the maternity period).

2020 11 25 (C-302/19), Italian family benefits.

ECJ Judgment of 25 November 2020 (C-302/19), Italian family benefits. ECLI:EU:C:2020:957.

- *Istituto Nazionale della Previdenza sociale (INPS) v. WS.*
- Request for a preliminary ruling from the Corte suprema di Cassazione (Supreme Court of Cassation, Italy).
- (Directive 2011/98/EU; residence and work for third-country nationals): EU law precludes (for determining entitlement to social security benefit) the family members of the holder of a single permit from being taken into account when they reside in a third country, unlike the rule applied to nationals who have family members in third countries.
- Criticism of the rules contrary to the right to equal treatment laid down in Directive 2011/98, the rights of holders of the single permit having to be compared with those of Italian nationality.
- (Sri Lankan national whose wife and children live in his or her country of origin; he or she applies for family benefits even though Italian law rules it out.).

2020 11 25 (C-799/19), NI and others.

ECJ Judgment of 25 November 2020 (C-799/19), NI and others. ECLI:EU:C:2020:960.

- *NI and Others v. Sociálna poisťovňa.*
- Request for a preliminary ruling from the District Court of Košice I (District Court of Košice I (Slovakia)).
- (Directive 2008/94, business insolvency): EU law does not identify an employer as insolvent because it is declared so in the context of a judicial enforcement for non-payment of compensation arising from an accident at work. But it is possible that the State decides to extend protection to that case.
- For EU law, compensation for moral damage caused by an accident at work is a claim derived from the employment contract if it constitutes “remuneration” for national law.

- (Heirs of a person who died in an accident at work to whom the public insurer compensates for material damages, but not for moral damages; the company condemned by the court is insolvent).

2020 12 01 (C-815/18), *Federatie Nederlandse Vakbeweging*.

ECJ (Grand Chamber) of 1 December 2020 (C-815/18), *Federatie Nederlandse Vakbeweging*.

ECLI:EU:C:2020:976.

- *Federatie Nederlandse Vakbeweging v Van den Bosch and Others*.
- Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).
- (Directive 96/71/EC, posting of workers): EU law on the posting of workers is applicable to all sectors of activity, including road transport, but without this deriving from the mere existence of an enterprise group and vice versa.
- The driver's relationship with the undertaking for which he works (under a charter party) in a State other than that of his employer's registered office must be examined, but this is not decisive.
- The concept of applicable convention is a matter of national law; in principle, it is one that is implemented to prevent another from being so.
- (Group of transport companies that does not apply the Dutch collective agreement of its parent company to those who, coming from German or Hungarian companies in the group, carry out their activity outside the Netherlands).

2020 12 08 (E-620/18), *Hungary vs European Parliament*.

ECJ (Grand Chamber) of 8 December 2020 (C-620/18), *Hungary v European Parliament*.

ECLI:EU:C:2020:1001.

- *Republic of Hungary v. European Parliament and Council of the European Union*.
- Appeal for annulment.
- Directive 2018/957 (amending Directive 96/71/EC) on the posting of workers in the framework of the provision of services is in accordance with primary law (Articles 53 and 62 TFEU).
- Directive 2018/957 aims to ensure that the working and employment conditions of posted workers are as similar as possible to those of workers employed by undertakings established in the host Member State.

- The choice of the legal basis for an EU act must be based on objective factors susceptible to judicial review (such as the purpose and content of that act). Where there is a more specific provision in the Treaties which may constitute the legal basis for the act at issue, it must be based on that provision.
- The reinforced guarantee (of displaced persons) in terms of remuneration, guaranteeing the remuneration (not only the SMI) of the workplace is valid: it is about covering the cost of living in the State where you work, not in the State of residence.
- (Hungary submits that, by relying on Article 53(1) TFEU and Article 62 TFEU, the EU legislature did not choose a correct legal basis for adopting the contested directive. It considers that, by its object and content, the purpose of that directive is exclusively or principally the protection of workers and is not intended to remove obstacles to the freedom to provide services).

2020 12 08 (E-626/18), Poland vs Parliament and Council.

ECJ (Grand Chamber) of 8 December 2020 (C-626/18), Poland v Parliament and Council.

ECLI:EU:C:2020:1000.

- *Republic of Poland v. European Parliament and Council of the European Union.*
- Appeal for annulment.
- Directive 2018/957 (amending Directive 96/71/EC) on the posting of workers in the framework of the provision of services is in accordance with primary law (Articles 53 and 62 TFEU).
- The reinforced guarantee (of displaced persons) in terms of remuneration, guaranteeing the remuneration (not only the SMI) of the workplace is valid: it is about covering the cost of living in the State where you work, not in the State of residence.
- The quasi-equalization of conditions when the posting lasts more than 12 months (18 in exceptional cases) is valid, constituting a special rule with respect to the provisions for conflicts of laws by the “Rome I” Regulation.

2020 12 17 (E-218/19), Onofrei.

ECJ Judgment of 17 December 2020 (C-218/19), Adina Onofrei.

ECLI:EU:C:2020:1034.

- *Adina Onofrei v. Paris Bar and others.*

- Request for a preliminary ruling from the Cour de Cassation (Court of Cassation, France).
- (Articles 45 and 49 TFEU; freedom of movement and establishment): EU law precludes the exemption of requirements (professional training, certificate of aptitude) in favour of officials who have practised in France from being waived in favour of officials who have practised in France in an EU civil service who have practised in that capacity in a European institution and outside French territory.
- The exemption may be reserved for those who have carried out legal activities in the field of national law, leaving out EU employees whose activity has not required the practice of national law.
- The State, when defining the knowledge necessary for the practice of Law, may require a satisfactory knowledge of national law; Community freedoms do not require that access to a professional activity in a Member State be subject to lower requirements than those required of those who have not exercised them.
- (An official of the European Commission applies to be registered with the Paris Bar Association; refusal on the grounds that she has not practised in the French public sector, nor has she been assigned to the French administration, nor has she demonstrated practice in the field of national law).

2020 12 17 (C-710/19), Jobseeker G.M.A.

ECJ Judgment of 17 December 2020 (C-710/19), Job Seeker G.M.A.
ECLI:EU:C:2020:1037.

- *G.M.A. v. the Belgian State.*
- Request for a preliminary ruling from the Conseil d'État (Council of State, Belgium), acting as the Supreme Administrative Court.
- (Art. 45 TFEU and Directive 2004/38, freedom of movement and residence): EU law requires the host Member State to grant a Community citizen a reasonable period of time, starting from the date of registration as a jobseeker, to take cognizance of job offers that may suit him or her and to take the necessary steps to be recruited.
- During the first three months, no requirement other than that of being in possession of a valid identity card may be imposed.
- During the search period (the duration of which is considered appropriate for six months), the host State may require the jobseeker to prove that he or she is looking for work.

- Only after that period has elapsed will that Member State be able to require the jobseeker to prove not only that he is still looking for a job, but also that he has a real chance of being recruited.
- (Greek man applies for permission to reside in Belgium for more than three months while looking for work.).

2021

2021 01 21 (C-843/19), Early voluntary retirement.

ECJ Judgment of 21 January 2021 (C-843/19), Early voluntary retirement.

ECLI:EU:C:2021:55.

- *BT v. National Social Security Institute*.
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of Catalonia.
- (Directive 79/7/EEC, equal treatment on grounds of sex in Social Security): EU law is compatible with access to voluntary early retirement (a decisive aspect) being subject to the amount of the pension being at least equal to the amount of the minimum pension that would correspond to the age of 65.
- This conformity occurs even if the regulation is more detrimental to women (which must be verified) provided that it is justified by legitimate social policy objectives and unrelated to any discrimination on grounds of sex (such as avoiding the payment of numerous pension supplements).
- (Domestic worker with more than 44 years of contributions).

2021 01 26 (C-16/19), Krakow Clinical Hospital.

ECJ Judgment (Grand Chamber) of 26 January 2021 (C-16/19), Krakow Clinical Hospital.

ECLI:EU:C:2021:64.

- *VL v. Krakow Clinical Hospital*.
- Request for a preliminary ruling from the Regional Court of Krakow, Poland.
- An employer who pays a salary supplement to disabled workers who have submitted their disability certificate after a date chosen by the employer, and not to those who have submitted the certificate before that date.
- (Directive 2000/78, Equal treatment in employment and occupation): EU law leads to the fact that such conduct is considered to be directly discriminatory in so far as it may make it definitively impossible for

disabled workers whose employer already knew of their condition to comply with this temporary requirement.

- Such a practice may constitute indirect discrimination when it causes a disadvantage to certain workers, because of the ostensity of their disability or because it requires reasonable adjustments to working conditions, without being objectively justified by a legitimate aim and without the means of achieving that aim being adequate and necessary.
- (Hospital which, at a certain point, brings together the staff and invites those who have not yet proven their disability to do so, in order to apply the reductions in the Social Security contribution; it pays a salary supplement of 60 euros per month; the plaintiff had already accredited this much earlier).

2021 02 11 (C-407/19 and 471/19), Port works.

ECJ Judgment of 11 February 2021 (C-407/19 and 471/19), Dock work in Belgium.

ECLI:EU:C:2021:107.

- *Port companies against the Belgian State.*
- Request for preliminary rulings from the Council of State, acting as the Supreme Administrative Court of Belgium (C407/19) and the Constitutional Court of Belgium (C471/19).
- (Articles 45, 49 and 56 TFEU; freedom of movement, establishment and provision of services): EU law allows port tasks to be required to be carried out only by those who are recognised as professionals in the sector. However, non-discrimination on the basis of nationality must be applied and the activity of workers recognised as such in other Member States must be allowed.
- Admission to work cannot depend on the criteria of a joint body that applies discriminatory and quota criteria, deciding without being subject to a deadline.
- It is possible to make admission to work subject to passing psychophysical and technical tests carried out by the prevention service to which all companies are compulsorily attached; as long as there is transparency, objectivity and impartiality.
- The requirement of a specific safety certificate for logistics workers, regulated by collective agreement, is also admissible, provided that the aforementioned principles are respected.

2021 02 11 (E-760/18), Agios Nikolaos.

ECJ Judgment of 11 February 2021 (C-760/18), Agios Nikolaos City Council.

ECLI:EU:C:2021:113.

- *Cleaning employees against the Agios Nikolaos City Council.*
- Request for a preliminary ruling from the Monomeles Protodikeio Lasithiou (District Court, Lasithi, Greece).
- (Directive 1999/70/EC, Fixed-term work): EU law refers to “successive fixed-term employment contracts” including cases of automatic extension (even if the mandatory written form has been omitted).
- The conforming interpretation supports the application of previous national legislation, still in force, which authorises the conversion of successive fixed-term employment contracts into an employment contract for an indefinite period, even though the Constitution prohibits such conversion in the public sector.
- The effectiveness of the Framework Agreement would be jeopardised by the unilateral extension of the duration of a fixed-term employment contract by legislative intervention.
- Ineffectiveness of the constitutional reform to prevent the conversion of abusive temporary contracts into permanent contracts carried out during the period of adaptation of the Directive.
- (Temporary cleaners of the City Council, automatically renewed by retroactive legal mandate; terminated when they reach between 24 and 29 months, without having accredited temporary needs in the novations).

2021 02 25 (C-129/20), Caisse pour l’avenir des enfants.

ECJ Judgment of 25 February 2021 (C-129/20), Caisse pour l’avenir des enfants.

ECLI:EU:C:2021:140.

- *Xl contra Caisse pour l’avenir des enfants.*
- Request for a preliminary ruling from the Cour de cassation du Grand-Duché de Luxembourg (Court of Cassation of the Grand Duchy of Luxembourg, Luxembourg).
- (Directive 96/34/EC, parental leave): EU law allows parental leave to be made conditional on the parent working uninterruptedly for at least twelve months, immediately before it is taken.

- EU law does preclude making parental leave conditional on having the status of worker at the time of birth or adoption.
- (A worker with separate temporary contracts who gives birth to twins and requests parental leave; national legislation makes it conditional on affiliation and registration at the time of the child's birth, a requirement that she does not meet).

2021 02 25 (C-940/19), Dentists of France.

ECJ Judgment of 25 February 2021 (C-940/19), Dentists of France.
ECLI:EU:C:2021:135.

- *French dentists and others against the French Ministry of Solidarity and Health.*
- Request for a preliminary ruling from the Conseil d'État (Council of State, acting as the Supreme Administrative Court, France).
- (Directive 2005/36/EC on the recognition of professional qualifications): EU law does not preclude partial access to one of the professions to which the mechanism for the automatic recognition of professional qualifications applies.

2021 03 03 (C-841/19), FOGASA.

ECJ Order of 3 March 2021 (C-841/19), FOGASA.
ECLI:EU:C:2021:159.

- *JL v. Wage Guarantee Fund.*
- Request for a preliminary ruling from the Juzgado de lo Social No 41 de Madrid.
- (Directive 79/7/EEC, Equality in Social Security; Directive 2006/54/EC, Equality in employment and occupation): EU law does not preclude the provision of a quantitative limit on the payment of wages and compensation by FOGASA, nor the fact that this ceiling is reduced in proportion to the working day worked.
- The application of the pro rata temporis principle leads to equal treatment with respect to unpaid claims per hour worked and thus promotes equality.
- (Waiter who works part-time for a company that closes and is declared insolvent, having unpaid wages).

2021 03 09 (E-344/19). Radiotelevizija Slovenija.

ECJ Judgment (Grand Chamber) of 9 March 2021 (C-344/19), Surveillance of isolated repeaters.
ECLI:EU:C:2021:182.

- *D.J. v. Radiotelevizija Slovenija*.
- Request for a preliminary ruling from the Supreme Court, Slovenia.
- In accordance with EU law (Directive 2003/88, working time), in order to determine whether the entire time spent in solitary confinement (including housing provided by the company and the obligation to remain in the vicinity) should be taken into account for the purposes of working hours, all the circumstances of the case must be assessed (consequences of the response period, frequency of interventions after hours, etc.). etc.).
- The key lies in whether limitations during on-call objectively and significantly affect the ability to freely manage that time. It doesn't matter if the environment is inhospitable.
- (Framework Directive 89/391 on safety and health): EU law precludes periods of on-call duty that are so long or frequent as to constitute a risk to the safety or health of workers, irrespective of whether such periods are classified as "rest periods".
- (Maintenance of antennas with 12 hours of ordinary work per day, paid; 6 hours of non-face-to-face on-call, with the obligation to report before 1 hour, paid with 20% base salary).

2021 03 09 (C-580/19), Stadt Offenbach am Main.

ECJ Judgment (Grand Chamber) of 9 March 2021 (C-580/19), Non-face-to-face firefighter's guard.

ECLI:EU:C:2021:183.

- *RJ vs. Stadt Offenbach am Main*.
- Request for a preliminary ruling from the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany).
- Non-face-to-face firefighter guard, with 20 minutes to appear in uniform and emergency vehicle (siren.) in the municipal area of the city.
- (Directive 89/391/EEC 891; Directive 2003/88, working time): EU law means that in order to determine whether we are dealing with "working time", it is necessary to assess all the circumstances of the case (consequences of the deadline, frequency of interventions, etc.).
- The key lies in whether on-call limitations objectively and significantly affect the ability to freely manage that time; It is a question of determining whether it is working time "in its entirety" that of making available (whether or not there are emergencies).
- (Firefighter is on duty between 5:00 p.m. and 7:00 a.m. the following day. Weekends: from 17.00 on Friday to 7.00 on Monday. Between 10 and 15 weekends a year. In three years: 126 guards, with 20 interventions).

2021 03 17 (E-585/19), Academia de Studii Economice din Bucureşti.

ECJ Judgment of 17 March 2021 (C-585/19), Academy of Economic Studies Bucharest (ASE).

ECLI:EU:C:2021:210.

- *Academia de Studii Economice din Bucureşti v Organismul Intermediar pentru Programul Operaţional Capital Uman - Ministerul Educaţiei Naţionale.*
- Request for a preliminary ruling from the District Court of Bucharest, Romania.
- (Directive 2003/88, working time): under EU law, employment contracts concluded by an employee with the employer must be examined together in order to verify compliance with the period classified as daily rest.
- If the worker has several employment contracts with the same employer, the minimum daily rest period is applied on a unitary basis (not separately for each contract), regardless of the will of the person who works.
- (Full-time employees of the ASE; a Special Project arises and they are hired for it, with the same employer, for additional tasks).

2021 03 17 (C-652/19), Consulmarketing.

ECJ Judgment of 17 March 2021 (C-652/19), Consulmarketing.

ECLI:EU:C:2021:208.

- *KO against Consulmarketing SpA, with the intervention of Filcams CGIL and Confederazione Generale Italiana del Lavoro (CGIL).*
- Request for a preliminary ruling from the Court of Milan, Italy.
- (Directive 98/59, collective redundancies): EU law does not provide for the case where, in a single unlawful collective dismissal, the legislation provides for the simultaneous application of two different schemes for the protection of permanent workers; the problem, therefore, cannot be examined in the light of the rights guaranteed by the CEFEU (art. 20: equality before the law; art. 30: protection in case of unjustified dismissal).
- (Directive 1999/70, fixed-term work): EU law does not preclude the law from establishing specific protection in the event of unfair collective dismissal for those who had a temporary contract that has become indefinite after that date.

- Possible differences in treatment between certain categories of staff with contracts of indefinite duration do not fall within the scope of the principle of non-discrimination.
- EU law does not regulate protection in the event of unfair collective dismissal, nor the selection criteria for dismissal.
- (Italian law: unfair dismissal entails reinstatement for permanent contracts prior to 7 March 2015, but only compensation for those entered into subsequently, even if they were already temporary on that date; the plaintiff had a temporary contract when the law was approved and subsequently becomes permanent; he claims the same treatment as the rest of the dismissed colleagues).

2021 03 23 (E-28/20), Airhelp.

ECJ Judgment (Grand Chamber) of 23 March 2021 (C-28/20), Airhelp.
ECLI:EU:C:2021:226.

- *Airhelp v. Scandinavian Airlines System Denmark-Norway-Sweden*.
- Request for a preliminary ruling from the District Court, Attunda, Sweden.
- (Regulation 261/2004; Compensation and assistance in the event of cancellation or long delay of flights): EU law means that a strike called by a trade union established in the aviation sector, complying with the requirements laid down by national legislation (including the notice period), and supported by staff whose presence is essential to operate a flight, it is not included in the concept of “extraordinary circumstance” which excludes the obligation to compensate the passenger.
- The strike as an expression of collective autonomy; an event inherent to the normal exercise of business activity.
- A strike seeking a wage increase, a change in working hours and greater predictability of working hours is an event inherent in the normal exercise of business activity, in particular when the strike is organised within the legal framework.
- (Claimant whose flight was cancelled by Eurowings on the day it was supposed to operate, due to the pilots’ strike that lasted 7 days; the passenger ceded his rights to claim from Airhelp, a specialized institution; request for €250 plus interest as compensation).

2021 03 24 (C-870/19 and C-871/19), Prefettura Ufficio territoriale del governo di Firenze.

ECJ Judgment of 24 March 2021 (C-870/19 and 871/19), Prefettura Ufficio territoriale di Firenze.

ECLI:EU:C:2021:233.

- *Prefettura Ufficio territoriale di Firenze v. MI and TB.*
- Request for a preliminary ruling from the Cour de cassation du Grand-Duché de Luxembourg (Court of Cassation of the Grand Duchy of Luxembourg, Luxembourg).
- (Regulation 3821/85, Control of road transport): EU law implies that if the driver fails to submit the tachograph control sheets for several days of activity (out of the previous 28), the competent authorities must find a single offence in respect of that driver and consequently impose a single penalty.
- The (only) sanction must be modulated (severity) according to the number of days during which respect for driving times is not accredited.
- The consideration that the maximum amount of the penalty is not a deterrent does not allow us to consider that there have been several infringements, out of respect for proportionality, legality and typicity.
- (The administrative authority imposes a penalty for each of the days for which the tachograph control is not presented).

2021 04 15 (C-30/19), Braathens Regional Aviation.

ECJ Judgment of 15 April 2021 (C-30/19), Braathens Regional Aviation.
ECLI:EU:C:2021:269.

- *Authority against Discrimination against Braathens Regional Aviation.*
- Request for a preliminary ruling from the Supreme Court of Sweden).
- (Art. 47 of the Convention on the Functioning of the European Union, judicial protection; Directive 2000/43/EC on Equality based on racial or ethnic origin): EU law precludes the court from not being able to examine the alleged discrimination when the defendant agrees to pay compensation but not the violation of the fundamental right.
- The national court, hearing a dispute between individuals, must ensure legal protection in such cases by disapplying, if necessary, any contrary provision of national law.
- (Passenger of Chilean origin residing in Sweden, with a ticket for an internal flight, of the Braathens Company, subject to an additional security check by decision of the captain; the airline agrees to pay the compensation claimed but without acknowledging the discrimination).

2021 04 15 (C-511/19), Olympiako Athlitiko Kentro Athinon.

ECJ Judgment of 15 April 2021 (C-511/19), Olympiako Athlitiko Kentro Athinon.
ECLI:EU:C:2021:274.

- *AB vs. Olympiako Athlitiko Kentro Athinon*.
- Request for a preliminary ruling from the Areios Pagos (Supreme Court, Greece).
- (Directive 2000/78/EC; equal treatment in employment and occupation): EU law allows public employees who meet the requirements for a full retirement pension within a certain period to access a special situation (lower pay, without promotion or severance pay), given that there is a legitimate employment policy objective.
- The difference in treatment based on age is justified; This “labor reserve” allows for the distribution of employment, with young people accessing it.
- (Public employee since 1982 who in 2021 goes to a labor reserve and the following year is dismissed without compensation; the national law provides for it for those who have contributed 35 years and reached 58 years of age).

2021 05 12 (C-27/20), CAF (Family Benefits).

ECJ Judgment of 12 May 2021 (C-27/20), Caisse d’allocations familiales d’Ille et Vilaine (CAF).

ECLI:EU:C:2021:383.

- *F and QG v. Caisse d’allocations familiales d’Ille et Vilaine (CAF)*.
- Request for a preliminary ruling from the Tribunal de Grande Instance de Rennes (District Court, Rennes, France).
- (Regulation 492/2011, freedom of movement): EU law does not preclude the calculation of family benefits from taking into account the income of the penultimate year prior to the payment period.
- (Regulation according to which, in the event of a substantial increase in the income received by an expatriate civil servant during a secondment, after his return the amount of family allowances is significantly reduced for two years).

2021 05 12 (C-130/20), Maternity supplement.

ECJ Judgment of 12 May 2021 (C-130/20), Maternity supplement.

ECLI:EU:C:2021:381.

- *IJ v. National Social Security Institute*.
- Request for a preliminary ruling from the Labour Court No 3 of Barcelona.
- (Directive 79/7/EEC, equal treatment on grounds of sex in Social Security): EU law is not applicable to the regulation of the LGSS on contributory maternity pension supplement, specifically, when it excludes its payment in cases of early retirement at the worker’s will.

- The situation described does not concern discrimination between male workers, on the one hand, and female workers, on the other, but an alleged breach of equal treatment between female workers.
- (Worker who claims payment of the maternity supplement when accessing voluntary early retirement, complying with the other requirements of art. 60 LGSS).

2021 06 02 (C-103/19), SUSH and CGT of Health.

ECJ Order of 2 June 2021 (C-103/19), SUSH and CGT of Health.

ECLI:EU:C:2021:460.

- *Sindicato Único de Sanidad e Higiene (SUSH) and Sindicato de Sanidad la Confederación General del Trabajo (CGT) against the Consejería de Sanidad de la Comunidad de Madrid.*
- Request for a preliminary ruling from the Juzgado de lo Contencioso-Administrativo No 24 de Madrid.
- (Directive 1999/70, Fixed-term work): the national court must assess whether transforming temporary regulated staff into temporary staff, with the possibility of consolidating employment after the relevant selection process, is an appropriate measure to prevent and, where appropriate, punish abuses.
- If the judge considers this consequence insufficient, he must check whether there are other effective measures to prevent and punish such abuses.
- EU law does not preclude the stability inherent in temporary vacancy from only being assigned to temporary staff (not to other modalities) provided that there are other effective measures to prevent and sanction existing abuses.
- (Contentious-administrative appeal against the regional order establishing an extraordinary procedure for the transformation of appointments of temporary statutory staff into appointments of interim statutory staff).

2021 06 03 (E-326/19), Università degli Studi Roma Tre.

ECJ Judgment of 3 June 2021 (C-326/19), Università degli Studi Roma Tre.

ECLI:EU:C:2021:438.

- *EB v. Presidenza del Consiglio dei Ministri and others.*
- Request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Italy).

- (Directive 1999/70/EC, fixed-term work): EU law allows the hiring of university researchers for three years (including teaching tasks) and with a possible extension of two.
- Validity is accepted, without it being necessary for said legislation to define objective and transparent criteria that make it possible to verify that the conclusion and renewal of such contracts do indeed respond to a real need and that they are appropriate to achieve the objective pursued and necessary for that purpose.
- (Temporary contract subject to the existence of funds for the promotion of research, which does not respond to an objective need, with an initial duration of three years and extension for another two years if there is a positive evaluation. Researcher who claims at the end of that long relationship).

2021 06 03 (E-624/19), Tesco Stores.

ECJ Judgment of 3 June 2021 (C-624/19), Tesco Stores.

ECLI:EU:C:2021:429.

- *K and Others v Tesco Stores Ltd.*
- Request for a preliminary ruling from the Labour Court of Watford, United Kingdom.
- Article 157 TFEU has direct effect in disputes between individuals in which infringement of the principle of equal pay for male and female workers for “work of equal value” is alleged.
- It is possible to contrast the work activity carried out by people (women vs. men) assigned to different workplaces of the same company, provided that the applicable sources of law coincide.
- (Comparison of the remuneration of a woman assigned to one workplace with respect to colleagues who are assigned to others, but from the same supermarket chain).

2021 06 03 (E-726/19), IMIDRA.

ECJ Judgment of 3 June 2021 (C-726/19), Madrid Institute for Rural, Agricultural and Food Research and Development (IMIDRA).

ECLI:EU:C:2021:439.

- *Madrid Institute for Rural, Agrarian and Food Research and Development v. JN.*
- Request for a preliminary ruling from the High Court of Justice of Madrid.

- (Directive 1999/70/EC, fixed-term work): EU law does not allow the renewal of temporary contracts without indicating a maximum period and it does not go down well with the fact that these long temporary contracts are not equated with permanent non-permanent staff in order to be compensated at the end of the contract.
- Measures must be implemented to prevent and punish the abusive use of successive temporary contracts.
- Only economic considerations (crisis) do not justify the absence of measures to prevent and sanction the successive use of temporary contracts.
- Extensions of a contract are equivalent to new hires for the purposes of abuse and chaining.
- (JN was hired in 2003 for a vacancy, called in 2005, then deserted, her interim position being extended in 2008 and reconvened in 2009, without the worker obtaining it, leaving in 2016).

2021 06 03 (E-784/19), Team Power Europe.

ECJ Judgment (Grand Chamber) of 3 June 2021 (C-784/19), Team Power Europe.

ECLI:EU:C:2022:427.

- “*Team Power Europe*” *EOOD contra Direktor na Teritorialna direkt-sia na Natsionalna agentsia za prihodite - Varna*.
- Request for a preliminary ruling from the Administrative Court, Varna, Bulgaria.
- (Regulation 987/2009, Coordination of Social Security Systems): according to EU law, temporary employment agencies established in a Member State “normally carry out their activities” in that State only if a substantial part of their activity is carried out in favour of user companies that are established and carry out their activities in that State.
- If the contract is carried out in the competent State and the majority of client companies are located in another, the EU regulation protects the freedom to provide services, but not the preservation of the original regulation on Social Security.
- (Bulgarian temporary employment agency hires and transfers personnel to companies based in third countries, thus preserving social security and employment conditions.

2021 06 03 (C-914/19), Access to Notaries.

ECJ Judgment of 3 June 2021 (C-914/19), Ministry of Justice (Notaries).
ECLI:EU:C:2021:430.

- *Ministry of Justice v. GN.*
- *Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy).*
- (Art. 21 of the Convention on the Functioning of the European Union, non-discrimination; Directive 2000/78/EC, Equal treatment in employment and occupation): EU law precludes the setting of a maximum age of 50 years for applying for notary public examinations.
- That limitation does not appear to pursue the objectives of ensuring the exercise of that profession for a significant period prior to retirement, protecting the proper functioning of notarial prerogatives and facilitating generational renewal and rejuvenation of that profession.
- In any case, it seems to exceed what is necessary to achieve these objectives.
- (Call for 500 places for Notaries, establishing the maximum age of access at 50 years; contestant over 50 years of age, precautionarily admitted to the tests, which he passes).

2021 06 03 (C-942/19), Aragonese Health Service.

ECJ Judgment of 3 June 2021 (C-942/19), Aragonese Health Service.
ECLI:EU:C:2021:440.

- *Aragonese Health Service against LB.*
- Request for a preliminary ruling from the High Court of Justice of Aragon.
- (Directive 1999/70/EC, fixed-term work): EU law does not provide for the case of permanent staff who take up temporary employment in another administration and wish to take leave of absence from their original post.
- Directive 1999/70 applies only to those who provide paid services in the context of a fixed-term employment relationship.
- (Odontostomatologist of the Aragonese Health Service who obtains a position as an Associate Professor at the University and is interested in leave of absence for the provision of services in the public sector; refusal based on the temporary nature of the new position to be held in the public sector).

2021 06 03 (C-280/20), Consulate General of Bulgaria.

ECJ Judgment of 3 June 2021, (C-280/20), *Generalno konsulstvo na Republika Bulgaria*.

ECLI:EU:C:2021:443.

- *ZN contra Generalno konsulstvo na Republika Bulgaria v grad Valensia*.
- Request for a preliminary ruling from the Sofiyski Rayonen sad (District Court, Sofia, Bulgaria).
- (Regulation 1215/2012, jurisdiction): EU law applies to determine jurisdiction in respect of disputes between a worker of a Member State who does not perform functions of the exercise of public authority and a consular authority located in the territory of another Member State.
- By analogy with embassies, a consulate general should be considered to constitute an “establishment” for the purposes of determining jurisdiction. One of the parties to the dispute must therefore be regarded as having its domicile or habitual residence in a different Member State.
- (Bulgarian citizen who, with a residence permit, provides services for the Consulate General of Bulgaria in Spain; she claims before the courts of her country both employment and unused holidays of four years).

2021 06 22 (E-439/19), CV-Online Latvia.

ECJ Judgment (Grand Chamber) of 22 June 2021 (C-439/19), *Primacy of EU law*.

ECLI:EU:C:2021:504.

- *Proceedings brought by B*.
- Request for a preliminary ruling from the Constitutional Court of the Republic of Latvia.
- (Free access, via the Internet, to the “points” that each person has lost as a result of traffic offences when the ECJ has considered that this entails a violation of private life and, at the same time, an appeal of unconstitutionality against the national law that allowed it is pending).
- (Primacy of EU law): if the ECJ has ruled that a national regulation is contrary to EU law, the Constitutional Court of the relevant State cannot agree that the regulation should continue to have its effects until it rules on its constitutional adjustment.

2021 06 24 (C-550/19), Public Works & Services & Acciona Agua.

ECJ Judgment of 24 June 2021 (C-550/19), Public Works and Services & Acciona Agua.

ECLI:EU:C:2021:514.

- *EV v. Obras y Servicios Públicos & Acciona Agua S.A.*
- Request for a preliminary ruling from the Juzgado de lo Social No 14 de Madrid.
- (Directive 1999/70/EC, Fixed-term work): the regulation of the “permanent work” contract cannot be legitimised by the fact that it is authorised by the sectoral collective agreement since “it does not prevent, in practice, the employer in question from meeting permanent and stable staff needs through such renewal”.
- The renewal of fixed-term employment contracts or relationships to cover needs that, in fact, are not provisional, but permanent and stable, is not justified.
- (Directive 2001/23, transfer of undertakings): EU law allows a subrogated undertaking to assume only the rights of the last contract “provided that the application of that legislation does not have the effect of placing it in a less favourable position by the mere fact of that subrogation, which is a matter for the referring court to verify”.
- (Worker hired for work or service, in 1996, followed by five others, who requests permanent and seniority from the beginning, one month before company subrogation).

2021 07 08 (C-71/20), VAS Shipping.

ECJ Judgment of 21 July 2021 (C-71/20), VAS Shipping.

ECLI:EU:C:2021:550.

- *Criminal proceedings brought against VAS Shipping ApS.*
- Request for a preliminary ruling from the Court of Appeal of the Eastern Region, Denmark.
- (Articles 49 and 79 TFEU; freedom of establishment, controlled immigration): EU law does not preclude national (Danish) legislation requiring a work permit for the crew, a third-country national, of a ship flying the flag of that State (Sweden) and owned, directly or indirectly, by a company established in a second Member State (Denmark), unless the ship concerned has made 25 or fewer calls in a year.
- (Four Swedish shipping companies register four Danish vessels for the purpose of carrying out their maritime transport activities there; they

appoint a Danish company as the competent managing shipowner; this company is criminally charged because crews from third countries do not have work permits.).

2021 07 08 (C-166/20), Lietuvos respublikos sveikatos apsaugos ministerija.

ECJ Judgment of 8 July 2021 (C-166/20), Ministry of Health of Lithuania.

ECLI:EU:C:2021:554.

- *BB vs. Lietuvos respublikos sveikatos apsaugos ministerija.*
- Request for a preliminary ruling from the Supreme Administrative Court of Lithuania.
- Directive 2005/36 on the recognition of diplomas is inapplicable to a person who applies for recognition of his or her professional qualifications but has not obtained a formal qualification in the Member State of origin in order to pursue a regulated profession there.
- (Articles 45 TFEU and 49 TFEU; freedoms of movement and establishment): if the person concerned does not have a diploma attesting to his professional qualification as a pharmacist, but has acquired professional competences for that purpose (in the State of origin and in the host State), they must be examined and recognised (in whole or in part).
- Knowledge acquired in the host Member State can be used to prove possession of the missing knowledge.
- (Lithuanian studied four years of pharmacy in the United Kingdom and did a 6-month internship, which he interrupted to return to his country for personal reasons; there he completed the remaining 6 months of internship, mandatory to obtain the Degree; the Lithuanian Ministry of Health did not recognize his qualification as a pharmacist).

2021 07 08 (E-428/19), Rapidsped.

ECJ Judgment of 8 July 2021 (C-428/19), Rapidsped.

ECLI:EU:C:2021:548.

- *OL and others v. Rapidsped Fuvarozási és Szállítmányozási Zrt.*
- Request for a preliminary ruling from the Administrative and Labour Court of Gyula, Hungary.
- (Directive 96/71/EEC, posting in the framework of the provision of services): EU law on temporary posting applies to road transport.
- Allowances are not wages if they compensate for the expenses actually incurred (travel, accommodation, maintenance).

- (Regulation 561/2006, social provisions for road transport): EU law allows you to pay a fuel saving supplement unless it encourages behaviour that compromises road safety or occupational health.
- (Truck drivers in the service of a Hungarian company, often working in France, where they go by minibus; the salary is less than the French minimum, but they receive allowances and supplements for fuel savings).

2021 07 15 (C-152/20 and 218/20), SC Gruber Logistics.

ECJ Judgment of 15 July 2021 (C-152/20 and 218/20), SC Gruber Logistics. ECLI:EU:C:2021:600.

- *DG and EH v. SC Gruber Logistics SRL; Sindicatul Lucratulilor din Transporturi v. SC Samidani Trans SRL.*
- Requests for judicial decision from the District Court of Mures, Romania.
- (Regulation 593/2008 [“Rome I”]; Law applicable to contractual obligations): the law chosen by the parties to the employment contract that does not coincide with those indicated by EU law prevails except for “provisions that cannot be excluded by agreement”, such as those relating to the minimum wage.
- The parties to the employment contract are free to choose the applicable law, even if this must be supplemented by national labour law, unless this is of a public policy nature.
- Self-regulatory freedom does not disappear because the contractual clause has been drafted by the employer.
- (Romanian truck drivers hired in that country by a national company, but carrying out their tasks mainly in Italy or Germany; the regulations applicable to their remuneration are discussed).

2021 07 15 (C-325/20), Shopping Centres.

ECJ Judgment of 15 July 2021 (C-325/20), BEMH and National Council of Shopping Centres.

ECLI:EU:C:2021:611.

- *BEMH and the National Council of Shopping Centres against the Government and others.*
- Request for a preliminary ruling from the Conseil d’État (Council of State, acting as the Supreme Administrative Court, France).
- (Directive 2006/123/EC, Services in the internal market): EU law precludes the presence (even without a vote), in a collegiate body competent to deliver an opinion, of qualified representatives of the economic

sector of the relevant catchment area, on the licence application, provided that the applicant's current or potential competitors participate in the appointment of those persons.

- (Body to rule on applications for licences for commercial establishments; a study office specialising in commercial planning questions the regulation of such bodies).

2021 07 15 (C-709/20), The Department for Communities in Northern Ireland.

ECJ Judgment of 15 July 2021 (C-709/20), The Department for Communities in Northern Ireland.

ECLI:EU:C:2021:602.

- *CG v. The Department for Communities in Northern Ireland.*
- Request for a preliminary ruling from the Court of Appeal of Northern Ireland, United Kingdom.
- (Directive 2004/38/EC, freedom of movement and residence): EU law does not preclude the exclusion of social assistance benefits for economically inactive (and resourceless) Union citizens with a right of temporary residence, where such benefits are guaranteed to nationals.
- In such cases, it must be verified that the citizen (and dependent children) can live in decent conditions, taking into account the support mechanisms from which they may benefit.
- (A woman of Croatian and Dutch nationality, resident in Northern Ireland with two dependent children; lives in a shelter for battered women; lacks resources).

2021 07 15 (C-742/19), Ministry of Defence.

ECJ Judgment of 15 July 2021 (C-742/19), On-call duty for military personnel.

ECLI:EU:C:2021:597.

- *BK v. Slovenian Ministry of Defence.*
- Request for a preliminary ruling from the Supreme Court of Slovenia.
- (Directive 2003/88/EC): EU law on working time does not govern the activity of the military officer who is on duty located in his barracks: 1) during his training; 2) when rotation is not possible; 3) when exceptional events occur; 3) When it disturbs the proper performance of military operations properly speaking.
- The missions of the Armed Forces (national security, territorial integrity) must be able to be carried out, fully, even in peacetime.

- (Army non-commissioned officer who has served as an imaginary for seven uninterrupted days a month, with obligatory presence in the barracks; alternated periods of effective surveillance and others of exclusive permanence; eight hours a day are counted as effective work).

2021 07 15 (E-795/19), Tartu Vangla.

ECJ Judgment of 15 July 2021 (C-799/19), Tartu Vangla (Tartu Prison).
ECLI:EU:C:2021:606.

- *XX against Tartu Vangla, with the intervention of the Ministries of Justice and Labour.*
- Request for a preliminary ruling from the Supreme Court of Estonia.
- (Directive 2000/78/EC, Equal treatment in employment and occupation): EU law precludes the absolute impossibility of maintaining in his duties a prison officer whose hearing acuity does not comply with the minimum thresholds of acoustic perception laid down in that legislation, and it must be allowed to check whether he is able to perform such functions, if necessary after reasonable adjustments (including hearing aids).
- Certain hearing acuity can be considered an “essential and determining occupational requirement for the profession of prison guard.
- The defence of the rights of persons with disabilities requires that their dismissal for ineptitude be justified by incompetence, or inability or unavailability to perform the fundamental tasks of the post in question.
- (Prison guard fired after 15 years of service for failing to pass acoustic acuity test.).

2021 07 15 (C-804/18 and 341/19), Wave.

ECJ Judgment (Grand Chamber) of 15 July 2021 (C-804/18 and 341/19), Wabe.
ECLI:EU:C:2021:594.

- *IX v. WABE e.V. and MH Müller Handels GmbH v. MJ.*
- Request for a preliminary ruling from the Arbeitsgericht Hamburg (Labour Court, Hamburg, Germany) (C-804/18) and the Bundesarbeitsgericht (Federal Labour Court, Germany) (C-341/19).
- Religious freedom versus freedom of enterprise in EU law (Directive 2000/78/EC) in line with the internal regulations of a private company that prohibit the visible use of any political, philosophical or religious sign (especially large ones) in the workplace.
- 1st Conclusion ECJ: the neutrality policy requires the company to prove that without it it would be harmed (“true need” and “accreditation”).

- 2nd Conclusion ECJ: the company rule is valid if it is applied indiscriminately.
- 3rd Conclusion ECJ: the policy of neutrality must be absolute, referring to “all visible forms” of symbols and not only to those of greater size or showiness.
- (Two employees of two companies reprimanded for wearing Islamic headscarf. The Drugstore had had conflicts in the staff for religious reasons. The Nursery wanted neutral weather and had asked an employee not to wear the crucifix.).

2021 09 02 (C-928/19), EPSU v Commission.

ECJ (Grand Chamber) of 2 September 2021 (C-928/19), EPSU v Commission.

ECLI:EU:C:2021:656.

- *European Federation of Public Service Unions (EPSU) v. European Commission.*
- Dismisses appeal against the EGC judgment of 24 October 2019 (T-310/18), schematised in its place.
- (Art. 155(2) TFEU): to interpret that the Commission is obliged to submit to the Council a proposal for a decision applying the agreement concluded between the social partners in the Union would be contrary to its independence in the exercise of its responsibilities.

2021 09 02 (C-502/20), Car Expert.

ECJ judgment of 2 September 2021 (C-502/20), Institut des Experts en Automobiles.

ECLI:EU:C:2021:678.

- *TP v. Institut des Experts en Automobiles.*
- Request for a preliminary ruling from the Cour d’appel de Mons (Court of Appeal, Mons, Belgium).
- (Directive 2005/36/EC, Professional qualifications): EU law requires that a professional established in another Member State be allowed to practise, temporarily or occasionally, his or her profession in the territory of the host Member State when he or she has an infrastructure (such as an office) or the services he or she provides are somewhat frequent.
- (A car expert resident in Luxembourg and who once worked in Belgium, where he continues to do so on a discontinuous basis; he is required to be a member of an ordinary association and not as a temporary one).

2021 09 09 (C-107/19), *Dopravní podnik hl. m. Prahy*.

ECJ Judgment of 9 September 2021 (C-107/19.), Firefighter's intra-day rest.

ECLI:EU:C:2021:722.

- *XR vs. Dopravní podnik hl. M. Prahy, a.s.*
- Request for a preliminary ruling from the 9th District Court of Prague, Czech Republic.
- The Czech Supreme Court, upholding the employer's appeal, considered that (unpredictability, randomness of the proceedings during the break) should not be counted as working and referred the matter back to the instance to resolve accordingly.
- ECJ: the lower body cannot be bound by the solution given by the superior when it is manifestly incompatible with EU law (primacy).
- (Directive 2003/88, working time): EU law suggests that, given the strong restraint that is maintained during breaks (they prevent the free administration of time and dedicating it to one's own interests), they must be counted as working time for the purposes of working time limits, without this entailing equal remuneration when carrying out an activity and otherwise.
- (Company firefighter with 12-hour shifts, including two 30-minute intraday breaks to go to the canteen, about 200 meters away, "provided that he carried a transmitter that warned him, if necessary, that the intervention vehicle would pick him up in front of the company canteen within two minutes").

2021 09 09 (C- 906/19), *Extraterritorial sanctions*.

ECJ Judgment of 9 September 2021 (C- 906/19), Public Prosecutor's Office.

EU:C:2021:715.

- *FO v. the Public Prosecutor's Office*.
- Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France).
- (Regulation 561/2006, social provisions in road transport): under EU law, the driver is obliged to present, whenever requested by an inspector, the record sheets for the previous twenty-eight days, even if he has also carried out, with the same vehicle, passenger transport within the framework of regular services whose distance does not exceed 50 km.
- EU law precludes the competent authorities of a Member State from imposing a penalty for offences committed outside its territory.

2021 10 06 (C-561/19), Catania Multiservizi.

ECJ Judgment (Grand Chamber) of 6 October 2021 (C-618/19), *Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi*.
ECLI:EU:C:2021:799.

- *Consorzio Italian Management and Catania Multiservizi SpA v. Rete Ferroviaria Italiana SpA*.
- Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy).
- (Art. 267 TFEU, question referred): the national court of last instance must refer a question for a preliminary ruling if requested, unless 1) It is not relevant to the resolution of the dispute. 2) The provision of EU law has already been interpreted by the ECJ. 3) The correct interpretation is imposed with such evidence that it leaves no room for any reasonable doubt.
- That court cannot be relieved of that obligation on the ground that it has already raised a similar question.
- It may refrain from referring a question for a preliminary ruling on grounds of inadmissibility specific to the proceedings before it, provided that the principles of equivalence and effectiveness are respected.

2021 10 06 (C-598/19), CONACEE.

ECJ Judgment of 6 October 2021 (C-598/19), *National Confederation of Special Employment Centres*.
ECLI:EU:C:2021:810.

- *National Confederation of Special Employment Centres (Conacee) v Provincial Council of Guipúzcoa and Spanish Business Federation of Associations of Special Employment Centres (Feacem)*.
- Request for a preliminary ruling, lodged by the Contentious-Administrative Chamber of the High Court of Justice of the Basque Country.
- Directive 2014/24/EU (on public procurement) allows a Member State to impose additional requirements for the award of “reserved public contracts” (for employers with at least 30% disabled or disadvantaged workers), provided that the principles of equal treatment and proportionality are respected.
- Possibility that the Special Employment Centres of business initiative (at least 30% of the workforce has a disability and their main objective is to promote social and professional integration) are excluded by prioritising the award to other types of social enterprises.

- (Provincial Council which reserves to special employment centres of social initiative or insertion companies the right to participate in procedures for the award of public contracts or some of their lots, as well as the execution of part of these contracts within the framework of protected employment programmes).

2021 10 06 (C-613/20), Eurowings.

ECJ judgment of 6 October 2021 (C-613/20), Eurowings.

ECLI:EU:C:202:820.

- *CS v Eurowings GmbH*.
- Request for a preliminary ruling from the Regional Court, Salzburg, Austria.
- (Regulation 261/2004; Compensation and assistance in the event of cancellation or long delay of flights): EU law means that a strike called in solidarity with the strike against the parent company and which continues a few hours longer than initially announced, despite the fact that an agreement has been reached with the parent company in the meantime, It does not fall within the concept of “extraordinary circumstances”, which excludes the obligation to compensate the passenger for having had to cancel the flight.
- (Strike by airline crew at Eurowings, to put pressure on Lufthansa as the parent company; passenger complaining about the cancellation of his flight, scheduled for when the strike should have ended according to the initial call).

2021 10 14 (C-244/20), INSS.

ECJ Judgment of 14 October 2021 (C-244/20), Widow’s pension for a couple *dh echo*.

ECLI:EU:C:2021:854.

- *F.C.I. v. National Social Security Institute (INSS)*.
- Request for a preliminary ruling from the High Court of Justice of Catalonia.
- Directive 79/7/EEC (Equal treatment of men and women in matters of social security) does not apply to survivors’ benefits as expressly provided, and the anti-discrimination rules (of primary law) cannot reverse this situation.
- The rules on Social Security for Migrants (Regulation 883/2004 and related regulations) or on non-discrimination (art. 21.1 of the Conven-

tion on the Functioning of the European Union) are incapable of altering the above conclusion.

- EU law (and the ECJ) does not contemplate the problem raised by access to the widow's pension for unmarried couples as a result of having been constituted less than two years before death (art. 222.1 LGSS).
- (Man and woman live as an informal couple for more than 20 years, have two children, register 43 days before the death of one of them).

2021 10 21 (C-824/19), Visual impairment.

ECJ Judgment of 21 October 2021 (C-824/19), Bulgarian Commission for Protection against Discrimination.

ECLI:EU:C:2021:862.

- *President and Member of the Tribunal v. Commission for the Protection against Discrimination.*
- Request for a preliminary ruling from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria).
- (Directive 2000/78/EC, Equal treatment in employment; arts. 21 and 26 of the Convention on the Functioning of the European Union): EU law precludes a blind person from being deprived of any possibility of exercising jury duty in criminal proceedings (without assessing the possibility of reasonable accommodation or a variety of matters to be dealt with).
- Relevance of the right to earn a living through work freely chosen or accepted in a market and work environment that is open, inclusive and accessible to persons with disabilities.
- Condemnation of radical exclusion, without assessing the individual's capacity to perform his or her duties and without examining the possibility of remedying any difficulties that may have arisen.
- (A law graduate with incapacity due to blindness who is appointed to the Jury Courts; after a long period of time without being required to perform that function, she complains against the judicial authorities, who argue that she needs to be visually capable of doing so; the Commission for the Protection against Discrimination fines them).

2021 10 28 (C-909/19), Uniatea Administrativ Teritorialv d.

ECJ Judgment of 28 October 2021 (C-909/19), Necessary and out-of-hours firefighter training.

ECLI:EU:C:2021:893.

- *BX v. Uniatea Administrativ Teritorialv D.*

- Request for a preliminary ruling from the High Court, Lavi (Romania).
- (Directive 2003/88/EC, working time): for EU law, working time is the period during which a worker undergoes vocational training imposed by the employer and carried out outside normal working hours and on the premises of the teaching entity.
- (Directive 2019/1152, transparent and predictable working conditions): EU law requires that such training be free of charge, count as working time and, if possible, take place during working hours.
- (Fire Brigade Manager claims the payment of 124 hours of overtime because he has had to follow a compulsory course, taught outside his place and working hours).

2021 11 11 (E-214/20), Dublin City Council.

ECJ Judgment of 11 November 2021 (C-214/20), Dublin City Council.
ECLI:EU:C:2021:893.

- *MG v. Dublin City Council*.
- Request for a preliminary ruling from the Labour Court (Ireland).
- (Directive 2003/88/EC, working time): for EU law, “working time” does not constitute “working time” when, in view of the circumstances (alternative professional activity, possible decline to intervene in some cases), it follows that the limitations imposed do not objectively and very significantly affect the ability to administer it freely.
- (Firefighter who performs non-face-to-face on-call, during which he carries out a professional activity as a self-employed, authorized; he has 10 minutes to get up if called).

2021 11 11 (E-948/19), Manpower Lit.

ECJ Judgment of 11 November 2021 (C-948/19), Manpower Lit.
ECLI:EU:C:2021:906.

- *E.S. and others against Manpower Lit, with the intervention of the European Institute for Gender Equality (EIGE)*.
- Request for a preliminary ruling from the Supreme Court of Lithuania.
- Directive 2008/104/EC (temporary employment work) applies to the provision of employment services to the European Institute for Gender Equality (EIGE) for the purpose of providing employment services at the Institute (EU Agency, based in Lithuania).
- The post occupied by a person placed at the disposal of the EIGE constitutes the “same post” within the meaning of that provision, even if all the posts for which the EIGE recruits workers directly include tasks

which can be performed only by persons subject to the Staff Regulations of Officials of the European Union.

- (Staff hired by temporary employment agencies and seconded to the EU institution; they demand remuneration similar to that of EU agents, given that they have performed equivalent functions).

2021 11 23 (C-564/19), IS Criminal Procedure.

ECJ Judgment (Grand Chamber) of 23 November 2021 (C-564/19), IS.
ECLI:EU:C:2021:949.

- *Criminal proceedings brought against IS.*
- Request for a preliminary ruling from the Pesti Központi Kerületi Bíróság (Pest Centre Urban District Court, Hungary).
- (Art. 267 TFEU): EU law precludes the national Supreme Court from declaring a request for a preliminary ruling by a lower court to be unlawful even if it does so on the basis of reason. If that happens, the primacy of EU law obliges this lower body to disapply the Supreme Court's resolution.
- EU law (Article 267 TFEU) precludes the initiation of any disciplinary procedure against a national judge for having sent a request for a preliminary ruling to the ECJ.

2021 11 25 (E-233/20), Job Medium.

ECJ Judgment of 25 November 2021 (C-233/20), Job Medium GmbH.
ECLI:EU:C:2021:960.

- *WD v. Job Medium GmbH.*
- Request for a preliminary ruling from the Supreme Court, Austria.
- (Directive 2003/88/EC, working time): EU law requires that there be financial compensation for unused paid annual leave corresponding to the last year of employment in progress when the worker terminates the employment relationship early and unilaterally without just cause.
- There is no condition for the right to financial compensation to arise, except for the requirement that, on the one hand, the employment relationship has been terminated and, on the other, that the worker has not taken all the annual leave to which he was entitled.
- (Worker who resigns after four months of activity without explicit cause; claims €322 but the national regulation rules out this right in the event of abandonment).

2021 12 09 (C- 217/20), Vacation Remuneration.

ECJ Judgment of 9 December 2021 (C- 217/20), Secretary of State for Finance.

EU:C:2021:987.

- *XXXX v the Netherlands Secretary of State for Finance.*
- Request for a preliminary ruling from the Rechtbank Overijssel (District Court, Overijssel, Netherlands).
- (Directive 2003/88/EC, Working time): EU law precludes holiday pay from being reduced on the basis of the reduction in working hours during the previous year for health reasons.
- The right to leave depends on the periods actually worked, without their remuneration having to take into account the possible reduction derived from a TD due to illness.
- (Worker on long-term partial sick leave, with reduced working hours for it; the employer pays him the holidays in accordance with this situation and he claims the full salary).

2022

2022 01 13 (C-282/19), Ufficio Scolastico Regionale per la Campania.

ECJ judgment of 13 January 2022 (C-282/19), MIUR and Ufficio Scolastico Regionale per la Campania.

ECLI:EU:C:2022:3.

- *YT and Others against Ministero dell'Istruzione, dell'Università e della Ricerca (MIUR) and Ufficio Scolastico Regionale per la Campania, with the intervention of the trade union GILDA-UNAMS.*
- Request for a preliminary ruling from the Tribunale di Napoli (Ordinary Court, Naples, Italy).
- (Directive 1999/70/EC, Fixed-term work): EU law precludes Catholic teachers from being excluded from the rules on the abusive use of successive fixed-term contracts, unless there is some effective measure that sanctions it.
- The need for the declaration of suitability issued by an ecclesiastical authority cannot be considered as an objective reason that justifies the annual temporality and successive renewals.
- Temporary employment may be justified by the existence of temporary needs, but not by the protection of religious heritage or the necessary annual declaration of suitability.

- (Several religion teachers, hired annually on a repeated basis, request that they be reclassified as permanent or that they be compensated for the damage suffered).

2022 01 13 (C514/20) DS & Koch Personaldienstleistungen GmbH.

ECJ Judgment of 13 January 2022 (C-514/20), Koch Personaldienstleistungen.

ECLI:EU:C:2022:19.

- *DS vs. Koch.*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Art. 31.2 of the Convention on the Functioning of the European Union; Directive 2003/88, working time) EU law precludes the collective agreement which, in order to set the monthly threshold that gives the right to receive the overtime supplement, ignores the fictitious ones corresponding to the holiday period.
- Any practice or omission that has a potentially dissuasive effect and entails an economic disadvantage due to its enjoyment clashes with the holiday purpose.
- (Full-time worker who claims payment of €72.32 as an overtime supplement for exceeding the threshold of 184 hours worked in the month; he argues that virtually attributable activity time for the holidays included in that period should be taken into account).

2022 02 10 (C-219/20), Remuneration of posted workers.

ECJ Judgment of 10 February 2022 (C-219/20), Remuneration of posted workers.

ECLI:EU:C:2022:89.

- *NE and Bezirkshauptmannschaft Hartberg-Fürstenfeld, with the participation of Finanzpolizei Team 91.*
- Request for a preliminary ruling from the Regional Administrative Court of Styria, Austria.
- (Directives 2014/67/EU and 96/71/EC, posting of workers in the framework of the provision of services): EU law on proportionality of penalties has direct effect.
- The primacy of EU law imposes the disapplication of national rules as far as necessary to allow only the imposition of proportionate sanctions.
- (Art. 49(3) of the Convention on the Functioning of the European Union): proportionality is a general principle of Union law (“the inten-

sity of penalties shall not be disproportionate to the offence”), it binds the Member States when they apply this law, even if the applicable penalties are not harmonised.

- (Directive 96/71/EC posting of workers; Art. 47 of the Convention on the Functioning of the European Union): EU law does not preclude a five-year limitation period in respect of non-compliance with documentary obligations relating to the remuneration of posted workers.
- (Slovak company transfers workers to a company established in Austria, where its representative is fined for non-compliance with various documentary obligations in labour and social security matters).

2022 02 10 (C-485/20), HR Rail SA.

ECJ Judgment of 22 February 2022 (C-485/20), HR Rail SA.

ECLI:EU:C:2022:85.

- *XXXX vs. HR Rail SA.*
- Request for a preliminary ruling from the Conseil d’État, acting as the Supreme Administrative Court (Belgium).
- (Directive 200/76/EC; Equal treatment in employment): EU law requires that “reasonable accommodation for persons with disabilities” applies to trainee contract holders.
- If the person, due to his disability, is declared unfit to perform the essential functions of the post he or she holds, he or she must be assigned to another for which he or she has the required skills, abilities and availability, provided that this measure does not entail an undue burden on the employer.
- The development of the “workplace” is a priority measure to enable the person with disabilities to continue to carry out their work, which includes a change of “job”.
- (Worker hired for railway maintenance; a year later he is fitted with a pacemaker sensitive to radiation from the railways and is declared unfit for the performance of his activity; the company dismisses him and helps him to look for another job).

2022 02 22 (C-430/21), Effects of constitutional judgment.

ECJ Judgment (Grand Chamber) of 22 February 2022 (C-430/21), Effects of a constitutional judgment.

ECLI:EU:C:2022:99.

- *Proceedings initiated by RS.*
- Request for a preliminary ruling from the High Court of Craiova, Romania.

- (Articles 2 and 19 TEU, rule of law; Article 267 TFEU, jurisdiction of the ECJ): EU law precludes ordinary courts from being able to examine their compliance with a national rule that the Constitutional Court has declared to be consistent with the Constitution and the very primacy of EU law.
- EU law also precludes the possibility of a national judge being held liable for disciplinary liability for having applied it according to the case-law of the ECJ, and departing from the doctrine of its Constitutional Court.

2022 02 24 (C-262/20), Civil Protection.

ECJ Judgment of 24 February 2022 (C-262/20), Fire Prevention and Civil Protection.

ECLI:EU:C:2022:117.

- *VB against the General Directorate of Fire Prevention and Civil Protection.*
- Request for a preliminary ruling from the Court of First Instance, Lukovit, Bulgaria.
- (Directive 2003/88/EC, Working time): EU law does not require that the normal duration of night work in the public sector (such as police or firefighters) be less than the normal duration of day work.
- The arduous nature of night work must be compensated by protective measures in terms of working time, wages, specific remuneration or similar benefits.
- (Arts. 20 and 31 of the Convention on the Functioning of the European Union; Equality before the law; Guarantees on working time): EU law does not prevent the normal duration of night work in the private sector (7 hours) from being inapplicable to the public sector (including police and firefighters), provided that there is objective and reasonable justification.
- (Firefighter who has worked 8 hours at night during the last three years and demands the conversion of the eighth of each day into overtime).

2022 02 24 (C-389/20), Unemployment of domestic workers.

ECJ Judgment of 24 February 2022 (C-389/20), Unemployment of a domestic worker.

ECLI:EU:C:2022:120.

- *CJ v. General Treasury of the Social Security.*
- Request for a preliminary ruling from the Juzgado de lo Contencioso-Administrativo No 2 de Vigo (Pontevedra).

- (Directive 79/7/EEC on equal treatment of men and women in matters of social security): EU law precludes the exclusion of unemployment protection in the social security system for domestic workers if this entails a particular disadvantage for the workers concerned compared with male workers and is not justified by objective factors unrelated to any discrimination on grounds of sex.
- Article 251 of the LGSS provides for indirect discrimination on the basis of sex in view of the statistical data, without the difficulty of control or the extra cost being able to justify exclusion.
- Take into account that other professional groups in the home are protected by unemployment.
- (Domestic worker who, after 8 years of providing services, requests the TGSS to contribute to unemployment protection, despite being excluded from this protection by the LGSS).

2022 03 03 (C-409/20), Government Sub-delegation in Pontevedra.

ECJ Judgment of 3 March 2022 (C-409/20), Sub-delegation of the Government in Ciudad Real.

ECLI:EU:C:2022:1148.

- *Sub-delegation of the Government in Pontevedra against UN.*
- Request for a preliminary ruling from the High Court of Justice of Galicia.
- (Directive 2008/115/EC, Return of third-country nationals): EU law does not preclude the Spanish Aliens Law when it penalises irregular stay (without aggravating circumstances) first with a fine and obligation to leave the country (unless supervening regularisation); second, with an expulsion order, provided that a reasonable period of time (from 7 to 30 days) is granted and extended in case of justified cause.
- (Colombian who enters as a tourist and stays beyond 90 days, registering at her son's home).

2022 03 03 (C-634/20), Basic medical training.

ECJ Judgment of 3 March 2022 (C-634/20), Basic medical training.

ECLI:EU:C:2022:149.

- *Proceedings initiated by A.*
- Request for a preliminary ruling from the Supreme Administrative Court, Finland.
- (Articles 45 and 49 TFEU; freedoms of movement and establishment): EU law precludes those who already have an academic degree from

another State and have one year to go to professional practice from imposing additional requirements on the host State (three-year limit; supervision by another professional; completion of a specific and three-year training period).

- (Finnish woman who studies medicine in the United Kingdom and returns when she has obtained the Academic Degree, but without the annual practice required to obtain the professional qualification).

2022 03 08 (C-205/20), *Bezirkshauptmannschaft Hartberg-Fürstenfeld*.

ECJ (Grand Chamber) of 8 March 2022 (C-205/20), Direct effect.

ECLI:EU:C:2022:168.

- *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld*.
- Request for a preliminary ruling from the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria).
- (Directives 2014/67/EU and Directive 96/71/EC; Posting of workers): EU law on the proportionality of administrative penalties (with respect to posting of workers) has direct effect and can be invoked in the event of poor transposition, enjoying its own primacy.
- (Slovak company transfers personnel to Austria, whose authorities sanction infringements regarding the conservation and provision of salary and social security documentation).

2022 03 17 (C-232/20), *Daimler*.

ECJ Judgment of 17 March 2022 (C-232/20), DaimlerAG, Mercedes-Benz Werk Berlin.

ECLI:EU:C:2022:196.

- *NP v. DaimlerAG, Mercedes-Benz Werk Berlin*.
- Request for a preliminary ruling from the Landesarbeitsgericht Berlin-Brandenburg (Regional Labour Court, Berlin-Brandenburg, Germany).
- (Directive 2008/104/EC, Temporary Employment Agency): EU law allows exceptions to the maximum duration of the temporary employment contract and does not preclude the assignment to cover a position that is of a permanent nature, without replacing anyone in particular.
- Indicatively, the reiteration of assignments of the same worker and for the same position for 55 months is abusive.
- EU law is infringed if a national rule limits the maximum time of assignment through temporary employment agencies but excludes from its

calculation the time prior to its publication. However, the court is not required, on the basis of EU law alone, to refrain from applying such a transitional provision.

- Without a provision of national law that penalises non-compliance with the regulation on temporary employment agencies, the seconded worker cannot deduce from EU law a subjective right to establish an employment relationship with the user company.
- EU law does not preclude the social partners from derogating from the maximum period of making available at the level of the user business sector.
- (Between September 2014 and May 2019, NP was assigned by a temporary employment agency to Daimler to work in the engine assembly workshop, without replacing anyone in particular; the worker wants to be declared an employee of the transferee company).

2022 04 28 (C-86/21), Regional Health Management of Castilla y León.

ECJ Judgment of 28 April 2022 (C-86/21), Regional Health Management of the Junta de Castilla y León.

ECLI:EU:C:2022:310.

- *Regional Health Management of Castilla y León v. Delia.*
- Request for a preliminary ruling from the High Court of Justice of Castilla y León (Contentious Chamber).
- (Art. 45 TFEU and Regulation 492/2011; free movement of workers): EU law precludes the rule that (for career purposes) prevents taking into account professional experience acquired in a public health service of another Member State.
- That conclusion yields to whether the regulation responds to an objective of general interest, makes it possible to guarantee its realisation and does not go beyond what is necessary to achieve it.
- (Interim civil servant of the Regional Health Service who, for the purposes of recognition of professional level I, alleges seven years of professional experience in the Public Hospital of Portugal).

2022 04 07 (C-236/20), Italian Justices of the Peace.

ECJ Judgment of 7 April 2022 (C-236/20), Statute of Italian Justices of the Peace.

ECLI:EU:C:2022:263.

- *PG v. Ministry of Justice and others.*

- Request for a preliminary ruling from the Tribunale amministrativo regionale per l'Emilia Romagna (Regional Administrative Court, Emilia-Romagna, Italy).
- (Directive 2003/88/EC, working time; Directive 97/81/EC part-time work; Council Directive 1999/70/EC on fixed-term work): EU law precludes the justice of the peace from having paid annual leave or social benefits like professional judges, provided that it is subsumable under the concept of “part-time worker” or “fixed-term worker”.
- The existence of an initial competition specially designed for professional judges for access to the judiciary, which is not inherent in the appointment of justices of the peace, allows for the possibility that they may not enjoy all the rights of professional judges; but the exclusion of any right to leave and of all forms of protection in the field of social benefits and pensions is not admissible.
- (Directive 1999/70, Fixed-term work): EU law precludes the fact that a fixed-term employment relationship may be subject to a maximum of three successive renewals, of four years each, for a total period not exceeding sixteen years, without establishing the possibility of effectively and dissuasively sanctioning the abusive renewal of employment relationships.
- (Justice of the Peace for 14 years, exercising jurisdictional functions and receiving “compensation” for it).

2022 04 22 (C-337/21), University of Barcelona.

ECJ Order of 22 April 2022 (C-337/21), University of Barcelona.

ECLI:EU:C:2022:337.

- *QL against Universitat de Barcelona.*
- Request for a preliminary ruling from the Labour Court No 3 of Barcelona.
- (Directive 1999/70, Fixed-term work): the guarantees of EU law for fixed-term workers apply to those who have been linked to their public sector employer through successive temporary contracts and can become, as a penalty, “indefinite non-permanent”.
- The conversion of the employment relationship into a “non-permanent indefinite one” is a penalty for the abusive use of successive fixed-term employment contracts, but it does not change the very nature of those contracts.
- (Higher Technician of the University of Barcelona hired successively on a temporary basis, who claims to be permanent or “indefinite non-permanent”).

2022 04 28 (C-237/20), Pre-pack procedure.

ECJ Judgment of 28 April 2022 (C-237/20), Pre-pack procedure.

ECLI:EU:C:2022:321.

- *Federation of the Dutch Trade Union Movement (FNV) v. New Heiploeg*.
- Request for a preliminary ruling from the Supreme Court of the Netherlands.
- (Directive 2001/23/EC, transfer of undertakings): EU law on labour subrogation does not apply where the transferor is the subject of bankruptcy or insolvency proceedings.
- This exclusion is present in the pre-pack procedure: transfer before the opening of bankruptcy proceedings and in order to achieve a liquidation of the operating company that satisfies the interests of all creditors as much as possible and that allows jobs to be preserved as far as possible.
- This pre-pack procedure is understood to be controlled by an authority because a “pre-appointed trustee”, under the supervision of a “pre-appointed bankruptcy judge”, is involved and the contract on that transfer is concluded and enforced once the bankruptcy has been declared, which is aimed at the liquidation of the transferor’s assets.
- An exception justified to rule out the serious risk of deterioration, from the overall point of view, of the value of the transferred company or of the living and working conditions.
- The exception is only possible if it is a regulated procedure and not only created by jurisprudence.
- (Fishing business group in difficult economic situation; activation of the pre-bankruptcy proceedings; healthy company of the group that acquires assets from the insolvent, subrogating itself in part of the workforce but worsening working conditions).

2022 05 05 (E-265/20), Universiteit Antwerpen.

ECJ Judgment of 5 May 2022 (C-265/20), Universiteit Antwerpen.

ECLI:EU:C:2022:361.

- *FN v Universiteit Antwerpen and Others*.
- Request for a preliminary ruling from the (Court of Appeal, Antwerp, Belgium).
- (Directive 97/81/EC, part-time work): EU law precludes national legislation and practice under which a full-time academic staff member is

automatically appointed on a permanent basis, for no objective reason other than full-time teaching, while a member of the academic staff who teaches part-time does not have this right.

- EU law does not impose any requirement as to how the percentage of that part-time charge is calculated in relation to a comparable full-time charge.
- (Temporary and part-time teacher for 20 years) who demands the same treatment as that given to those who have worked full-time (transformation into permanent workers).

2022 05 05 (E-405/20), BVAEB.

ECJ Judgment of 5 May 2022 (C-405/20), Insurance Agency for the Civil Service, Railways and Mining, Austria.

ECLI:EU:C:2022:347.

- *EB and Others v Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB)*.
- Request for a judicial decision from the Verwaltungsgerichtshof (Supreme Dispute Court, Austria).
- (Directive 2006/54/EC, Equal treatment between men and women): EU law on equality between men and women applies to the annual revaluation of retirement pensions.
- EU law is compatible with the progressively decreasing annual updating of retirement pensions, with those above a certain amount remaining frozen, even if it affects many more men than women, provided that it is to guarantee the sustainability of the system and respect the principle of proportionality.
- (Retired men with capped pensions who demand their revaluation, alleging indirect gender discrimination).

2022 05 05 (E-101/21), AA Director.

ECJ Judgment of 5 May 2022 (C-101/21), Director of AA.

ECLI:EU:C:2022:356.

- *HJ v. Ministry of Labour and Social Affairs of the Czech Republic*.
- Request for a preliminary ruling from the Supreme (Administrative Court) of the Czech Republic.
- (Directive 2008/94/EC, protection against business insolvency): EU law precludes a person who simultaneously performs the functions of director and member of the board of directors from being classified as a salaried worker in order to apply the guarantees of business insolvency.

- Managing a commercial company and being a member of the Board of Directors does not, in itself, allow the existence of employment to be presumed or excluded; it cannot be presumed, without possible evidence to the contrary, that the person who manages the company is responsible for its insolvency.
- (Architect and Director of the company that ends up being promoted to Chairman of the Board of Directors; claim for unpaid remuneration when the company becomes insolvent).

2022 05 12 (C-426/20), Luso Temp.

ECJ Judgment of 12 May 2022 (C-426/20), Luso Temp.

ECLI:EU:C:2022:373.

- *GD and ES v. Luso Temp, Empresa de Trabalho Temporário SA.*
- Request for a preliminary ruling from the Court of First Instance, Braga, Labour Court, Barcelos, Portugal.
- (Directive 2008/104, Temporary Work Agencies): EU law precludes the compensation for unused leave (or the associated extra pay) of staff seconded by a temporary employment agency from being lower than what they would obtain in the event of direct recruitment by the user company.
- Vacation duration and remuneration are essential conditions, which must be enjoyed by the staff assigned through temporary employment agencies as if they belonged to the user's staff.
- National legislation contrary to that result must be interpreted in order to reconcile it, but that obligation is limited by general principles of law and cannot serve as a basis for an interpretation contra legem of national law.
- (Employees assigned by temporary employment agencies for two years; at the end of their employment relationship, the compensatory amount for vacations not taken and the extra pay associated with them is discussed).

2022 05 19 (C-33/11), Ryanair.

ECJ Judgment of 19 May 2022 (C-33/11), INAIL and INPS.

ECLI:EU:C:2020:402.

- *Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL) and Istituto nazionale della previdenza sociale (INPS) against Ryanair DAC.*
- Request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy).

- (Regulation 1408/71, Social Security Coordination): the social security of that country applies to flight staff of an air carrier established in a Member State who works for 45 minutes a day in a premises located in another Member State (where the staff resides), while the rest of the working day is on board the aircraft, the social security of that second country is applied, unless they are covered by Irish Social Security (E-101 Certificate).
- (Ryanair only provides proof of being in Irish Social Security in respect of some of the 219 crew members assigned to the Bergamo base; the Authorities require contributions in arrears in Italy).

2022 06 02 (C-587/20), HK/Danmark and HK/Privat.

ECJ Judgment of 2 June 2022 (C-587/20), HK/Danmark and HK/Privat.
ECLI:EU:C:2022:419.

- *Ligebehandlingsnævnet, acting on behalf of A against HK/Danmark and HK/Privat.*
- Request for a preliminary ruling from the Court of Appeal of the Eastern Region, Denmark.
- (Directive 2000/78/EC, non-discrimination): national legislation setting a maximum age for the recruitment of workers affects employment conditions.
- An age limit laid down in the statutes of a trade union for eligibility for its Presidency falls within the scope of Directive 2000/78: broad scope of the concept of “workers”.
- Freedom of association is not absolute and its exercise may entail limitations, provided that these are provided for by law and that they respect its essential content and the principle of proportionality.
- (President of a union who wants to stand for re-election, despite the fact that the Statutes limit the age of access to the position at 60 years).

2022 06 16 (C-328/20), Commission v Austria.

ECJ judgment of 16 June 2022 (C-328/20), European Commission v. Austria.
ECLI:EU:C:2022:468.

- *European Commission v. Austria.*
- Action for failure to fulfil obligations under Article 258 TFEU.
- (Austrian adjustment mechanism for family allowances and tax advantages for workers with children residing in another Member State; recalculation, upwards or downwards, according to the general price level in that other State).

- Indirect and unjustified discrimination on grounds of nationality: migrant workers participate in contributions and taxes in the same way as nationals, without having their children's place of residence examined.

2022 06 16 (E-577/20), Psychotherapists.

ECJ Judgment of 16 June 2022 (C-577/20), Free movement of Psychotherapists.

ECLI:EU:C:2022:467.

- *Proceedings initiated by A.*
- Request for a preliminary ruling from the Supreme Administrative Court of Finland (Finland Korkein hallinto-oikeus).
- (Directive 2005/36 on the recognition of professional qualifications; arts. 45 and 49 TFEU, freedom of movement and right of establishment): professional qualifications issued by a State in which a profession is not regulated must be taken into account by the host State, without questioning knowledge or qualifications.
- In case of serious doubts, the host State may request the home authority to re-examine the regularity of the title; if it is confirmed, it can only be questioned because its lack of veracity is evident.
- (Finnish graduate University of the United Kingdom is interested in being recognized as a psychotherapist before its Health Administration; the refusal is based on deficient training and lack of equivalence with that required in Finland).

2022 06 22 (E-534/20), Leistritz.

ECJ Judgment of 22 June 2022 (C-534/20), Leistritz.

ECLI:EU:C:2022:495.

- *Leistritz AG v. LH.*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Regulation 2016/679, Protection of Personal Data): EU law is compatible with the fact that a controller or a processor can only dismiss a data protection officer who is part of its staff for serious cause, even if the dismissal is not related to the exercise of the functions of said delegate.
- Regardless of the link between the person in charge of the processing and the entity responsible for the processing, their independence must be guaranteed; the fact that national law provides greater protection does not undermine that purpose.

- (Responsible for Legal Advice and data processing who is dismissed for outsourcing her functions; national law grants enhanced protection to these people and their dismissal would be null and void).

2022 06 28 (C-278/20), *Commission v. Spain*.

ECJ Judgment of 28 June 2022 (C-278/20), Compensation for infringement of EU law.

ECLI:EU:C:2022:503.

- *European Commission v. Kingdom of Spain*.
- Action for breach of obligations arising from the principles of effectiveness and equivalence.
- Laws 39 and 40/2015 infringe EU law by establishing the requirements for obtaining compensation for damages caused to individuals by the Spanish legislator as a result of the infringement of EU law.
- Making reparation for the damage caused by the State to an individual for infringing EU law subject to a prior declaration by the ECJ is contrary to the principle of effectiveness.
- It cannot be inexcusably required that the injured individual has obtained a final judgment dismissing an appeal against the administrative action that caused the damage; at least this should be the case where the damage derives directly from an act or omission of the legislature, contrary to EU law, and there is no administrative action that can be challenged.
- In any event, the limitation period of one year from the publication in the OJEU of the ECJ judgment declaring the application of the rule with the status of law to be contrary to EU law is not admissible, as there are cases in which there is no such judgment.
- Nor can it be accepted that only damages caused in the five years prior to the date of said publication are compensable, unless the judgment provides otherwise.
- Injured individuals are entitled to compensation when three (sufficient) conditions are met: that the infringed rule of EU law is intended to confer rights on them; that the infringement of this rule is sufficiently serious; that there is a direct causal link between such an infringement and the damage suffered by those individuals.
- Doctrine applicable in any case, regardless of the organ of the State to whose action or omission the infringement is due, including the national legislator, and of which public authority must, in principle, assume the burden of reparation.

2022 06 30 (C-192/21), Community of Castilla y León.

ECJ Judgment of 30 June 2022 (C-192/21), Community of Castilla y León.

ECLI:EU:C:2022:513.

- *D. Clemente v. Community of Castilla y León (Directorate-General for the Civil Service).*
- Request for a preliminary ruling from the High Court of Justice of Castilla y León (Contentious Chamber).
- (Directive 1999/70, Fixed-term work): EU law means that, for the purposes of consolidating the personal grade, the services that an official has provided as an interim official before acquiring the status of career civil servant are taken into account.
- (Prolonged and interim performance of a civil servant position with level 24, subsequently passing the competition for a lower level position).

2022 06 30 (C-625/20), INSS (Compatibility of permanent disability pensions).

ECJ Judgment of 30 June 2022 (C-625/20), Community of Castilla y León.

ECLI:EU:C:2022:508.

- *KM v. National Social Security Institute (INSS).*
- Request for a preliminary ruling from Juzgado de lo Social n.º 26 de Barcelona.
- (Directive 79/7/EEC, equality of men and women in Social Security): EU law precludes the prohibitive rule of the compatibility of two total permanent disability pensions (IPT) when they are from the same Scheme, while it is admitted when they arise from different Schemes (e.g. RGSS and RETA). if it discriminates.
- That result discriminates if it places female workers at a particular disadvantage compared to male workers, by allowing compatibility with a significantly higher proportion of men (which must be calculated on the basis of the total number of persons subject to the two regulations), unless this is justified by objective factors unrelated to any discrimination on grounds of sex.
- (Administrative assistant who in 1999 accesses IPT due to common illness; resumes activity as a subordinate and in 2018 accesses IPT due to accident; claims both pensions, without having to choose).

2022 07 04 (C-568/20), H Limited.

ECJ Judgment of 7 April 2022, (C-568/20), H Limited.

ECLI:EU:C:2022:264.

- *J. v. H. Limited.*
- Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria).
- (Regulation 1215/2012, enforcement): the concept of “judgment” subject to enforcement covers any decision issued by a court of a Member State, including an order for payment in execution of two judgments issued by courts of the Kingdom of Jordan, which, as such, are not enforceable in EU Member States.
- (The High Court of England and Wales makes an order requiring a natural person resident in Austria to pay the bank H Limited a certain amount, in execution of two judgments of two Jordanian courts).

2022 07 07 (E-13/21), Pricoforest.

ECJ Judgment of 7 July 2022 (C-13/21), Pricoforest SRL.

ECLI:EU:C:2022:531.

- *Pricoforest SRL v Inspectoratul de Stat pentru Controlul în Transportul Rutier (ISCTR).*
- Request for a preliminary ruling from the Court of First Instance of Miercurea Ciuc (Romania).
- (Regulation 561/2006, Road Transport): EU law allows States to derogate from driving time rules in respect of vehicles used (or rented without a driver) by agricultural, horticultural, forestry, livestock or fishing companies for the transport of goods within a radius of 100 kilometres around the company’s place of operation and within the framework of their own activity.
- The radius described must be understood as referring to a straight line that does not exceed 100 km, drawn on the map from said center of exploitation and that joins that center to all the points of a circular geographical area that surrounds it.
- If a State grants exceptions to vehicles carrying out transport not only within a radius of up to 100 kilometres, but also in excess of that radius, the exceptions apply only to vehicles that do not exceed that radius.

2022 07 07 (C-213/21 and 214/21), Italy Emergenza Cooperativa Sociale.

ECJ Judgment of 7 July 2022 (C-213/21 and 214/21), Italy Emergenza Cooperativa Sociale.

ECLI:EU:C:2022:508.

- *Italy Emergenza Cooperativa Sociale v Azienda Sanitaria Locale Barletta-Andria-Trani and Azienda Sanitaria Provinciale di Cosenza.*
- Requests for a preliminary ruling from the Consiglio di Stato (Council of State, Italy).
- (Directive 2014/24, Public Procurement): EU law allows emergency and emergency medical transport services to be awarded on a priority basis by agreement only to voluntary organisations, and not to social cooperatives that can distribute cooperative returns linked to their activities to their members.
- Since cooperative returns make it possible to distribute “profits” to members, the Cooperative is not equivalent to a “non-profit” organization or association.

2022 07 07 (C-257/21 and 258/21), Coca-Cola European Partners Deutschland.

ECJ judgment of 7 July 2022 (C-257/21 and 258/21), Coca-Cola European Partners Deutschland.

ECLI:EU:C:2022:529.

- *Coca-Cola European Partners Deutschland GmbH v. L.B. and R.G.*
- Requests for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 2003/88, Working Time): a collective agreement that remunerates occasional night work better than that provided on a regular basis does not apply EU law, so that the problem is outside it (art. 51.1 CEFEU: principle of subsidiarity that leads to the application of the Charter only with respect to EU law).
- (Night worker who receives a 20% supplement, while those who perform sporadic work in such a period receive 25%).

2022 07 07 (C-261/21), F. Hoffmann-La Roche and others.

ECJ Judgment of 7 July 2022 (C-261/21), F. Hoffmann-La Roche and others.

ECLI:EU:C:2022:534.

- *Hoffmann-La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato.*

- Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy).
- (Articles 42 and 19 TEU, shared competences): EU law does not preclude the judgment handed down by the Supreme Court after having referred a question for a preliminary ruling to the ECJ from being unappealable, even if it is considered that this answer has not been taken into account.

2022 07 07 (C-377/21), Zone de secours Hainaut-Centre.

ECJ Judgment of 7 July 2022 (C-377/21), Zone de secours Hainaut-Centre. ECLI:EU:C:2022:530.

- *Ville de Mons and Zone de secours Hainaut-Centre v. RM.*
- Request for a preliminary ruling from the Cour du Travail de Mons (High Labour Court, Mons, Belgium).
- (Directive 97/81/EC; Part-time work): EU law is compatible with calculating the remuneration of professional firefighters hired on a full-time basis, computing, for the purposes of the seniority supplement, the services previously provided part-time (as volunteer firefighters) according to the principle of *pro rata temporis*, i.e. on the basis of the services actually performed, as long as for full-time work it is done that way.
- (After 20 years as a volunteer and part-time firefighter, compatible with various other tasks, he enters the job as a professional; it is important that his remuneration takes into account all the time of employment and not only that of effective activity).

2022 07 14 (C-436/20), ASSADE.

ECJ Judgment of 14 July 2022 (C-436/20), State Association of Home Care Service Entities. ECLI:EU:C:2022:559.

- *ASSADE v. Valencian Community.*
- Request for a preliminary ruling submitted by the Contentious Chamber of the High Court of Justice of the Valencian Community.
- (Directive 2014/24/EU, Public Procurement): EU law does not preclude the rule that reserves the provision of certain social services to private non-profit entities (subject to a transparent tender). Such entities must contribute to social purposes and solidarity objectives.
- EU law does preclude the award of these tenders from taking into account the establishment of the economic operator in the locality where the services are to be provided.

- (Regional decree excluding for-profit entities from the possibility of providing certain social services, while it does allow any non-profit entity, and not only voluntary organizations, without having to go through a transparent competitive process that guarantees equal treatment between the economic operators concerned).

2022 08 01 (C-411/20), Family Benefits.

ECJ judgment of 1 August 2022 (C-411/20), Familienkasse Niedersachsen-Bremen der Bundesagentur für Arbeit.

ECLI:EU:C:2022:602.

- *S v. Familienkasse Niedersachsen-Bremen der Bundesagentur für Arbeit.*
- Request for a preliminary ruling from the Finanzgericht Bremen (Commercial Court, Bremen, Germany).
- (Regulation 883/2004, Social Security Coordination): EU law precludes the denial of family benefits to a citizen of another EU State who is inactive for work but is in the first three months of stay in the country, provided that the national (in a similar situation) is granted to return after having exercised free movement.

2022 09 15 (C-793/19 and 794/19), Spacenet.

ECJ Judgment of 15 September 2022 (793/19 and 794/19), Spacenet.

ECLI:EU:C:2022:702.

- *SpaceNet AG and Telekom Deutschland Gmb v. German Ministry of Telecommunications.*
- Request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany).
- (Directive 2002/58/EC; art. 52.1 CEFEU; Data Protection): EU law does not apply to the generalized (temporary, motivated) retention of (non-discriminatory, including PI) data in order to combat serious crime and ensure public safety.
- Respect for the relevant substantive and procedural conditions and the existence of effective safeguards (including jurisdictional) against the risks of abuse must be ensured.
- (Digital service providers challenge the national rule that requires them to retain traffic data and location data relating to their customers' telecommunications as of July 1, 2017).

2022 09 15 (C-22/21), Cousin of an EU citizen.

ECJ Judgment of 9 September 2022 (C-22/21), Minister for Justice and Equality (Ressortissant de pays tiers cousin d'un citoyen de l'Union).

ECLI:EU:C:2022:683.

- *SRS and AA v Ministry of Justice and Equality*.
- Request for a preliminary ruling from the Supreme Court.
- (Directive 2004/38/EC, freedom of movement and residence): the legislative reference to “any other member of the family who lives with the Union citizen who is the beneficiary of the right of residence as principal” identifies a person who maintains a relationship of dependency with the Union citizen, based on close and stable personal ties, with a domestic cohabitation that goes beyond mere and temporary cohabitation.
- (Pakistani nationalized British who welcomes a student cousin; the first moves to Northern Ireland and the second is interested in permission to move and live with him).

2022 09 22 (C-518/20 and 727/20), Fraport.

ECJ Judgment of 22 September 2022 (C-518/20 and 727/20), Fraport.

ECLI:EU:C:2022:707.

- *XP v. Fraport AG Frankfurt Airport Services Worldwide; AR v. St. Vincenz-Krankenhaus GmbH*.
- Requests for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 2003/88/EC, Working Time; Art. 31(2) of the Convention on the Functioning of the European Union, Leave): EU law precludes leave accrued before incapacity (permanent or temporary) from being lost at the end of a carry-over period even if the employer has not offered the worker, at the appropriate time, the possibility of exercising that right.
- If the company does not give the possibility of exercising the right effectively, it cannot invoke the legal prescription either, since this would give rise to unjust enrichment.
- (Driver affected by persistent disability, from December 2014 to August 2022, who claims the holidays not taken for the year in which it was declared).
- (Hospital employee who falls ill in 2017 having 14 days of vacation pending, without the company warning her that at the end of 2019 her right lapses).

2022 09 22 (C-120/21), LB (Prescription of the right to leave).

ECJ Judgment of 22 September 2022 (C-120/21).

ECLI:EU:C:2022:718.

- *TO v. LB Company*.
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 2003/88/EC, Working Time; Art. 31.2 of the Convention on Leave): EU law precludes accrued holidays from expiring within a period of three years (from the end of the annual accrual) if the employer has not enabled the worker to exercise this right effectively.
- The right to leave cannot be terminated at the end of the reference period or a carry-over period fixed by national law where the worker has not been able to take his leave.
- If the company does not give the possibility of exercising the right effectively, it cannot invoke the legal prescription either, since this would give rise to unjust enrichment.
- (When his contract expired in July 2017, the worker claimed the holidays not taken for the years 2013 to 2016).

2022 10 12 (E-344/20), SCRL (Clothing with Religious Significance).

ECJ Judgment of 12 October 2022 (C-344/20), S.C.R.L.

ECLI:EU:C:2022:744.

- *L.F and S.C.R.L.*
- Request for a preliminary ruling from the French-speaking Labour Court of Brussels (Belgium).
- (Directive 2000/78/EC, Equality): EU law outlawing discrimination on the basis of “religion or belief” (sole ground) covers both religious and philosophical or spiritual beliefs.
- Provided that it is applied in a general way, it is not discriminatory for the employer to prohibit workers from expressing their convictions, either verbally, through the visible use of signs or clothing with religious connotations, or in any other way.
- EU law precludes interpreting religious and philosophical beliefs as separate grounds, even on the grounds that this entails “provisions more favourable to the protection of the principle of equal treatment”.
- (Company with a Regulation obliging to “respect the policy of strict neutrality prevailing in the company”, including “not to manifest in any way, either verbally, through the way of dressing or in any other

way, their religious, philosophical or political convictions, of any kind”. The Muslim engineer L.F. rules out dispensing with the Islamic headscarf, despite the fact that a selection process is being carried out that is going in her favour, and the company desists from hiring her).

2022 10 13 (C-714/20), Intervals in temporary employment contracts.

ECJ Judgment of 13 October 2022 (C-713/20), Netherlands Social Security Administration.

ECLI:EU:C:2022:782.

- *Board of Directors of the Social Security Fund, Netherlands.*
- Request for a preliminary ruling from the Central Court of Appeal, Netherlands.
- (Regulation 883/2004, Social Security Coordination): in the field of Social Security, the legislation of the State of residence is applicable when there is no living employment relationship between a temporary employment agency domiciled in another State and the resident who moves to that State to work discontinuously.
- (A Dutch person residing in Germany and working in the Netherlands for a Netherlands temporary employment agency, with intervals during which there is no employment relationship).

2022 10 18 (C-677/20), IG Metall and ver.di.

ECJ Judgment of 18 October 2022 (C-677/20), IG Metall and ver.di.

ECLI:EU:C:2022:800.

- *Industriegewerkschaft Metall (IG Metall), ver.di and SAP SE, SEBetriebsrat der SAP SE.*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 2001/86/EC; European Company as regards employee involvement): if required by national law, when an entity is to be transformed into a European Company, EU law requires a separate vote for representatives proposed by trade unions in order to elect salaried members of the Control Board.
- In such a vote, equal treatment must be respected between the workers of that company, its subsidiaries and its establishments and between the trade unions represented therein.
- Where the applicable national law requires a certain formula for the election of workers’ representatives to the supervisory board (in that case, the separate vote of the representatives proposed by the trade

unions), that formula must be complied with in the same terms in order to comply with the mandate of the Directive.

- (German Society that had 8 representatives of the workforce, 2 of them elected through trade unions, and decided to transform itself into a European Company; the regulation kept a quota of representatives of trade union extraction).

2022 10 20 (E-604/20), ROI Land Investments.

ECJ Judgment of 20 October 2022 (C-604/20), ROI Land Investments Ltd and FD, E.

ECLI:EU:C:2022:807.

- *ROI Land Investments Ltd vs FD*.
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Regulation 1215/2012, Jurisdiction): the courts of the workplace (present or last) are competent to sue a subject other than the employer, but directly responsible for the fulfillment of labor obligations.
- Employers not domiciled in an EU State can be sued at the place of work (current or last) or at the workplace, without this rule being altered by even more favourable legislation.
- Competence in the consumption of products for professional use is applicable to both self-employed and salaried activities, including employment guarantee clauses provided by a third party.
- (Citizen domiciled in Germany who works for a Canadian real estate company, but their contract is terminated in favour of a Swiss company in incorporation; the company guarantees before the director the fulfillment of the contractual obligations).

2022 10 20 (C-301/21), Curtea de Apel Alba Iulia and others.

ECJ Judgment of 20 October 2022 (C-301/21), Curtea de Apel Alba Iulia and others.

ECLI:EU:C:2022:811.

- *Curtea de Apel Alba Iulia and others; YF and others*.
- Request for a preliminary ruling from the Curtea de Apel Oradea (Court of Appeal, Oradea, Romania).
- (Directive 2000/78/EC, Equal treatment): EU law does not apply to national law that assigns lower remuneration to judges recruited after its entry into force, provided that this does not result in any direct or indirect discrimination on grounds of age.

- (Directive 2000/78): EU law on equal treatment only prohibits discrimination on the basis of the circumstances expressly defined therein.
- (National legislation which, according to domestic case-law, means that the remuneration received by certain judges is higher than that of other judges of the same rank and who perform the same functions; “Double salary scale”).

2022 10 27 (E-129/21), Proximus.

ECJ Judgment of 27 October 2022 (C-129/21), Proximus.

ECLI:EU:C:2022:833.

- *Proximus v Belgian Data Protection Agency (DPA)*.
- Request for a preliminary ruling from the Court of Appeal of Brussels, Belgium.
- (Regulation 2016/679, Data Protection of Natural Persons): the consent of the customer whose data is provided by their telephone company to the company that prepares directories is required.
- The customer has the right to request that their data be removed from published guides.
- (Telecommunications company that also provides telephone directories and information including name, address and telephone number; it is sanctioned for incorporating customer data from another company, which had provided it).

2022 11 10 (C-163/21), Paccar.

ECJ Judgment of 10 November 2022 (C-163/21), Paccar.

ECLI:EU:C:2022:863.

- *AD and Others v PACCAR Inc, DAF TRUCKS NV and DAF Trucks Deutschland GmbH*.
- Request for a preliminary ruling from Juzgado de lo Mercantil n.º 7 de Barcelona.
- (Directive 2014/104, damages for unlawful competition): for EU law, the disclosure of “relevant evidence” includes documents that a party can create by aggregating or classifying information, documents or data in its possession (not just pre-existing ones).
- (Purchasers of trucks affected by the illicit cartel ask the Court for access to evidence that is in the hands of the manufacturers, to quantify the artificial increase in prices).

2022 11 17 (E-304/21), Italian Ministry of the Interior.

ECJ Judgment of 17 November 2022 (C-304/21), Italian Ministry of the Interior.

ECLI:EU:C:2022:897.

- *VT v. Ministero dell'Interno (Dipartimento della Pubblica Sicurezza)*.
- Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy).
- (Art. 21 CEFEU and Directive 2000/78/EC, Equal treatment): EU law precludes the establishment of a maximum age of 30 years to participate in a selection process for the provision of police commissioner posts.
- The maximum age may be justified if the functions actually to be performed require specific physical abilities, but the passing of such tests calls into question the validity of the age limit.
- If such specific skills are necessary, EU law requires that such a legitimate objective must not be imposed in a disproportionate manner, which is a matter for the referring court to verify.
- (Call for an open selection process to fill posts of Commissioner of the National Police, requiring age between 18 and 30 years; some internal promotion positions allow access up to 40 years of age; the computer system prevents the applicant from registering as an applicant because on that date he had already reached the maximum age).

2022 11 24 (C-289/21), Repeal of questioned rule.

ECJ Judgment of 24 November 2022 (C-289/21), Repeal of the disputed rule.

ECLI:EU:C:2022:920.

- *IG v. Bulgarian Ministry of Energy*.
- Request for a preliminary ruling from the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria).
- (Art. 47 of the Convention on the Functioning of the European Union, Effective judicial protection): the Community principle of effectiveness precludes the view that the dispute loses its purpose by questioning the conformity of a national rule with EU law if it is repealed.
- Effective judicial protection cannot preclude, in all cases, an action for annulment of a national provision allegedly contrary to EU law from being regarded as devoid of purpose in the event of the repeal of the contested provision.

- That principle does preclude the termination of the proceedings on that ground without the parties having been able to first claim a possible interest in continuing the proceedings, which must be taken into account.
- (IG challenges part of the Decree on district heating, obtaining a favourable ruling; the rule is modified and the Court of Second Instance considers that the dispute has become devoid of purpose).

2022 12 01 (C-564/21), Access to the administrative file.

ECJ Judgment of 1 December 2022 (C-564/21), Access to administrative file.

ECLI:EU:C:2022:951.

- *BU v. German Republic*.
- Request for a preliminary ruling from the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany).
- (Art. 47 of the Convention on the Functioning of the European Union, judicial protection; Directive 2013/32/EU (International Protection): EU law does not require the Administration to send a printed file on numbered sheets to the person requesting it in order to make a claim.
- It is lawful to transfer an electronic file in the form of PDF files, even if they are not paginated, which can be viewed through free software and free access on the Internet, provided that the information is complete and reliable.
- (Asylum seeker attended by an official who completes the digital file and signs it, sending it to the body in charge of resolving it).

2022 12 08 (E-731/21), Domestic partnership.

ECJ Judgment of 15 December 2022 (C-731/21), Unmarried couple.

ECLI:EU:C:2022:969.

- *GV v Caisse nationale d'assurance pension*.
- Request for a preliminary ruling from the Cour de cassation (Court of Cassation, Luxembourg).
- (Art. 45 TFEU, freedom of movement): EU law precludes a State from making access to the widow's pension conditional on the fact that the common-law partner was registered in its territory, without recognising the pension constituted in another area of the EU.
- (French couple forming a common-law partnership in their country, both working in Luxembourg; refusal to grant a pension to the survivor on the grounds that the partnership has not been formalised in accordance with Luxembourg national law).

2022 12 15 (C-40/20 and 173/20), University researchers in Italy.

ECJ Judgment of 15 December 2022 (C-40/20 and 173/20), University researchers in Italy.

ECLI:EU:C:2022:985.

- *Several persons against Ministero dell'Istruzione, dell'Università e della Ricerca and Università degli studi di Perugia.*
- Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy).
- (Directive 1999/70/EC, temporality): EU law does not preclude the Law that allows universities to hire researchers for three years, extendable for a further two, without being subject to objective or temporal reasons.
- EU law does not preclude the law that sets the total duration of temporary employment contracts that the same researcher can conclude at twelve years, even with different universities and institutions.
- EU law does not prevent the stabilisation of research staff in public bodies from leaving out those in universities.
- EU law does prevent permanent researchers from being able to access the teaching staff and not when they are temporary and have passed the same accreditation tests.

2022 12 15 (E-311/21), TimePartner.

ECJ Judgment of 15 December 2022 (C-311/21), TimePartner.

ECLI:EU:C:2022:983.

- *CM v TimePartner Personalmanagement GmbH.*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 2008/104/EC, temporary employment agencies): EU law does not require that workers on mission be more protected than the rest, but if the collective agreement excludes them from any benefit enjoyed by those of the user company, they must enjoy compensation.
- The comparison between people on mission and those hired directly by the user company must be made with respect to each specific job, without it being necessary for the transferee to have a permanent contract.
- Collective agreements that establish differences between personnel on mission and their own must be judicially reviewable to verify the mandatory global equivalence.

- (Worker who is paid in accordance with the temporary employment agreement and claims the difference with what is set out in the sectoral agreement applied to the user).

2022 12 22 (E-392/21), Corrective Glasses.

ECJ Judgment of 22 December 2022 (C-392/21), Corrective glasses.

ECLI:EU:C:2022:1020.

- *CJ v. Inspector General pentru Imigrări*.
- Request for a preliminary ruling from the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania).
- (Directive 90/270/EEC 2008/104/EC, specific on equipment with screens): “special corrective devices” are prescription glasses that serve specifically to correct and prevent vision disorders, but are not limited to those used exclusively in the professional field.
- They are special glasses to correct or prevent vision disorders (outside work or not) when normal glasses cannot do so.
- The employer must provide this device, delivering it or reimbursing its cost, but not paying a general salary supplement.
- (Public employee who works with equipment that includes display screens, increases his visual impairment and asks for reimbursement of the €530 that the new glasses cost).

2023

2023 01 12 (C-132/21), Budapesti Elektromos Művek Zrt.

ECJ Judgment of 12 January 2023 (C-132/21), Budapesti Elektromos Művek Zrt.

ECLI:EU:C:2023:2.

- *BE and the National Data Protection and Freedom of Information Authority (Hungary) in respect of the company Budapesti Elektromos Művek Zrt.*
- Request for a preliminary ruling from the General Court of the Capital (Hungary).
- (Regulation 2016/679, Data Protection): EU law requires States to harmonise the remedies against the decision of the Guarantee Body (contentious) and against the decision of the Data Controller (civil).
- The existence of contradictory decisions would jeopardise the objective of ensuring a consistent and homogeneous application of the rules in relation to the processing of personal data.

- (Shareholder attending the General Meeting of the company, then requesting the recording of the act and receiving only his interventions; he excites the intervention of the Guarantee Body and challenges its dismissal in court, but also resorts to civil court against the decision of the data controller).

2023 01 12 (C-154/21), Information on recipients of personal data.

ECJ Judgment of 12 January 2023 (C-154/21), Information on the recipients of personal data.

ECLI:EU:C:2023:3.

- *RW v. Österreichische Post AG*.
- Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria).
- (Regulation 2016/679, Data Protection): the right of access to personal data implies that the data controller must indicate (to whom they are communicated) the identity of the recipients.
- That identification obligation ceases when it is impossible to comply with it or when the requests for access by the data subject are manifestly unfounded or excessive, in which case it is sufficient to indicate the categories of recipients in question.
- (Person requests from the Editor of the telephone directory the personal data that concerned him/her, current or past, as well as, in the event that the data had been communicated to third parties, the identity of those recipients).

2023 01 12 (C-356/21), Freelance Editor on Polish Television.

ECJ Judgment of 12 January 2023 (C-356/21), Freelance Editor on Polish Television.

ECLI:EU:C:2023:9.

- *JK v. Polish Public Television*.
- Request for a preliminary ruling from the District Court, Warsaw (Poland).
- (Directive 2000/78/EC, Non-discrimination in employment): EU law precludes freedom of contract from allowing self-employed persons to be discriminated against on the basis of sexual orientation.
- Anti-discrimination protection extends throughout the employment relationship, including those who provide services on their own account and with a certain stability, since their vulnerability is comparable to that of the employee.

- A refusal to conclude a contract for the provision of services with a self-employed worker on grounds relating to sexual orientation is protected by that directive.
- (Art. 16 of the Convention on the Functioning of the European Union): the freedom to choose the contractual counterparty is not unlimited; in particular, it must respect the prohibition of discrimination.
- (Audiovisual editor who, uninterruptedly and for several years, produces reports for Television; after publishing on YouTube a Christmas short greeting in the company of his partner, of the same sex, he sees the commissions cancelled and the professional collaboration terminated).

2023 01 19 (C-292/21), National Confederation of Driving Schools.

ECJ Judgment of 19 January 2023 (C-292/21), National Confederation of Driving Schools (CNAE).

ECLI:EU:C:2023:32.

- *Public Prosecutor's Office and Association for the Defence of the Common Interests of Driving Schools (AUDICA) versus the General State Administration, CNAE and the Temporary Union of Companies CNAE-ITT-FORMASTER-ECT.*
- Request for a preliminary ruling from the Contentious Chamber of the Supreme Court (Spain).
- (Directive 2006/123, internal market): EU law precludes road safety re-education courses for the recovery of driving licence points from being carried out under a public service concession regime, in so far as they go beyond what is necessary to achieve the objective of general interest pursued, namely the improvement of road safety.
- The territorial division and quantitative limit imposed do not appear to be necessary for the fulfilment of the particular task at hand under economically viable conditions.
- (The Directorate General of Traffic tenders the development of the courses for drivers to recover their points from the driving license; Spain is divided into five territories; whoever is awarded each lot will have exclusivity in the matter; AUDICA challenges the call, for violating the freedom to provide services).

2023 02 02 (E-372/21), Seventh-day Adventist Church in Germany.

ECJ judgment of February 2, 2023 (C-372/21), Seventh-day Adventist Church in Germany.

ECLI:EU:C:2023:59.

- *Free Church of Seventh-day Adventists in Germany in front of the Vorarlberg Education Directorate (Austria).*
- Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).
- (Articles 17 and 49 TFEU, Status of Churches and Freedom of Establishment): EU law does not preclude public subsidies for private confessional schools from being reserved for Churches and religious associations recognised by the Member State concerned.
- This limitation on the freedom of establishment is justified by the fact that in Austria private confessional schools complete the public education system, allowing children to choose their education on the basis of religious convictions. By being intended to ensure that choice, the Austrian legislation pursues a legitimate interest.
- (The Adventist Church in Germany is applying in Austria for a grant to pay for the teachers of a private school, which it recognizes and supports as a denominational school. His application was rejected because these subsidies are reserved for recognized churches and religious associations in Austria.).

2023 02 09 (E-402/21), Turkish Citizen Residency.

ECJ Judgment of 9 February 2023 (C-402/21), Residence of Turkish citizens.

ECLI:EU:C:2023:77.

- *Turkish citizens against the Secretary of State for Justice and Security, Netherlands.*
- Request for a preliminary ruling from the Raad van State (Council of State, Netherlands).
- (EC-Turkey partnership): Turkish nationals who, in the opinion of the competent national authorities, constitute a genuine, present and sufficiently serious threat to a societal interest may object to the revocation of their residence permit.
- The revocation of the permit may be justified provided that it is appropriate to ensure the achievement of the objective of protection of public order pursued and is proportionate.

2023 02 09 (E-453/21), X-FAB Dresden.

ECJ Judgment of 9 February 2023 (C-453/21), X-FAB Dresden.

ECLI:EU:C:2023:79.

- *Turkish citizens against the Secretary of State for Justice and Security, Netherlands.*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Regulation 2016/79, Data Protection): EU law does not preclude the data controller (a company) from only being able to dismiss the Data Protection Officer for serious cause and with the guarantees provided, even when the dismissal is not related to the performance of the functions of said officer.
- A “conflict of interest” may exist when an employee representative is entrusted with responsibility for the processing of your company’s data.
- (President of the Works Council who is appointed data protection officer in three companies of the business group; the State Authority is interested in his dismissal, which is carried out by his employer; the affected person requests that the guarantees provided for this purpose be applied to him).

2023 02 16 (C-524 and 525/21), Romanian Wage Guarantee Fund.

ECJ Judgment of 16 February 2023 (C-524 and 525/21), Romanian Wage Guarantee Fund.

ECLI:EU:C:2023:100.

- *Wage Guarantee Fund against beneficiaries who have also received unemployment benefits.*
- Request for a preliminary ruling from Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania).
- (Directive 2008/94, Protection against the insolvency of the employer): EU law does not preclude the reference date for specifying the protected wage claims from being the opening of the employer’s collective insolvency proceedings.
- EU law does not preclude the guarantee of only salary claims accrued between the three months immediately before and after the date of opening of the employer’s collective insolvency proceedings.
- EU law precludes the recovery of salary claims paid by FOGASA outside the general limitation period when there is no action or omission attributable to the worker.
- EU law precludes rules on the reimbursement of undue benefits from being more severe in the case of unpaid wage claims than in the case of social protection benefits.

- (FOGASA is interested in the reimbursement of benefits paid as it has interpreted the applicable rules differently from that established by case law).

2023 02 16 (E-710/21), IEF Service.

ECJ Judgment of 16 February 2023 (C-710/21), IEF Service.

ECLI:EU:C:2023:109.

- *Sales Director vs. Employer (S GmbH)*.
- Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria).
- (Company domiciled in Austria but also offering its services in Germany, where it does not have staff; Commercial Director resident in Germany and alternating provision of services in the two States; the worker claims salary credits due to the insolvency of the company; the competent institution is discussed).
- (Directive 2008/94, Protection against the insolvency of the employer): EU law does not consider that the employer carries out activities in several States when the claimant worker has his or her habitual place of work at the registered office, even if he or she carries out, in part, his or her activity in the State where he or she resides.
- In order to consider that an undertaking established in a Member State has activities in the territory of another State, it must have a permanent economic presence there, characterised by the existence of human resources enabling it to carry out the activities.

2023 03 02 (E-270/21), Opetushallitus.

ECJ Judgment of 2 March 2023 (C-270/21), Opetushallitus.

ECLI:EU:C:2023:147.

- *Early Childhood Education Teacher versus Opetushallitus (National Education Agency, Finland)*.
- Request for a preliminary ruling from Korkein hallinto-oikeus (Supreme Administrative Court, Finland).
- (Directive 2005/36 on the recognition of professional qualifications): for EU law, a “regulated profession” is not one that requires aptitude requirements for access and practice, but grants employers discretion to assess compliance with these requirements.
- (A citizen who has worked as a teacher of early childhood education in Estonia requests that Finland recognize his professional qualifications;

Estonia does not require a specific university degree and each company assesses the necessary skills).

2023 03 02 (C-410 and 661/21), DRV Intertrans.

ECJ Judgment of 2 March 2023 (C-410 and 661/21), DRV Intertrans.
ECLI:EU:C:2023:138.

- *Criminal proceedings for Social Security fraud.*
- Request for a preliminary ruling from the Hof van Cassatie (Court of Cassation, Belgium).
- (Regulations 883/2004 and 987/2000 on the coordination of social security systems): the A1 certificate is binding on the State where you work, even if the issuing entity has provisionally suspended it following a request from the competent institution.
- But if the competent State finds that it is fraudulent, it may not take it into account for the purposes of criminal proceedings for Social Security fraud. Conditions: that a reasonable time has elapsed without the issuing entity having made a final decision and that the guarantees of defence are respected.
- For the purposes of determining the applicable Social Security legislation, the data of which State has issued a Community road transport licence is not definitive.
- (Related companies established in Belgium and Slovakia; workers registered with the Slovak Social Security; the Labour Inspectorate verifies that the predominant activity is carried out in Germany).

2023 03 02 (E-477/21), Daily rest.

ECJ Judgment of 2 March 2023 (C-477/21), Daily rest.
ECLI:EU:C:2023:140.

- *Worker who is a train driver against his employer (MÁV-START Vasúti Személyszállító Zrt).*
- Request for a preliminary ruling from the Miskolci Törvényszék (General Court, Miskolc, Hungary).
- (Art. 31 of the Convention on the Functioning of the European Union, fair working conditions; Directive 2003/88, working time): EU law requires that the daily and weekly rest periods do not overlap, since the former is not part of the latter but is added to it.
- EU law requires that when a weekly rest period is granted, a daily rest period must also be taken prior to it.

- Even if national law provides for a weekly rest period in excess of the minimum provided for by EU law, the guaranteed daily rest period must be granted in addition to that period.
- (Train driver to whom the company does not grant daily rest if he enjoys the weekly or other leave).

2023 03 02 (C-666/21), Åklagarmyndighete.

ECJ Judgment of 2 March 2023 (C-666/21), Åklagarmyndighete.

ECLI:EU:C:2023:149.

- *Åklagarmyndigheten (Public Prosecutor's Office, Sweden) versus Public Prosecutor's Office.*
- Request for a preliminary ruling from the Hovrätten för Nedre Norrland (Court of Appeal, Sundsvall, Sweden).
- (Regulation 561/2006, labour aspects in road transport): for EU law, “road transport of goods” is carried out by a vehicle whose maximum authorised mass exceeds 7.5 tonnes, even when such vehicle is equipped to serve as a space not only for temporary housing for private use, but also for non-commercial loading of goods, The load capacity of the vehicle and the category in which it appears in the National Traffic Registry are not relevant in this regard.
- Even if the vehicle is not used for commercial purposes, the advantages of applying specific transport legislation outweigh the inconvenience or burdens caused.
- (Driver of a vehicle transporting two snowmobiles for competition; he is sanctioned because the tachograph is not up to date; the vehicle has six seats).

2023 03 02 (C-695/21), Recreatieprojecten Zeeland BV.

ECJ Judgment of 2 March 2023 (C-695/21), Recreatieprojecten Zeeland BV.

ECLI:EU:C:2023:144.

- *Gambling companies against the Belgian State.*
- Request for a preliminary ruling from Nederlandstalige rechtbank van eerste aanleg Brussel (Netherlands-speaking Court of First Instance, Brussels, Belgium).
- (Art. 56 THUE, freedom of establishment): EU law precludes a State (Belgium) from granting certain gambling establishments located in its territory the possibility of advertising, while it is not allowed for operators located in another Member State (the Netherlands).

- A disproportionate restriction that can only be accepted with prior justification that it is essential to achieve the objectives pursued.
- (Three gambling companies carry out static advertising on Belgian territory near the border; they are fined for not having obtained prior authorisation; authorisation to advertise can only be granted to companies established in the Belgian State itself).

2023 03 30 (C-34/21), Minister des Hessischen Kultusministeriums.

ECJ Judgment of 30 March 2023 (C-34/21), Minister des Hessischen Kultusministeriums.

ECLI:EU:C:2023:270.

- *Hauptpersonalrat der Lehrerinnen und Lehrer beim Hessischen Kultusministerium (Main Committee of the Teaching Staff of the Ministry of Education and Culture of the Land of Hesse, Germany) and the Minister des Hessischen Kultusministeriums (Minister of Education and Culture of the Land of Hesse, Germany).*
- Request for a preliminary ruling from the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany).
- (Regulation 2016/679, data protection): the application of national provisions adopted to ensure the protection of workers' rights and freedoms should be excluded if they do not respect the conditions and limits of EU law.
- The processing of personal data of teachers in the context of the live videoconference broadcasting of the public education classes they teach falls within the material scope of the GDPR.
- (Live broadcasting system of classes by videoconference in times of pandemic; connection to the videoconferencing service would only be authorized with the consent of the students themselves or their parents; it was not planned to obtain the prior consent of teachers).

2023 04 20 (C-650/21), Landespolizeidirektion.

ECJ Judgment of 20 April 2023 (C-650/21), Landespolizeidirektion.

ECLI:EU:C:2023:300.

- *Officials versus Landespolizeidirektion Niederösterreich (Regional Police Directorate of Lower Austria, Austria) and the Finanzamt Österreich (Tax Administration, Austria).*
- Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).
- (Directive 2000/78, employment discrimination): EU law is opposed to the Law which, for remuneration purposes, provides that periods of

service prior to the age of 18, while subsequent periods of service are computed (only up to seven) if they are more than four.

- EU law does not preclude periods of apprenticeship in a national territorial authority from being taken into account in full only when the official concerned has been appointed by the State after a certain date, while periods of apprenticeship are to be taken into account in half, and are subject to a general reduction, when the official concerned was appointed by the State before that date.

2023 04 27 (C-192/22), Bayerische Motoren Werk.

ECJ Judgment of 27 April 2023 (C-292/21), Bayerische Motoren Werk.
ECLI:EU:C:2023:347.

- *Worker (FI) versus his employer (Bayerische Motoren Werke AG).*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 2003/88, working time): EU law precludes the right to leave (accrued by providing part-time services) from being extinguished (at the end of the year of accrual or at a later date) if the worker has not been able to take it before retirement, even if it is due to illness.
- (Employed in the company since 1986; in 2013 he agreed to partial retirement with concentrated work until May 2016 and full retirement in September 2019; due to illness he could not enjoy 2.5 days of vacation in 2016; he claims payment when the contract expires).

2023 05 04 (C-300/21), Moral damages.

ECJ Judgment of 4 May 2023 (C-300/21), Moral damage.
ECLI:EU:C:2023:370.

- *Austrian citizen against the postal company Österreichische Post AG, e.*
- Request for a preliminary ruling from the General Court of the Capital (Hungary).
- (Regulation 2016/679, Data Protection): EU law precludes compensation for moral damage if it is subject to a certain degree of severity.
- For the right to compensation to arise, it is not enough that there is an infringement of the rules on data protection; the damage and the causal link are necessary.
- In order to quantify the compensation, they must apply the internal rules of each Member State relating to the extent of the pecuniary compensation, provided that the principles of equivalence and effectiveness of EU law are respected.

- (Austrian postal company collects and markets data on political affinities; the company stores data on the alleged political affinity of the plaintiff, which asks for its cancellation and compensation of €1,000).

2023 05 11 (C-156 to 158/22), TAP Portugal.

ECJ Judgment of 11 May 2023 (C-156 to 158/22), TAP Portugal.

ECLI:EU:C:2023:393.

- *Companies that manage passenger rights (Flightright GmbH (Case C156/22) and Myflyright GmbH) versus TAP Portugal.*
- Request for a preliminary ruling from the Landgericht Stuttgart (Regional Court, Stuttgart, Germany).
- (Regulation 261/2004, air passengers): under EU law, the unforeseen absence, due to illness or death, of a member of the crew essential to perform a flight, which occurs shortly before the scheduled departure of that flight, does not fall within the concept of “extraordinary circumstances” that exempt consumers from liability.
- (Cancellation of a flight due to the unforeseen death of the co-pilot of the aircraft shortly before departure; the 6.05 a.m. flight was made in the afternoon, with alternate crew.).

2023 05 11 (E-155/22), Driving Time.

ECJ Judgment of 11 May 2023 (C-155/22), Driving time.

ECLI:EU:C:2023:394.

- *Driver versus the Bezirkshauptmannschaft Lilienfeld (Administrative Authority of the District of Lilienfeld, Austria).*
- Request for a preliminary ruling from the Landesverwaltungsgericht Niederösterreich (Regional Administrative Court, Lower Austria, Austria).
- (Regulation 1071/009, road transport): EU law precludes the road transport company from delegating control over compliance with working hours to a third party and being excluded from the consequences arising from its infringements.
- (National legislation allowing criminal liability to be transferred for serious offences relating to driving time and rest periods for drivers).

2023 06 15 (C-132/22), Ministero dell’Istruzione, dell’Università e della Ricerca.

ECJ Judgment of 15 June 2023 (C-132/22), Ministero dell’Istruzione, dell’Università e della Ricerca.

ECLI:EU:C:2023:489.

- *Italian citizens in front of the Ministry of Education).*

- Request for a preliminary ruling from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy).
- (Regulation 492/2011, free movement): EU law precludes only those who have acquired certain professional experience in national public centres of artistic, musical and choreographic higher education from being admitted for recruitment in these centres.
- EU law precludes only professional experience acquired in other Member States from being taken into account for admission to the relevant competition.
- (Public competition for access to teaching posts in artistic, choreographic or musical centres; two Italian teachers challenge the administrative decision not to recognise professional experience of three or more academic years acquired in centres of the same level located in other Member States).

2023 06 22 (C-427/21), ALB FILS Kliniken GmbH.

ECJ Judgment of 22 June 2023 (C-427/21), ALB FILS Kliniken GmbH.
ECLI:EU:C:2023:505.

- *Employee of his company (ALB FILS Kliniken GmbH) and the subsidiary to which he is assigned (A Service GmbH).*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 2008/104, Temporary Employment Agencies): EU law on temporary employment agencies does not apply if the functions performed by a worker are permanently transferred to a third-party company and the worker, who has opposed the subrogation, is obliged, at the request of his employer, to carry out his activity permanently in the new company.
- In order for an employment relationship to fall within the scope of Directive 2008/104, both at the time of conclusion of the employment contract and at the time of each of the actual employment contracts, the employer must intend to place the worker concerned at the disposal of a user undertaking on a temporary basis.
- (Worker of a private hospital but belonging to a public corporation; after 18 years the Hospital transfers certain procedures to a subsidiary, including those assumed by the worker; the worker opposes the subrogation and maintains his contract with the Hospital although, according to German law, he is assigned to the subsidiary on a permanent basis).

2023 06 22 (C-579/21), Panki.

ECJ Judgment of 22 June 2023 (C-579/21), Panki.

ECLI:EU:C:2023:501.

- *Apulaistietosuojavaltuutettu (Deputy Data Protection Supervisor, Finland) and Pankki S, (Bank) versus former Bank employee.*
- (Regulation 2016/679, data protection): EU law is applicable to a request for access to information covered by this provision where the processing operations to which that request relates had been carried out before the date on which it became applicable, but the request was submitted after that date.
- Information on the consultation of personal data (dates and for the purposes of these operations) must be provided by the data controller.
- EU law does not require the identity of the employees who accessed the personal data to be provided, unless this is essential for the effectiveness of the data subject's rights.
- The fact that the controller carries out a banking business and that the customer is at the same time its employee does not, in principle, influence the scope of protection.
- (After his dismissal, an employee asks the bank where he worked to identify the accesses to his data as a customer).

2023 07 13 (E-765/21), Università di Padova.

ECJ Judgment of 13 July 2023 (C-765/21), Università di Padova.

ECLI:EU:C:2023:566.

- *Nurse versus her employer (Azienda Ospedale-Università di Padova (University Hospital of Padua, Italy)).*
- Request for a preliminary ruling from the Tribunale ordinario di Padova (Ordinary Court, Padua, Italy).
- (Regulation 726/2004, medicines for human use): possible discrimination between people who are not vaccinated against COVID and those who are vaccinated is outside EU law.
- (Hospital nurse suspended from employment and salary for not having been vaccinated against Covid, being impossible to assign her without risk of contagion).

2023 07 13 (C-134/22), Corporate liquidation.

ECJ Judgment of 13 July 2023 (C-134/22), Corporate liquidation.

ECLI:EU:C:2023:567.

- *Judicial liquidator of a company (G GmbH), following collective redundancies.*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 98/59, collective redundancies): the employer's obligation to transmit to the competent public authority a copy of the written communication initiating the collective redundancy procedure is not intended to confer individual protection on workers affected by collective redundancies.
- The communication of the dismissal plan does not initiate any deadline that the employer must respect nor does it generate any obligation for the competent public authority.
- This communication takes place at a stage in which the employer limits itself to planning collective dismissals; The action of the competent public authority is not aimed at addressing the individual situation of each worker, but aims to obtain a global vision of the collective dismissals considered.
- (Insolvency administrator who activates total collective dismissal, with liquidation of the company; transmits the necessary information to the works council, which accepted the existence of the cause, but not to the labour authority; an affected worker requests the nullity of his dismissal).

2023 07 23 (E-404/22), Elliniko Dimosio.

ECJ Judgment of 23 July 2023 (C-404/22), Elliniko Dimosio.
ECLI:EU:C:2023:548.

- *The Ethnikos Organismos Pistopoiisis Prosonton & Epangelmatikou Prosanatolismou (Eoppep) [National Agency for the Certification of Qualifications and Vocational Guidance (Eoppep), Greece] and the Elliniko Dimosio (Greek State).*
- Request for a preliminary ruling from the Dioikitiko Protodikeio Athinon (Administrative Court, Athens, Greece).
- Directive 2002/14 on the information and consultation of employees may apply to a legal person governed by private law acting as a person governed by public law and carrying out activities inherent in the exercise of the prerogatives of public authority, provided that it also provides, in return for remuneration, services which compete with those provided by market operators.
- The obligation to provide information and consultation does not apply in the event of a change of post of a small number of workers appointed ad interim to positions of responsibility, if such change does not affect the

situation, structure and likely development of employment in the undertaking concerned and does not pose a risk to employment in general.

- (Fine imposed on the Reference Bodies for not having provided the competent administration with the documents showing that the representatives of the workers of the latter had been informed and consulted prior to the dismissal of two workers from their posts).

2023 09 14 (E-113/22), Maternity supplement.

ECJ Judgment of 14 September 2023 (C-113/22), Maternity allowance.
ECLI:EU:C:2023:665.

- *Father of two children against the National Social Security Institute (INSS) and the General Treasury of Social Security (TGSS).*
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of Galicia (Spain).
- (Application for a pension supplement submitted by a man, denied by virtue of a national regulation that reserves the granting of said supplement to female affiliates; prior to the ECJ declaring that rule discriminatory; the INSS denies it by applying its own criterion that decides so until the legal text is changed).
- (Directive 79/7 on equality between men and women before social security): the Labour Court hearing a claim for a pension supplement, which has been rejected despite its discriminatory nature, must order the administration to grant the supplement and compensation to compensate in full for the damage actually suffered as a result of the discrimination, in accordance with the applicable national rules, including costs and lawyer's fees incurred by the interested party in the course of the legal proceedings.

2023 10 05 (E-496/22), Brink's Cash Solutions.

ECJ Judgment of 5 October 2023 (C-496/22), Brink's Cash Solutions.
ECLI:EU:C:2023:741.

- *Worker dismissed against his employer (SC Brink's Cash Solutions SRL).*
- Request for a preliminary ruling from the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania).
- (Directive 98/59, collective redundancies): EU law is compatible with the employer not having the obligation to consult individually the workers affected by a collective redundancy plan, when they have not ap-

pointed workers' representatives, without obliging them to appoint representatives.

- The aforementioned doctrine is subject to the regulation allowing the will of the workers themselves to be respected.
- (As a result of the pandemic, the transport company initiates proceedings to dispense with 128 jobs; it notifies the competent authorities; the salaried representation is pending elections).

2023 10 12 (C-57/22), Leave after readmission.

ECJ Judgment of 12 October 2023 (C-57/22), Holidays after reinstatement.

ECLI:EU:C:2023:770.

- *Reinstated worker against his employer (Directorate of Roads and Motorways of the Czech Republic, hereinafter referred to as the Czech Republic).*
- Request for a preliminary ruling from the Nejvyšší soud (Supreme Court, Czech Republic).
- (Directive 2003/88, working time): EU law precludes the worker who has been given notice of dismissal, which has finally been annulled, from not having a holiday for the time spent in that situation (two years).
- This doctrine is valid even if the worker in question did not perform effective work in the service of the employer (who rejected it) if financial compensation is accrued for that period.
- (Notice of dismissal with cessation of functions, finally annulled; in that time the employer refuses to provide services; the worker returns and takes vacation unilaterally; the company dismisses him).

2023 10 19 (C-660/20), Lufthansa.

ECJ Judgment of 19 October 2023 (C-660/20), Lufthansa.

ECLI:EU:C:2023:789.

- *Aviation pilot versus his employer (Lufthansa CityLine GmbH).*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 97/81, part-time work): for EU law, unfavourable treatment arises if the rule makes the payment of supplementary remuneration conditional on the completion of a number of hours of activity, identical for comparable part-time and full-time workers.
- EU law precludes legislation which makes the payment of supplementary remuneration, uniformly for comparable part-time and full-time

workers, subject to the exceeding of the same number of working hours in a given activity, such as the flight activity of a pilot, in order to compensate for a particular workload of that activity.

- (Workers receive remuneration for overtime if they have completed a certain number of flight hours per month; there are three steps and as many amounts as an increasing remuneration supplement; the pilot asks that the steps be set in proportion to his working day).

2023 11 09 (C-271 to 275/22), Keolis Agen.

ECJ Judgment of 9 November 2023 (C-271 to 275/22), Keolis Agen.

ECLI:EU:C:2023:834.

- *Several employees against his transport company (Keolis Agen SARL).*
- Request for a preliminary ruling from the Conseil de prud'hommes d'Agen (Joint Labour Court, Agen, France).
- (Art. 31.2 of the Convention on the Functioning of the European Union; Directive 2003/88, working time): for EU law, a worker may rely on the right to paid annual leave, the fact that he or she is a private undertaking, holding a public service concession, being irrelevant in this regard.
- EU law is compatible with the refusal of leave not taken due to sickness when more than fifteen months have elapsed after the end of the leave entitlement period and do not cover more than two consecutive leave periods.

2023 11 09 (C-477/22), Azienda regionale sarda trasporti.

ECJ Judgment of 9 November 2023 (C-477/22), Azienda regionale sarda trasporti.

ECLI:EU:C:2023:838.

- *Several employees versus the Azienda regionale sarda trasporti (local public transport company of the region of Sardinia, Italy).*
- Request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy).
- (Regulation 561/2006, road transport): to determine the length of the journey (less than 50 km) it is necessary to follow the established itinerary to connect a starting point with a point of arrival and to provide service, where appropriate, with previously established intermediate stops, to guarantee the transport of passengers in the regular service for which it is intended.

- EU law applies only to journeys exceeding 50 kilometres.
- For the purposes of the “total cumulative driving time for two consecutive weeks” it does not take into account any “other work” performed by the driver.
- (Several drivers claim compensation proportional to the hours of rest not taken and those that exceed the maximum total accumulated driving time).

2023 11 16 (C-422/22), Revocation of A1 certificate.

ECJ Judgment of 11 November 2023 (C-422/22), Revocation of the A1 certificate.

ECLI:EU:C:2023:869.

- *Entrepreneur verses Zakład Ubezpieczeń Społecznych Oddział w Toruniu (Social Security Agency, Toruń Fund, Poland).*
- Request for a preliminary ruling from the Sąd Najwyższy (Supreme Court, Poland).
- (Regulation 987/2009 on the coordination of social security systems): the institution issuing an A1 certificate which, after an ex officio review, finds that its requirements do not exist may withdraw it without first initiating the dialogue and conciliation procedure with the competent institutions of the Member States concerned in order to determine the applicable national legislation.
- Justification of the age requirement: it promotes the integration of the assisted person into the social, personal and university environment.
- (An entrepreneur domiciled in Poland applies for and obtains an A1 certificate to temporarily provide services in France; the issuing entity subsequently verifies that the company has only carried out activity in France and withdraws the A1 certificate).

2023 11 16 (C-583 to 586/21), Transfer of Notary.

ECJ Judgment of 16 November 2023 (C-583 to 586/21), Transfer of Notary's Office.

ECLI:EU:C:2023:872.

- *Several employees of the Notary's Office against several Holders.*
- Request for a preliminary ruling from the Juzgado de lo Social No 1 de Madrid (Labour Court No 1, Madrid, Spain).
- (31.2 CDEU; Directive 2001/23, transfer of undertaking): EU law on transfer of undertaking covers the case of a Notary (public official and private employer at the same time) who succeeds the previous owner,

assumes his protocol and a substantial part of the workforce, carrying out the same activity and with similar infrastructure (premises, material means), as long as the identity of said Notary is maintained.

- The activity of such a notary's office depends mainly on the workforce it employs, so that it can maintain its identity after its transfer if the new holder takes over a substantial part of the staff in number and skills, thus allowing him to continue the activities of the notary's office.
- (Notary who offers his staff to move with him or terminate the employment relationship for organisational reasons; four months later a new Notary takes office, who rehires those dismissed; a month and a half later, in the face of the refusal to apply the anti-Covid measures, the new Notary terminates the contracts claiming that they have not passed the probationary period).

2023 12 07 (E-518/22), AP Assistenzprofis.

ECJ Judgment of 7 December 2023 (C-518/23), AP Assistenzprofis.
ECLI:EU:C:2023:956.

- *Jobseeker versus a provider of assistance and counselling services for people with disabilities (AP Assistenzprofis).*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Art. 26 of the Convention on the Functioning of the European Union, protection of disability; Directive 2000/78 on non-discrimination in employment): EU law does not preclude the recruitment of a person providing personal assistance from being subject to an age requirement, in accordance with national legislation which provides for the taking into account of the individual wishes of persons who, because of their disability, are entitled to the provision of personal assistance services, whether such a measure is necessary for the protection of the rights and freedoms of citizens.
- Justification of the age requirement: it promotes the integration of the assisted person into the social, personal and university environment.
- (Young university students with severe disabilities want to have a personal assistant; a specialized entity offers this work, including age requirements; a Social Worker who exceeds the limit attends the selection and is considered discriminated against).

2023 12 14 (C-206/22), Sparkasse Südpfalz.

ECJ Judgment of 14 December 2023 (C-206/22), Sparkasse Südpfalz.
ECLI:EU:C:2023:984.

- *Several employees against his transport company (Keolis Agen SARL).*
- Request for a preliminary ruling from the Arbeitsgericht Ludwigshafen am Rhein (Labour Court, Ludwigshafen am Rhein, Germany).
- (31.2 CDEU; Directive 2003/88, working time): EU law is compatible with the fact that a worker (who is not sick) is not allowed to postpone vacation days because it coincides with a quarantine period ordered by a public authority, due to the worker's contact with a person infected with a virus.
- Quarantine may affect the conditions in which the worker has his or her free time, but in itself it does not violate the right to effectively enjoy vacations.
- (Worker who, because he has been in contact with an infected person, is quarantined the day before starting to enjoy his vacation).

2024

2024 01 11 (E-231/22), Data processing by an official publication.

ECJ Judgment of 11 January 2024 (C-231/22), Data processing by an official publication.

ECLI:EU:C:2024:7.

- *Belgian Data Protection Authority (AEPD) and the Moniteur belge (Official State Journal).*
- Request for a preliminary ruling from the Cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium).
- (EU Regulation 2016/679, data protection): the body in charge of the publication of the official newspaper may be responsible for the processing of the data included in official acts or documents prepared by third parties under and ordered to be published by judicial decision.
- The body responsible for the publication of the official newspaper is solely responsible for the processing of the data, unless the law provides that this responsibility is shared.
- (The official gazette publishes the amendment of the bylaws of a commercial company; by mistake, the notarial act reproduced identifies the partners, adds their bank account number and the securitized capital; one of the partners asks the entity responsible for the newspaper to delete this information; the AEPD urges it to do so; it is disputed whether the Notary or the Court is responsible for this processing).

2024 01 18 (C-218/22), Comune di Copertino.

ECJ Judgment of 18 January 2024 (C-218/22), Comune di Copertino.

ECLI:EU:C:2024:51.

- *Former employee of the Comune di Copertino (Copertino City Council, Italy).*
- Request for a preliminary ruling from the Tribunale di Lecce (District Court, Lecce, Italy).
- (Directive 2003/88, working time): EU law precludes the prohibition of the payment of the salary of paid annual leave accrued when the public employee ceases of his own free will and did not take it for reasons beyond his decision.
- (Public employee who retires voluntarily and claims the payment of 79 days of vacation; the Italian Constitutional Court declared valid the precept applied by the City Council to deny that payment).

2024 01 18 (C-631/22), Ca na Negreta.

ECJ Judgment of 18 January 2024 (C-631/22), Ca Na Negreta.

ECLI:EU:C:2024:53.

- *Worker declared to be in a situation of permanent disability and his company (Ca Na Negreta).*
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of the Balearic Islands (Spain).
- (Directive 2000/78, non-discrimination in employment): EU law precludes the employer from terminating the employment contract because the worker is permanently unable to perform the tasks incumbent on him under that contract due to a disability arising during the employment relationship, without the employer being obliged, in advance, to provide for or maintain reasonable adjustments.
- When a worker becomes permanently unfit to take up his or her job due to a supervening disability, a change of job may be an appropriate measure as a reasonable accommodation provided that he or she possesses the required skills, abilities and availability. It is essential that there is a suitable job that is vacant and that this measure does not impose an undue burden on your employer.
- To determine whether the business burden is excessive, it is necessary to evaluate the financial costs, the size and resources of the company, its turnover, the public aid offered.
- (An accident truck driver who, after a period of temporary disability, is discharged and is provisionally relocated to another job; then he obtains a total permanent disability for his profession; the company informs him of the termination of his contract due to this circumstance; he sues for dismissal).

2024 02 20 (C-715/20), Unjustified dismissal.

ECJ Judgment of 20 February 2024 (C-715/22), Unjustified dismissal.
ECLI:EU:C:2024:139.

- *Temporary worker vis-à-vis his employer (X sp. z o.o.).*
- Request for a preliminary ruling from the Sąd Rejonowy dla Krakowa-Nowej Huty w Krakowie (District Court, Kraków-Nowa Huta, Poland).
- (Directive 1999/70, fixed-term work): EU law precludes the employer from giving reasons in writing for the termination of the employment contract in advance when it is for a fixed term, while it is required if it is of indefinite duration.
- (Art. 47 of the Convention on the Functioning of the European Union, judicial protection): A court that is unable to interpret national legislation in a way that does not discriminate against temporary workers must, as soon as necessary, disapply any provision contrary to the rights and freedoms guaranteed by EU law.
- (A company which, under Polish law, terminates a temporary employment contract, without specifying the reason for this in writing; the worker considers such dismissal to be unfair).

2024 02 22 (C-59, 110 and 159/22), Ministry of the Presidency, Justice and Interior of the Community of Madrid.

ECJ Judgment of 22 February 2024 (C-59, 110 and 159/22), Ministry of the Presidency, Justice and Home Affairs of the Community of Madrid.
ECLI:EU:C:2024:149.

- *Two public employees of the National University of Distance Education (UNED) and the Madrid Social Care Agency of the Community of Madrid.*
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of Madrid.
- (Directive 1999/70, fixed-term work): for the purposes of EU law, the “indefinite non-permanent” worker must be considered to be bound by a fixed-term contract.
- There is an abuse of temporary employment when the employing Administration does not convene the selection process within the established period and the worker’s employment is automatically extended.
- EU law precludes national legislation which does not provide for any of the measures provided for in Directive 1999/70 to prevent the misuse of non-permanent permanent contracts.

- EU law precludes the payment of compensation of 20 days' salary per year worked in the case of abuse of temporary employment if it is independent of any consideration relating to the legitimate or abusive nature of the use of such contracts.
- EU law is opposed to Spanish rules according to which irregularity in terms of temporary employment generates responsibilities of the Public Administrations if these provisions are not effective and dissuasive.
- EU law precludes national legislation that provides for the call for processes for the consolidation of temporary employment by means of public calls for the filling of posts occupied by temporary workers, including non-permanent permanent workers, when such notice is independent of any consideration relating to the abusive nature of the use of such fixed-term contracts.
- In the absence of adequate measures to prevent and punish temporary employment abuses (including in the case of non-permanent permanent staff), the conversion of such temporary contracts into permanent contracts may constitute such a measure.
- It is, where appropriate, for the national court to amend established national case-law if it is based on an interpretation of national provisions, including constitutional provisions, which is incompatible with the objectives of Directive 1999/70.

2024 02 22 (E-125/23), Unedic.

ECJ Judgment of 22 February 2024 (C-125/23), Unedic.

ECLI:EU:C:2024:163.

- *Several employees of a company (K) against the association Unedic délégation AGS de Marseille and the insolvency administrator.*
- Request for a preliminary ruling from the Cour d'appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence, France).
- (Directive 2008/94, business insolvency): EU law precludes legislation that guarantees the payment of compensation when the employment contract is terminated by a decision of the employer (as well as the insolvency or judicial administrator) but not in the case of communication of the termination of the employment contract at the request of the employee due to serious breach attributable to the employer once the company is already under intervened administration (judicial or bankruptcy).
- (Workers hired by a company that months later is subject to judicial administration; they then request the termination of their contracts for

serious corporate breach; French law does not protect compensation in such cases).

2024 02 22 (C-589/22), Resorts Mallorca Hotels International.

ECJ Judgment of 22 February 2024 (C-589/22), Resorts Mallorca Hotels International.

ECLI:EU:C:2024:155.

- *Several workers against Resorts Mallorca Hotels International, S. L.*
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of the Balearic Islands (Spain).
- (Directive 98/59/EEC) - collective redundancies: the collective redundancy procedure must be triggered when the employer, in the context of a restructuring plan, is considering or planning a reduction in the number of jobs whose number may exceed the numerical thresholds.
- Directive 98/59 is not complied with if collective redundancies are activated only when the employer, despite having adopted non-extinguishing restructuring measures, is certain that he will actually have to dismiss a number of workers in excess of those thresholds.
- The consultation initiated when a decision has already been taken making such collective redundancies necessary could not effectively deal with the examination of possible alternatives to try to avoid them.
- (Hotel management company that divests several establishments, with subrogation of staff; at the end of the segregation process there is an excess of staff in central services).

2024 02 22 (C-649/22), Randstad Employment.

ECJ Judgment of 22 February 2024 (C-649/22), Randstad Employment.

ECLI:EU:C:2024:156.

- *Worker hired by Randstad Empleo ETT and placed at the disposal of Serveo Servicio versus Axa Seguros Generales, S. A. de Seguros y Reaseguros.*
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of the Basque Country (Spain).
- (Directive 2008/104, temporary employment agencies): EU law precludes the compensation for disability in the event of an accident at work suffered by a worker on temporary employment through a temporary employment agency from being lower than that which he would receive if he belonged to the user company.

- The EU concept of remuneration includes the compensation to which workers seconded by a temporary employment agency are entitled in the event of total permanent incapacity to exercise their usual profession resulting from an accident at work occurring in the user company.
- The different treatment, resulting from the application of the collective agreement of the temporary employment agencies and not that of the user company, could only be justified if there were compensatory advantages with regard to the essential conditions of work and employment.
- (Worker hired by temporary employment agency and who is declared in a situation of permanent disability; claims the compensation provided for in such a case by the collective agreement of the user company).
- (The agreement applicable to the user company provides for compensation of 60,101 euros in the event of permanent disability resulting from an accident at work; the agreement for temporary employment agency personnel provides for 10,500 euros).

2024 03 14 (C-752/22), Long-term residence.

ECJ Judgment of 14 March 2024 (C-752/22), Long-term residence.

ECLI:EU:C:2024:225.

- *Long-term resident (Russian national) by concession of the Republic of Estonia, and the Maahanmuuttovirasto (Immigration Office, Finland, “the Office”)*.
- Request for a preliminary ruling from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland).
- (Directive 2003/109, long-term foreign residents): the enhanced protection against expulsion enjoyed by third-country nationals who are long-term residents does not prevent their removal by a third State on grounds of public policy or public security.
- Any expulsion carried out by the State that did not grant long-term residence must meet all the conditions laid down in the event that it was carried out by the authorizing State.

2024 04 11 (E-741/21), Juris.

ECJ Judgment of 11 April 2024 (C-144/23), Juris.

ECLI:EU:C:2024:881.

- *Client vs. Legal Services Company*.
- Request for a preliminary ruling from the Landgericht Saarbrücken (Regional Court, Saarbrücken, Germany).

- (Regulation 2016/679, data protection): the infringement of EU law cannot constitute, in itself, a case of “non-material damage” for the purposes of that provision, regardless of the seriousness of the damage suffered by that data subject.
- In order to exempt itself from liability, it is not sufficient for the controller to claim that the damage was caused by the error of a person acting under his authority.
- Compensation for damages cannot be calculated by applying *mutatis mutandis* the criteria for setting the amount of administrative fines.
- In determining compensation, it should not be taken into account that several infringements relating to the same processing operation affect the person claiming compensation.
- (A lawyer who is a client of a legal database, receiving advertising for other products of the company, warns twice that he withdraws his consent to it, but without success; he claims damages).

2024 04 18 (C-765 and 772/22), Air Berlin.

ECJ Judgment of 18 April 2024 (C-765 and 772/22), Air Berlin.
ECLI:EU:C:2024:331.

- *Insolvency administrator and several employees against Air Berlin Spain.*
- Requests for a preliminary ruling from the Juzgado de lo Mercantil n.º 1 de Palma de Mallorca (Balearic Islands. Spain).
- (Regulation 2015/848, insolvency): the law of the State of commencement of secondary insolvency proceedings applies only to the treatment of claims subsequent to that event, not to claims arising between the commencement of the main and secondary proceedings.
- The estate of assets located in the State of the secondary proceedings consists only of the assets which are in the State of the secondary proceedings at the time of the commencement of the secondary proceedings.
- The insolvency practitioner in the main proceedings (Germany) can transfer the debtor’s assets that are in another Member State (Spain), even if there are outstanding employment debts there (even with a seizure).
- The insolvency practitioner in the secondary insolvency proceedings may bring an action to set aside an act taken by the insolvency practitioner in the main insolvency proceedings.

- (Primary insolvency proceedings are commenced in Germany in 2017; secondary insolvency proceedings are initiated against the company's Spanish branch three years later.).

2024 04 25 (E-420/22 & 528/22), NW (Classified Information).

ECJ Judgment of 25 April 2024 (C-420/22 and 528/22), NW (Classified information).

ECLI:EU:C:2025:344.

- *Two foreign nationals (NW and PQ) in front of the General Directorate of Aliens Police (Hungary).*
- T.G. (citizen of Eritrea) v. Minister of Social Affairs and Labour (Netherlands).
- Request for a preliminary ruling from the General Court of Szeged (Hungary).
- (Directive 2003/109, long-term residents): EU law implies that even when a decision is based on classified information, it is essential to ensure effective remedies for those affected.
- (Art. 20 TFEU, EU citizenship): national authorities must provide sufficient reasons for their decisions and ensure that data subjects have access to procedures that enable them to defend their rights, while respecting the requirements of national security.
- (Withdrawal of the permanent residence card to NW, with an order to leave Hungarian territory; rejection of PQ's application for a national permanent residence permit; invocation of classified information that qualified them as threats to national security; persons, with minors in their care and with EU citizenship, without having exercised their right to free movement).

2024 05 16 (E-706/22), Konzernbetriebsrat.

ECJ Judgment of 16 May 2024 (C-706/22), Konzernbetriebsrat.

ECLI:EU:C:2024:402.

- *Konzernbetriebsrat der O SE & Co. KG (Works Council of the O SE & Co. KG Group) and Vorstand der O Holding SE (Board of Management of O Holding SE).*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Regulation 2157/200, European Public Limited Company): under EU law, when a holding SE (European Public Limited Company) consisting of participating companies that do not employ employees or have

subsidiaries that employ them, without prior negotiations on the involvement of employees, it is not mandatory for such negotiations to be initiated subsequently because that SE acquires control of subsidiaries in the European Union. one or more Member States employing workers.

- (Two companies without employees, one English and the other German, create a holding company; the next day the new one becomes the sole shareholder of a company that owns a Supervisory Board; six months later the holding company changes the type of company and the salaried participation ceases to govern through the Supervisory Committee).

2024 05 16 (C-27/23), Hocinx.

ECJ Judgment of 16 May 2024 (C-27/23), Hocinx.

ECLI:EU:C:2024:404.

- *A cross-border worker against the Caisse pour l'avenir des enfants (Box for the Future of Children, CAE).*
- Request for a preliminary ruling from the Cour de cassation (Court of Cassation, Luxembourg).
- (Art. 45 TFEU and Regulation 492/2011, free movement): EU law requires that non-resident workers receive a family benefit (for fostering a child) under the same conditions as residents.
- Whether the worker is responsible for the maintenance of the child can be taken into account in the same way as it is done with the residents.
- (Worker in Luxembourg but resident in Belgium and who takes in a minor by virtue of a Belgian court decision).

2024 05 16 (C-405/23), Touristic Aviation Services.

ECJ Judgment of 16 May 2024 (C-405/23), Touristic Aviation Services.

ECLI:EU:C:2024:408.

- *Flightright GmbH (litigating for several passengers) against the airline Touristic Aviation Services Ltd (TAS).*
- Request for a preliminary ruling from the Landgericht Köln (Regional Court, Cologne, Germany).
- (Regulation 261/2004, flight incidents): the lack of airport staff for baggage loading that caused a long delay in a flight may constitute an “extraordinary circumstance” and exonerate the Airline from liability.
- In order for the exemption to operate, the Carrier must demonstrate that such an extraordinary circumstance could not have been avoided even if

all reasonable measures had been taken and that it took measures adapted to the situation capable of avoiding the consequences of the exemption.

- (Flight very delayed, mainly due to lack of staff in charge of passenger check-in and baggage loading).

2024 05 16 (C-673/22), Single-parent family.

ECJ Judgment of 16 May 2024 (C-673/22), Single-parent family.

ECLI:EU:C:2024:408.

- *Worker with a single-parent family versus the National Social Security Institute (INSS) and the General Treasury of the Social Security (TGSS).*
- Request for a preliminary ruling from the Juzgado de lo Social No 1 de Sevilla (Spain).
- (Directive 2019/1158, family and professional life): EU law does not condition the eventual right to the accumulation of parental leave in the case of a single-parent family.
- Parental leave in the Directive and parental leave are different.
- Inapplicability of a Directive to a situation that arose before the end of the period for transposing it.
- (Worker who is a biological mother and requests that her maternity leave be added to the leave that the other parent would have enjoyed, if any).

2024 06 13 (C-331 and 332/22), DG of the Civil Service, Generalitat de Catalunya.

ECJ Judgment of 13 June 2024 (C-331 and 332/22), DG of the Civil Service, Generalitat de Catalunya.

ECLI:EU:C:2024:496.

- *Three employees against the Departments of the Presidency and Justice of the Generalitat of Catalonia.*
- Request for a preliminary ruling from the Juzgado de lo Contencioso-Administrativo No 17 de Barcelona (Spain).
- (Directive 1999/70/EC): EU law does not preclude abuse in public sector employment contracts from only occurring when the deadlines for filling the corresponding post are not met if it is assigned to meet permanent and stable needs.
- EU law opposes the sanction for the abuse of temporary employment in the public sector consisting of continuity until the call for applications and the payment of compensation in the event of failure to pass the selection process, when these measures are not proportionate, sufficiently effective and dissuasive.

- In the absence of adequate national measures against abuses of temporary employment, contracts may be converted into links of indefinite duration, provided that such conversion does not imply a contra legem interpretation of national law.
- (Temporary public employees who provide services for long periods and claim their permanent status).

2024 06 20 (C-540/22), Posting of workers.

ECJ Judgment of 20 June 2024 (C-540/22), Posting of workers.

ECLI:EU:C:2024:530.

- *Worker (EA) against his company (Artemis security SAS).*
- Request for a preliminary ruling from rechtbank Den Haag, zittingsplaats Middelburg (District Court, The Hague, Middelburg, Netherlands).
- (Ukrainians with temporary residence permits in Slovakia; their employer is a Slovak company, which makes them available to the Dutch company to carry out their work in Rotterdam, the Netherlands).
- (Articles 56 and 57 TFEU, freedom to provide services): EU law does not guarantee such workers a “derived right of residence”, either in Slovakia or in the Netherlands.
- EU law does not preclude Dutch law from requiring that workers posted for more than 90 days require a permit and that the company must prove it in advance to the local authorities.
- EU law does not preclude the duration of the permit issued by the Netherlands from being shorter than the duration of the task justifying the posting.
- EU law does not preclude the duration of the permit granted by the Netherlands from being limited to that of the permit granted by Slovakia.

2024 06 20 (C-590/22), Misdirection.

ECJ Judgment of 20 June 2024 (C-590/22), Wrong address.

ECLI:EU:C:2024:536.

- *Two clients (AT and BT) against the Tax Advisory Office (PS GbR) and its partners.*
- Request for a preliminary ruling from the Amtsgericht Wesel (Federal Court, Wesel, Germany).
- (Regulation 2016/679, data protection): the violation of the Regulation does not generate automatic compensation, but the damage must be proven (even if it is not serious).

- The fear suffered that the personal data has been known by third parties is sufficient to justify a request for compensation, provided that it is reasonably proven that it could have happened.
- The amount of compensation, in these cases, cannot be determined by applying (*mutatis mutandis*) the criteria set for administrative fines.
- The compensation relevant in such cases does not have a deterrent function and should not be calculated in the light of simultaneous infringements of national provisions relating to the protection of personal data outside the specification of Regulation 2016/679.
- (Tax advisory clients who inform you of their change of address; sensitive documentation for tax return is sent to the old address and they receive it but incomplete and in an open envelope).

2024 06 20 (C-367/23), Artemis.

ECJ Judgment of 20 June 2024 (C-367/23), Artemis.

ECLI:EU:C:2024:529.

- *Worker (EA) against his company (Artemis security SAS).*
- Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France).
- (Directive 2003/88, working time): EU law does not contain compensation rules on damage to night workers, so it does not preclude non-compliance with the applicable rules (free health assessments, both before and after being a night worker) only giving rise to the right to compensation after proof of the damage caused.
- The EU measures aim to check the aptitude for night work, diagnose pathologies and avoid disorders. Failure to comply with them does not entail automatic damage, unlike what happens for non-observance of the mandatory breaks.
- Any compensation must be based on the accreditation of real damage in order to avoid unjust enrichment.
- (Daytime worker, with two years of seniority, who urges termination of his contract and compensation for having been transferred to night duty and not enjoying medical follow-up).

2024 06 27 (E-41/23), Peigli.

ECJ Judgment of 27 June 2024 (C-41/23), Peigli.

ECLI:EU:C:2024:554.

- *Four Honorary Judges or Prosecutors against the Ministero della Giustizia (Ministry of Justice, Italy).*

- Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy).
- (Directive 1999/70, fixed-term work): EU law applies to these persons and precludes them from being subject to successive renewals without providing for effective and dissuasive sanctions or the transformation of their professional relationship into one of indefinite duration in order to limit abuse.
- It is necessary to assess whether their temporary designations have been used to cover permanent and lasting needs, not just transitory ones.
- Likewise, certain differences with respect to those who have passed the tests called to access the professional career can be considered justified.
- (Directive 2003/88, working time): EU law precludes these people from receiving any remuneration during their “holidays”, nor from being covered by Social Security against accidents at work and occupational diseases.
- (Substitute judges and prosecutors, for more than 16 years, have demanded the same remuneration treatment as career judges; they do indeed perform these functions, but not continuously or exclusively, nor have they passed tests like career judges).

2024 06 27 (C-284/23), Haus Jacobus.

ECJ Judgment of 27 June 2024 (C-284/23), Haus Jacobus.

ECLI:EU:C:2024:558.

- *Employee of the company Haus Jacobus Alten- und Altenpflegeheim GmbH.*
- Request for a preliminary ruling from Arbeitsgericht Mainz (Labour Court, Mainz, Germany).
- (Directive 92/85, safety and health of pregnant women): EU law precludes pregnant women who only know their status after the end of the period for bringing an action for dismissal (three weeks) from having only two additional weeks to request the admission of an untimely claim.
- This opposition to EU law exists to the extent that national regulation entails disadvantages that may make it excessively difficult to apply the rights of pregnant workers, affecting the principle of effectiveness.
- The complexity of the system established (concurrent obligations, different recipients, overlapping deadlines) must also be assessed to ve-

rify whether the effectiveness of the protection against dismissal is affected.

- (Assistant in Geriatric Residence who is dismissed; knows and communicates her pregnancy after the end of the limitation period to sue for dismissal, but within two weeks after which she was allowed to request late filing of the claim; claims outside this second period).

2024 07 11 (C-196/23), Plamaro.

ECJ Judgment of 11 July 2024 (C-196/23), Plamaro.

ECLI:EU:C:2024:596.

- *Eight workers against the universal heir of their former employer (natural person).*
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of Catalonia (Spain).
- (Directive 98/59, collective redundancies): EU law precludes the termination of employment contracts (in sufficient numbers for this purpose) not being considered a collective dismissal even if it is caused by the retirement of the employer, leaving without effect the obligations on information and consultation of workers' representatives.
- EU law does not require the national court hearing a dispute between individuals to disapply the national legislation which is pronounced in the terms set out above.
- (Employer, natural person, with a workforce of more than fifty workers, who activates his retirement and terminates employment contracts on that ground; the Workers' Statute, applicable national law, does not consider that we are dealing with a dismissal for the purposes of procedure or compensation).

2024 07 29 (C-112 and 223/22), Long-term residence.

ECJ Judgment (Grand Chamber) of 29 July 2024 (C-112 and 223/22), Long-term residence.

ECLI:EU:C:2024:636.

- *Criminal proceedings against foreign citizens for document forgery.*
- Request for a preliminary ruling from the Tribunale di Napoli (District Court, Naples, Italy).
- (Directive 2003/109, long-term foreign residents): EU law precludes third-country nationals who are long-term residents from having their entitlement to a social security, social assistance or social protection measure limited to the requirement, which also applies to

nationals of that Member State, of having resided in that Member State for at least ten years, of which the last two uninterrupted, criminally sanctioning any false declaration relating to this residence requirement.

- There is indirect discrimination, especially when EU law only requires five years to access long-term resident status. The State may not unilaterally extend the period of residence required by the Directive in order for a long-term resident of a third country to enjoy equal treatment with nationals of that Member State in that regard.
- (Two foreigners falsely declare that they meet the requirements to obtain the minimum income; they receive 3,414 or 3,186.66 euros for this benefit).

2024 07 29 (C-184 and 185/22), KfH Kuratorium für Dialyse und Nierentransplantation.

ECJ Judgment of 29 July 2024 (C-184 and 185/22), KfH Kuratorium für Dialyse und Nierentransplantation.

ECLI:EU:C:2024:637.

- *Two clinic assistants against their employer (KfH Kuratorium für Dialyse und Nierentransplantation).*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (Directive 97/81, part-time work): EU law precludes the overtime allowance from only being paid to part-time workers when their activity exceeds the ordinary full-time working day.
- (Directive 2006/54 on equality in employment between men and women): the rule under consideration constitutes indirect discrimination on grounds of sex if it affects a significantly higher proportion of women than men, even if men are not in the majority in the group of full-time workers.
- Indirect discrimination can be established if it is proven that a national legislation adversely affects a significantly higher proportion of persons of one sex than of the other sex; arises from the mere fact of placing people of one sex at a particular disadvantage compared to people of the other sex.
- Such diverse treatment cannot be justified by the desire for companies to avoid imposing overtime on part-time workers or to avoid less favourable treatment for full-time workers.
- (Part-time workers who claim payment of overtime with the same supplement as if they worked full-time; the employer only agrees to

remunerate them in this way when they exceed the ordinary weekly full-time working day).

- (There are more than 5,000 people in the workforce; 52.78% work part-time; 85% are women; among the full-time staff, 68.20% are women).

2024 09 12 (C-548/22), Italian Honorary Prosecutor.

ECJ Judgment of 12 September 2024 (C-548/22), Italian Honorary Prosecutor.

ECLI:EU:C:2024:730.

- *Honorary Prosecutor against the Presidency of the Consiglio dei ministri, the Ministero della Giustizia e il Ministero dell'Economia e delle Finanze.*
- Request for a preliminary ruling from the Giudice di pace di Fondi (Justice of the Peace, Fondi, Italy).
- Inadmissibility of the question as it is not proven that the regulation on part-time work is at stake, nor is it introduced elements of comparison with the activity of those who belong to the Public Prosecutor's career.
- (Honorary prosecutor who claims various remunerations because she considers herself discriminated with respect to career prosecutors).

2024 09 19 (C-439/23), Consiglio nazionale delle Ricerche.

ECJ Judgment of 19 September 2024 (C-439/23), Consiglio nazionale delle Ricerche.

ECLI:EU:C:2024:773.

- *Professor (KV) v. Consiglio Nazionale delle Ricerche (CNR) (National Research Council, Italy).*
- Request for a preliminary ruling from the Tribunale civile di Padova (Civil Court, Padua, Italy).
- (Directive 1999/70/EC, fixed-term work): EU law precludes services provided under fixed-term employment contracts (performed in whole or in part before the expiry date of the period for transposition of that directive) from being taken into account for the purposes of determining remuneration when the employee takes up employment for an indefinite period (after that date), unless this exclusion is justified on objective grounds.
- The acquisition of permanent employment is compatible with the invocation of the principle of non-discrimination on grounds of temporality.
- (CNR technologist who took up permanent employment in 2001, after having provided services under three temporary contracts prior to the 1999 Directive).

2024 09 19 (C-501/23), Director of a Public Limited Company.

ECJ Judgment of 19 September 2024 (C-501/23), Director of a Public Limited Company.

ECLI:EU:C:2024:776.

- *Insolvency proceedings brought by the Land Berlin (Land of Berlin, Germany) against the Chairman of the Supervisory Board of a commercial company.*
- Request for a preliminary ruling from the Bundesgerichtshof (Federal Supreme Court, Germany).
- (The State seeks a judicial declaration of insolvency against a person who holds a corporate office and is domiciled in Berlin, Monaco, the USA and the French West Indies; is Chairman of the supervisory board of a German corporation; owns bank assets in Monaco, as well as securities and shares in Germany.).
- (EU Regulation 2015/848, insolvency proceedings): in this case the “principal place of business” is different from the concept of “establishment”.
- It is presumed, unless proven otherwise, that when an individual carries out an independent commercial or professional activity, his centre of main interests is located in his main centre of activity, even if that activity does not require any human or material means.
- This is equivalent to attending to the place where the person manages his economic interests and where he receives and spends most of his income.

2024 09 26 (C-387/22), Nord Vest Pro Sani Pro.

ECJ Judgment of 26 September 2024 (C-287/22), Nord Vest Pro Sani Pro.

ECLI:EU:C:2024:786.

- *Nord Vest Pro Sani Pro SRL v. Tax Administration.*
- Request for a preliminary ruling from Tribunalul Satu Mare (District Court, Satu Mare, Romania).
- (Article 56 TFEU, freedom to provide services): EU law does not preclude reserving tax and social advantages only to employees of undertakings in the construction sector who carry out their activities in the territory of that Member State (excluding undertakings posting them), provided that such national legislation is justified by overriding reasons in the public interest and complies with the principle of proportionality.
- Valid reasons may be: the protection of workers; the maintenance and promotion of employment; the fight against fraud and irregular emplo-

yment; the prevention of abuse. But it is not possible to act with presumptions, but with real data.

- (Romanian construction company operating mainly in Germany and Austria; the Tax Administration denies it the advantages applied to those operating in Romania: lower contributions and taxation).

2024 09 26 (C-792/22), Energotehnica.

ECJ Judgment of 26 September 2024 (C-792/22), Energotehnica.
ECLI:EU:C:2024:788.

- *Heirs of worker against SC Energotehnica SRL Sibiu.*
- Request for a preliminary ruling from the Curtea de Apel Braşov (High Court, Braşov, Romania).
- (Directive 89/391/EEC, safety and health): EU law precludes a contentious judgment, ruling out considering an accident as work-related, from operating as *res judicata* in the civil liability lawsuit if the victim's successors have not been able to intervene in any of the proceedings.
- (Article 47 of the Convention on the Functioning of the European Union, effective judicial protection): EU law, due to its primacy, requires that ordinary courts may disapply decisions of the Constitutional Court if they consider that they violate the rights granted by a Directive and that they are not sanctioned when they act in this way.
- Article 47 of the Convention on the Functioning of the Convention violates Article 47 of the Convention on the Functioning of which the parties themselves, or one of them, could not have been aware, and on which, therefore, they have not been able to submit their observations.
- (Electrocuted electrician working on a low-voltage pole, located on a farm, under the supervision of a superior; a contentious judgment annuls the administrative sanction imposed on the company; the subsequent criminal litigation, where civil liability is settled, must apply *res judicata* in accordance with the country's constitutional doctrine).

2024 09 26 (C-432/23), Luxembourg Bar Association.

ECJ Judgment of 26 September 2024 (C-432/23), Luxembourg Bar Association.
ECLI:EU:C:2024:791.

- *Luxembourg Professional Association and Law Firm against the Tax Administration.*
- Request for a preliminary ruling from the Cour administrative (Supreme Administrative Court, Luxembourg).

- (Art. 7 of the Convention on Communications Privacy): under EU law, legal advice provided by a lawyer in matters of company law falls within the scope of enhanced protection of communications between lawyers and their clients.
- (Directive 2011/16/EU, tax cooperation): the requirement for a lawyer to provide the Administration with data on his or her relations with his or her client in the context of such advice constitutes an interference with the right to respect for communications.
- (The Spanish Tax Agency asks the Luxembourg Tax Agency to require a Law Firm to provide information on one of its clients, a Spanish company, regarding the acquisition of a company and a majority stake in a company; the Firm invokes professional secrecy and is fined).

2024 10 04 (E-446/21), Meta (Facebook).

ECJ Judgment of 4 October 2024 (C-446/21), Meta (Facebook).
ECLI:EU:C:2024:834.

- *Maximilian Schrems (Facebook user) v Meta Platforms Ireland Ltd (formerly Facebook Ireland Ltd)*.
- Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria).
- (EU Regulation 2016/679, data protection): EU law (“data minimisation”) precludes all personal data obtained by a social media platform, inside or outside it, from being aggregated, analysed and used to propose targeted advertising, without time limitation and without distinction depending on the nature of that data.
- The fact that a person manifests their sexual orientation in a public act does not authorise the platform to process other concordant data, obtained inside or outside it, in order to propose personalised advertising.
- (FB allows free use if you accept its commercial policy, directed based on the data it collects; using cookies and the like, the platform sent you specific advertising.
- to comparable technologies embedded in third-party websites and used by that company to improve Facebook’s products and to deliver targeted advertising; the plaintiff has never identified as homosexual on FB but he has on other networks).

2024 10 04 (E-621/22), Dutch Tennis Federation.

ECJ Judgment of 4 October 2024 (C-621/22), Dutch Tennis Federation
ECLI:EU:C:2024:858.

- *Koninklijke Nederlandse Lawn Tennisbond (Royal Netherlands Tennis Association) (KNLTB) v Autoriteit Persoonsgegevens (Data Protection Authority, Netherlands) (DPA).*
- Request for a preliminary ruling from the Court of First Instance, Amsterdam, Netherlands.
- (EU Regulation 2016/679, on data protection): for EU law, a transfer of data such as the one in this case is only legitimate if it is strictly necessary to achieve the purposes and interests of the transferor.
- Obtaining a profit may be legitimate, but the transfer must take into account the type of link between the data subjects (federated persons) and the data controller (KNLTB): a sponsor who sells sportswear is not comparable to an online gaming company.
- The rights and freedoms of the people who provided their data must be taken into account, as well as the purpose for which they did so.
- (The KNLTB sells members' personal data [name, address, e-mail, etc.] to two sponsors: one for sportswear and one for betting; federated individuals start receiving advertising offers from these two companies; the DPA imposes a fine of €525,000).

2024 10 04 (C-633/22), Real Madrid Club de Fútbol.

ECJ Judgment of 4 October 2024 (C-633/22), Real Madrid Club de Fútbol. ECLI:EU:C:2024:843.

- *Professional footballer against the Fédération internationale de football association).*
- Request for a preliminary ruling from the Cour d'appel de Mons (Court of Appeal, Mons, Belgium).
- (Regulation 44/2001, enforcement of judgments): EU law applies to the enforcement of a (Spanish) judgment ordering a publishing company of a (French) newspaper and one of its journalists to pay damages as compensation for the moral damage suffered by a sports club and one of its members of its medical team, as a result of the damage to their reputation caused by a news item about them (France).
- (Art. 11 of the Convention on freedom of the press and information): EU law means that the aforementioned execution must be refused insofar as it entails a manifest infringement of the freedom of the press and, therefore, the violation of the public policy of the requested Member State.
- (In 2006 Le Monde publishes an article on links between Real Madrid and a doping network; the Club sues the newspaper and the journalist; a final judgment is handed down, in Spain, condemning the payment of

more than € 400,000; the execution of the final sentence is urged before the courts of France).

2024 10 04 (C-650/22), FIFA.

ECJ Judgment of 4 October 2024 (C-650/22), FIFA.

ECLI:EU:C:2024:824.

- *Professional footballer against the Fédération internationale de football association*).
- Request for a preliminary ruling from the Cour d'appel de Mons (Court of Appeal, Mons, Belgium).
- (Art. 45 TFEU, freedom of movement): EU law opposes FIFA rules that restrict free movement (they have a direct impact on labour relations) because they establish: 1) Joint and several liability of the player who terminates his contract and of the new Club to pay compensation to the old Club based on non-objective and disproportionate criteria. 2) They prevent a Club from registering new players when it has incorporated a player who unilaterally terminated his contract. 3) The National Federation of the host Club does not issue the form that allows the player to play official competitions.
- Similar restrictions can only be established if it is proven that they are necessary to ensure the regularity of football competitions while maintaining a certain degree of stability in club squads.
- (Art. 101 TFEU, prohibition of anti-competitive agreements): EU law on the prohibition of agreements to distort competition covers decisions of FIFA (as a private association of undertakings).
- Similar FIFA agreements can only be accepted if they promote technical or economic progress, reserve users a fair share of the resulting profit and do not impose unnecessary restrictions.
- (Lokomotiv Moscow club claims compensation from footballer who terminates his employment contract; his signing for Belgian side Charleroi is frustrated for this reason; the interested party sued FIFA and the Belgian Football Federation claiming €6,000,000).

2024 10 04 (C-4/23), Romanian Civil Registry.

ECJ Judgment of 4 October 2024 (C-4/23), Civil Registry of Cluj (Romania).

ECLI:EU:C:2024:845.

- *M.-A. A. y Direcția de Evidență a Persoanelor Cluj, Serviciul stare civilă, Direcția pentru Evidență a Persoanelor și Administrarea Bazelor de Date din Ministerul Afacerilor Interne, Municipiul Cluj-Napoca,*

with the intervention of: Asociația Accept, Consiliul Național pentru Combaterea Discriminării.

- Request for a preliminary ruling from the Court of First Instance of Sector 6, Bucharest (Romania).
- (Articles 20 and 21 TFEU; 7 and 45 CFEU): EU law precludes the national rule that prevents the change of name and gender identity that a citizen has acquired in another State from being recorded in the Civil Registry.
- EU law opposes that those who have already changed their gender in a third country must initiate a procedure to achieve the same in their country, ignoring what has already happened in another.
- These conclusions are valid even if the change of name and gender had occurred in a state (Great Britain) that no longer belongs to the EU.
- (A person born in Romania as a woman, in the heart of a family who moves to the United Kingdom, where he or she is naturalized and changes his or her identity; he or she subsequently applies to the Romanian Civil Registry to update his or her data).

2024 10 04 (C-200/23), Bulgarian Trade Register.

ECJ Judgment of 4 October 2024 (C-200/23), Bulgarian Trade and Companies Register.

ECLI:EU:C:2024:827.

- *Agentsia po vpisvaniyata (Agency Responsible for Registrations, Bulgaria; “Agency”) and one natural person (OL).*
- Request for a preliminary ruling from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria).
- (Directive 2009/101/EC of the Commercial Companies Registry): EU law only requires that the Commercial Registry allows the publication of the minimum data.
- (EU Regulation 2016/679, on data protection): the Commercial Registry is both the recipient and the controller of the personal data incorporated into the registered documents (one of which is the handwritten signature).
- EU law requires the Commercial Registry to accept the request to delete the personal data contained in a deed of incorporation that are not legally essential.
- Public access to personal data can cause “immaterial damages”, which must be demonstrated, although there need not be additional tangible negative consequences to generate compensation.

- (A company partner who urges the Mercantile Registry to delete her personal data, incorporated into the registered corporate contract and accessible to the public: name and surname, identity document number, date and place of issue of said document, personal address, signature).

2024 10 04 (C-314/23), STAVLA.

ECJ Judgment of 4 October 2024 (C-314/23), STAVLA.
ECLI:EU:C:2024:842.

- *Union of Auxiliary Flight Crew of Airlines (STAVLA), Public Prosecutor's Office and Air Nostrum, Líneas Aéreas del Mediterráneo, S.A., Federation of Services of Workers' Commissions (CCOO), General Union of Workers (UGT), Workers' Union (USO), Works Council of Air Nostrum Líneas Aéreas del Mediterráneo, S.A., Directorate-General of Labour and Women's Institute, with the intervention of: Spanish Union of Airline Pilots (SEPLA), Professional Union of Airline Pilots (UPPA).*
- Request for a preliminary ruling from the Labour Chamber of the Audiencia Nacional (Spain).
- (Directive 2006/54/EC, equality in employment between men and women): for EU law, allowances (monetary amount for various accommodation and subsistence expenses) are an element of remuneration, regardless of their national classification as salary.
- EU law does not preclude a difference in the amount of such allowances, depending on whether they are paid to a group of people predominantly composed of men or women when these two groups of workers do not perform the same work or work to which the same value is attributed.
- (Airline that pays per diems for travel, applying two different collective agreements; its amount is higher in that of those who pilot the plane, mostly men; the other agreement applies to the rest of the crew, the vast majority of whom are women).

2024 10 04 (C-507/23), Consumer Protection Agency.

ECJ Judgment of 4 October 2024 (C-507/23), Consumer Protection Agency.
ECLI:EU:C:2024:854.

- *Patvīrtnju tiesību aizsardzības centrs (Consumer Protection Agency) (APC) and Sports Journalist.*
- Request for a preliminary ruling from the Augstākā tiesa (Sēvts) (Supreme Court, Latvia).

- (EU Regulation 2016/679, on data protection): EU law does not provide that the infringement of data processing rules, in itself, generates moral damage and reparative compensation, but that it is necessary to prove the damages.
- Whoever claims compensation for moral damage must prove the regulatory breach and the damage suffered.
- An apology may constitute an adequate reparation for moral damage, in particular if it is impossible to restore the previous situation, provided that this can fully compensate for the damage suffered by the person concerned.
- (APC carries out an advertising campaign on the danger of buying second-hand cars, using an imitation of a well-known motoring journalist, who unsuccessfully requests the withdrawal of the ticket and compensation).

2024 10 15 (E-144/23), Kubera.

ECJ Judgment (Grand Chamber) of 15 October 2024 (C-144/23), Kubera. ECLI:EU:C:2024:881.

- *Litigation between individuals in relation to the right to receive premiums derived from commercial transactions.*
- Request for a preliminary ruling from the Vrhovno sodišče (Supreme Court, Slovenia).
- (Art. 267 TFEU, question referred): EU law precludes the national court of last instance from deciding, in a procedure for the examination of an application for leave to bring an appeal, the outcome of which depends on the importance of the legal question raised by one of the parties to the dispute for legal certainty, for the uniform application of the law or for the development of the law, to refuse that application for authorisation without having examined whether it was required to refer a question for a preliminary ruling relied on in support of that request.
- (Art. 47 of the Convention on the Functioning of the European Union): under EU law, the national court of last instance must set out in its decision the reasons why it has not initiated the preliminary ruling procedure: (1) that the question is not relevant to the resolution of the dispute; (2) that the provision of EU law in question has already been interpreted by the Court; 3) that the correct interpretation of EU law is imposed with such evidence that it leaves no room for any reasonable doubt.
- (KUBERA, a food distributor, buys 87 600 Red Bull cans produced in Austria in Turkey and imports them through Slovenia, whose tax authorities seize them at the expense of the outcome of the legal proceedings

initiated by Red Bull GmbH, in defence of its intellectual property rights; Kubera agrees to cassation and requests that a question be referred for a preliminary ruling if the Supreme Court does not agree with its interpretation of applicable EU law).

2024 10 17 (E-322/23), Lufoni.

ECJ Judgment of 17 October 2024 (C-322/23), Lufoni.

ECLI:EU:C:2024:900.

- *Professor (ED) v. Ministero dell'Istruzione e del Merito (Ministry of Education and Merit, Italy) and the Istituto nazionale della previdenza sociale (INPS, National Institute of Social Security, Italy).*
- Request for a preliminary ruling from the Tribunale di Lecce (District Court, Lecce, Italy).
- (Directive 1999/70/EC on fixed-term work): EU law precludes the rule which, for the purposes of recognising the length of service of a worker at the time of his appointment as a career civil servant, limits to two thirds the calculation of periods of service completed, beyond four years, under fixed-term employment contracts, even if, after a certain number of years of service, the remaining third of the remaining periods of service are reimbursed for economic purposes only.
- That, in some cases, the application of this mechanism may eventually be favourable to the teachers concerned can only, where appropriate, partially compensate for the difference in treatment suffered, at the time of their appointment.
- (Teacher hired temporarily several times between 1996 and 2015: he passes the competition and is incorporated as a permanent employee, but the national law only allows him to be recognized as having less seniority than the real one).

2024 10 17 (C-349/23), Zetschek (Compulsory retirement of German judges).

ECJ Judgment of 17 October 2024 (C-349/23), Zetschek (Compulsory retirement of German judges).

ECLI:EU:C:2024:889.

- *HB, Judge of the Bundesgerichtshof (Federal Supreme Court, Germany) v the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Bundesministerium der Justiz (Federal Ministry of Justice, Germany).*

- Request for a preliminary ruling from the Verwaltungsgericht Karlsruhe (Administrative Court, Karlsruhe, Germany).
- (Directive 2000/78, non-discrimination in employment): EU law does not preclude legislation that prevents federal judges from deferring their retirement, whereas federal civil servants and judges in the Länder can do so.
- It is alien to the rules on discrimination on the basis of age that people in one group (federal judges) have different retirement rules from those of another (judges in each state) because their functions and rights are different.
- (Federal Supreme Court judge forced to retire at 66 years and four months who wants an extension).

2024 10 17 (C-408/23), Anwaltsnotarin (Access to German Notaries).

ECJ Judgment of 17 October 2024 (C-408/23), Anwaltsnotarin (Access to German Notaries).

ECLI:EU:C:2024:901.

- *Rechtsanwältin und Notarin and the Präsidentin des Oberlandesgerichts Hamm (President of the Higher Regional Court of Hamm, Germany).*
- Request for a preliminary ruling from the Verwaltungsgericht Karlsruhe (Administrative Court, Karlsruhe, Germany).
- (Art. 21 of the Convention on the Functioning of the European Union; Directive 2000/78/EC, non-discrimination in employment): EU law does not preclude national legislation that sets a maximum age limit of 60 years for access to the employment of lawyer-notary.
- Condition for the validity of that rule: that there is a legitimate employment policy objective and that the restriction is appropriate and necessary to achieve that objective, taking into account all the circumstances.
- (Lawyer who submits candidacy to access the status of Lawyer-Notary and is denied because she has reached the age of 60 at the end of the period to apply for it).

2024 10 22 (C-603/23), Transfer of Portuguese Notary.

ECJ Order of 22 October 2024 (C-603/23), Transfer of Portuguese Notary's Office.

ECLI:EU:C:2024:930.

- *Notary Employee against his outgoing (retired) and incoming (successor) Holders.*
- Request for a preliminary ruling from the District Court of Coimbra (Portugal).

- (31.2 CDEU; Directive 2001/23, transfer of undertaking): EU law considers a notary's office to be a company if it involves the existence of a set of organised material and human resources and its owner remunerates the staff employed there, assuming the business risk of doing so.
- There is a transfer of company when the holder of the Notary retires and, after a period of interim, another is appointed who assumes his functions with the same infrastructure as the retiree and maintaining the identity of the Notary.
- (After 14 years of service, an employee is dismissed by the retirement of the Notary Holder; immediately afterwards it is taken over by an interim Notary and finally awarded to the person who has merits for this purpose).

2024 10 24 (C-441/23), Omnitel Comunicaciones.

ECJ Judgment of 24 October 2024 (C-441/23), Omnitel Comunicaciones. ECLI:EU:C:2024:916.

- *The employee against Omnitel Comunicaciones, S.L., Microsoft Ibérica, S.R.L. (hereinafter, "Microsoft"), the Wage Guarantee Fund (Fogasa), Indi Marketers, S.L., and Leadmarket, S.L.*
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of Madrid (Spain).
- (Directive 2008/104/EC, temporary employment agencies (temporary employment agencies): EU law on temporary employment agencies (ETTs)): EU law on temporary employment agencies (ETTs)): EU law on temporary employment agencies (temporary employment agencies)): EU law on temporary employment agencies (temporary employment agencies)): EU law on temporary employment agencies (ETTs)): EU law on temporary employment agencies applies to anyone who hires a person to put them under the control of another company.
- The provisions of Directive 2008/104 apply to persons who have been temporarily assigned by their undertaking to a third party exercising managerial powers.
- The transferee must receive the salary provided for in the user company, even if his transferor does not appear as a true temporary employment agency.
- (Consultant who does an internship at Microsoft; then she is successively hired by three companies that are awarded contracts for the provision of services for Microsoft and assigned there, remaining under the control of

that company; the contract ends during her pregnancy and when she re-joins the company she is fired due to objective circumstances).

2024 11 14 (C-197/23), Composition of the Court.

ECJ Judgment of 14 November 2024 (C-197/23), Composition of the Court.

ECLI:EU:C:2024:956.

- *Litigation between individuals in relation to the right to receive premiums derived from commercial transactions.*
- Request for a preliminary ruling from Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland).
- (Arts. 2 and 6 TEU. Rule of Law; Article 47 of the Convention on the Functioning of the European Union, judicial protection): EU law precludes a national provision which prevents the appellate court from reviewing in any circumstances whether the reallocation of the case to the trial panel which delivered its judgment at first instance was carried out in breach of national rules on the allocation of cases within the courts.
- (The Magistrate in charge of the trial was on leave and the Vice-President appointed a third one, who issued a ruling unfavorable to one of the parties, who questions the change; procedural rules prevent questioning this aspect by way of appeal).

2024 11 14 (C-643/23), Agenciart.

ECJ Judgment of 14 November 2024 (C-643/23), Agenciart.

ECLI:EU:C:2024:959.

- *Professional actress against Agenciart-Management Artístico Lda.*
- Request for a preliminary ruling from the Tribunal da Relação de Lisboa (High Court, Lisbon, Portugal).
- (Directive 2011/7/EU on late payment): a natural person who habitually pursues the profession of actress as a self-employed person in return for consideration, even if he or she does not have his or her own premises, staff, tools or equipment related to his or her professional activity, falls within the concept of “undertaking” within the meaning of that provision.
- The conclusion of an agency contract by an actress is part of her professional activity; if he did not exercise that profession, the contract would be devoid of purpose.
- (Actress who usually works as a self-employed person, without her own premises, or employees or equipment related to her professional activity; her Agency gets her a television season and at the end bills her

for the services; in the event of non-payment, she claims by means of an order for payment).

2024 11 21 (C-336/23), Data from public bodies.

ECJ Judgment of 21 November 2024 (C-336/23), Public body data.

ECLI:EU:C:2024:979.

- *Public Postal Company v. State Information Officer of Croatia.*
- Request for a preliminary ruling from the Visoki upravni sud (High Administrative Court, Croatia).
- (Directive 2019/1024 on data and re-use of public sector information): for EU law, a request for access to documents held by a public sector body does not fall within its scope.
- (HP, a state-owned public company, is the provider of the universal postal service but also carries on commercial activities; it receives a request for information on a number of construction contracts, reports on the status of works and certificates of delivery of works; the Information Officer orders it to provide it and HP refuses).

2024 12 19 (C-65/23), Personal data in the employment contract.

ECJ Judgment of 19 December 2024 (C-65/23), Personal data in the employment contract.

ECLI:EU:C:2024:1051.

- *A worker (MK) against his employer (K GmbH).*
- Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany).
- (EU Regulation 2016/679, data protection): EU law requires that personal data collected by reason of the employment contract be treated with respect for dignity and fundamental rights, especially within the group or union of companies that may exist.
- EU law also prohibits the processing of personal data on racial or ethnic origin, political opinions, religious or philosophical convictions, trade union membership, genetic or biometric aspects, health, sex life, sexual orientation.
- Domestic rules or collective agreements cannot ignore these guarantees, even by invoking the need for more specific regulation.
- (President of the Works Council claiming compensation for moral damages; his personal data were transferred to a server of the company's parent company in the USA, including employee number, details of his

contract and remuneration, Social Security and tax identification numbers, nationality and marital status).

2024 12 19 (C-295/23), Corporate Law Firm.

ECJ Judgment of 12 December 2024 (C-295/23), Corporate Law Firm.
ECLI:EU:C:2024:1037.

- *Halmer Rechtsanwaltsgesellschaft UG versus Rechtsanwaltskammer München (Munich Bar Association, Germany).*
- Request for a preliminary ruling from the Bayerischer Anwaltsgerichtshof (Bavarian Bar Court, Germany).
- (Directive 2006/123, services in the internal market): EU law does not preclude the rule which, under penalty of cancellation of the registration of the Bar Association of the Bar Association, prohibits the transfer of its shares to a purely economic investor who does not intend to carry out a professional activity in that company.
- (Single-member commercial company dedicated to the Legal Profession; the sole shareholder transfers 51% of the capital to a commercial company; internal regulations only allow the transfer of these shares in favour of certain professionals or related companies).

2024 12 19 (C-531/23), Loredas.

ECJ Judgment of 19 December 2024 (C-531/23), Loredas.
ECLI:EU:C:2024:1050.

- *Dismissed worker (domestic worker) in front of her employers.*
- Request for a preliminary ruling from the Labour Chamber of the High Court of Justice of the Basque Country (Spain).
- (Directive 2003/88, working time): EU law precludes domestic employers from being exempt from the obligation to establish a system that allows the calculation of the working hours worked by domestic workers, depriving them of the possibility of determining objectively and reliably the number of hours of work worked and their distribution.
- Respect for rights in terms of working time requires a system that allows both the number of hours of work worked and their distribution and those carried out in excess of the ordinary working day to be calculated objectively and reliably.
- The particularities of domestic work may justify exceptions to the system of calculating overtime and part-time work, but maintaining the record of the ordinary working day.
- The feminization of the sector also means that the absence of such a registration system entails indirect discrimination.

- (Domestic worker dismissed after six months of service; she alleges that she worked up to 79 hours a week and has only been paid the 40 hours of the maximum legal working day).

2025

2025 01 09 (E-394/23), Mousse and SNCF.

ECJ Judgment of 9 January 2025 (C-394/23), Mousse and SNCF.
ECLI:EU:C:2025:2.

- *Mousse (association for privacy) versus Commission nationale de l'informatique et des libertés (CNIL) and SNCF Connect.*
- Request for a preliminary ruling from the French Council of State (as the Supreme Court of Disputes).
- (Regulation 2016/679, data protection): the term courtesy is neither objectively indispensable nor essential to allow the correct execution of the contract of carriage, being unnecessary.
- The relevance of that data for the purpose of personalising the ticket is not justified because: (1) the legitimate interest pursued was not indicated at the time the data was collected; (2) the processing exceeds the limits of what is strictly necessary for the pursuit of that legitimate interest; (3) the fundamental rights of clients may prevail as it is a question of avoiding the risk of discrimination based on gender identity; (4) the possible opposition to the processing of the data does not legitimize the generalized demand.
- (SNCF requires those who buy travel tickets to indicate their courtesy term by marking the indication “Sir” or “Madam”; the Mousse association unsuccessfully requests that this request be stopped for violating the GDPR; the CNIL considered such a requirement necessary and customary).

2025 01 23 (C-421/23), Fake A-1 ONSS Certificates.

ECJ Judgment of 23 January 2025 (C-421/23), False A-1 ONSS certificates.
ECLI:EU:C:2025:36.

- *EX (Portuguese businessman) versus Ministère public and Office National de Sécurité Sociale (ONSS) of Belgium.*
- Request for a preliminary ruling from the Court of Appeal of Liège (Belgium).
- (Regulation 883/2004, coordination of Social Security systems): the procedure of dialogue and conciliation between the institutions of the

two States (the broadcaster and that of the country where they work) must also be applied when fraud and falsehood of the A-1 are found in criminal proceedings.

- This procedure is also mandatory even if the issuing entity has received contributions.
- Without this prior procedure, the court of the country where you work cannot unilaterally rule on the authenticity of the A-1s or the fraudulent nature of the posting.
- (Portuguese builder sends up to 650 workers to Belgium to carry out various works during the period 2012/2017; he is convicted of fraud and forgery of documents; he does not deny the facts, but maintains that the procedure of dialogue between competent institutions [ignored] is imperative to rule out the validity of the A-1).

2025 02 04 (E-158/23), Keren.

ECJ (Grand Chamber) of 4 February 2025 (C-158/23), Keren.

ECLI:EU:C:2025:52.

- *T.G. (citizen of Eritrea) v. Minister of Social Affairs and Labour (Netherlands).*
- Request for a preliminary ruling from the Raad van State (Council of State, Netherlands).
- (Directive 2011/95 on international protection for third-country nationals or stateless persons): EU law does not preclude the requirement to pass a civic integration test, provided that: 1) the particular personal situation is taken into account; 2) The knowledge required is relevant; 3) The exam is validated for the person who proves effective integration.
- EU law does preclude a failure of the exam from entailing a fine of excessive amount, taking into account the personal and family situation.
- EU law does preclude the full cost of civic integration courses and examinations by the beneficiaries of international protection themselves.
- The granting of a forgivable loan in the event of passing the exam does not validate the provisions contrary to EU law.
- Beneficiaries of international protection are entitled to integration programmes without excessive financial obstacles, without being automatically sanctioned if they fail the examination within the prescribed period.
- (Eritrean national, beneficiary of international protection in the Netherlands, fined €500 for failing to pass the civic integration exam within the prescribed deadline; he is also claimed for the €10,000 loan granted to finance his integration programme).

2025 02 13 (E-383/23), Ilva.

ECJ Judgment of 13 February 2025 (C-383/23), Ilva.

ECLI:EU:C:2025:84.

- *Public Prosecutor's Office against Ilva (Mrcantil Company)*.
- Request for a preliminary ruling from Vestre Landsret (Western Regional Court of Appeal, Denmark).
- (Regulation 2016/679, data protection): where a fine is imposed on a controller of personal data that is or is part of an undertaking, the maximum amount of the fine is determined on the basis of a percentage of the total overall annual turnover of the undertaking's previous financial year.
- The concept of "undertaking" must also be taken into account in order to assess the actual or material economic capacity of the person to whom the fine is addressed and thus to ascertain whether it is effective, proportionate and dissuasive.
- (The company Ilva operates a chain of furniture stores and its annual turnover is 241 million euros; Ilva belongs to the Lars Larsen group whose annual turnover is 881 million euros; Ilva is accused of not having properly processed the data of 350,000 former customers).

2025 02 13 (E-393/23), Heineken.

ECJ Judgment of 13 February 2025 (C-393/23), Heineken.

ECLI:EU:C:2025:85.

- *Athenian Brewery SA (AB) and Heineken NV v. Macedonian Thrace Brewery SA (MTB)*.
- Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).
- (Regulation 1215/2012, enforcement of judgments): for the purposes of analysing the jurisdiction of the national court itself, EU law does not preclude the presumption that where a parent company directly or indirectly owns all or almost all of the capital of an infringing subsidiary, that parent company exercises decisive influence over that subsidiary.
- The foregoing provided that the defendants are not deprived of the possibility of invoking evidentiary evidence that suggests otherwise.
- (AB is a brewing company established in Greece and is part of the Heineken group, whose parent company indirectly owns around 98.8% of the shares; MTB is a competitor that denounces abuse of dominant position).

2025 02 25 (C-146 and 374/23), Judicial remuneration.

ECJ Judgment (Grand Chamber) of 25 February 2025 (C-146 and 374/23),
Judicial remuneration.

ECLI:EU:C:2025:109.

- *Various Judges litigating against the respective State.*
- Request for preliminary rulings from the District Court of Białystok (Poland) and the Regional Administrative Court of Vilnius (Lithuania).
- (Art. 19.1 TEU and 47 CEFEU, judicial protection): EU law, which guarantees judicial independence, does not preclude the remuneration of judges from being determined by Parliament or the Government.
- This power is admissible provided that: 1) it is exercised in accordance with the law; 2) it is adopted with objective, predictable, stable and transparent criteria; (3) guarantees judges a level of remuneration commensurate with the importance of the functions they perform; 4) can be controlled jurisdictionally.
- EU law does not prevent this remuneration from being frozen or reduced on an exceptional basis, provided that: 1) the law is acted upon; 2) there is a justification based on the general interest; 3) the decision is framed within a set of measures in public employment; (4) is necessary and strictly proportionate; (5) it does not undermine the adequacy of the remuneration of judges to the importance of the functions they perform; 6) can be questioned in court.
- The level of remuneration must be sufficiently high, taking into account the socio-economic context of its Member State, to confer genuine economic independence to protect against the risk of possible external interference or pressure.
- (Polish magistrate of a collegiate body who receives 3,500 euros gross per month, after three years of freezing; Lithuanian magistrates are demanding a decent remuneration and more than the €2,362 gross per month received in 2022).

2025 02 27 (C-203/22), Dun & Bradstreet Austria.

ECJ Judgment of 27 February 2025 (C-203/22), Dun & Bradstreet Austria.

ECLI:EU:C:2025:117.

- *Telephone and Local Government customer against Dun & Bradstreet Austria GmbH.*

- Request for a preliminary ruling from the Verwaltungsgericht Wien (Regional Administrative Court, Vienna, Austria).
- (Regulation 2016/679, data protection): EU law grants the data subject the right to demand detailed information on the logic applied when drawing up his or her solvency profile by automated means.
- If the entity responsible for preparing the profiles considers that the information required affects sensitive data or trade secrets, it must notify the corresponding Authority or Court so that it can weigh the conflicting rights.
- (A mobile operator refused to extend a mobile telephony contract, with a monthly payment of 10 euros, because it lacked solvency according to the automated report carried out by the specialized entity D&B; the Data Protection Authority ordered D&B to communicate to CK significant information on the procedure applied).

2025 02 27 (E-517/23), DocMorris.

ECJ Judgment of 27 February 2025 (C-517/23), DocMorris.

ECLI:EU:C:2025:122.

- *North Rhineland College of Pharmacists v. DocMorris NV*.
- Request for a preliminary ruling from the Bundesgerichtshof (Federal Supreme Court, Germany).
- (Art. 34 TFEU, freedom to provide services): EU law does not preclude prohibiting advertising that offers a monetary reward to customers residing in another State and sending their medical prescription.
- (Directive 2001/83/EC on medicinal products for human use): EU law allows advertising that offers a reduction in the price of prescription medicines, but rejects advertising consisting of gifts in the form of vouchers for the subsequent purchase of non-prescription medicines.
- (DocMorris operates a mail-order pharmacy established in the Netherlands and supplies medicines, with or without prescription, to customers in Germany; carried out various publicity stunts; the College of Pharmacists goes to court.).

2025 02 27 (C-638/23), Austrian Data Protection Authority.

ECJ Judgment of 27 February 2025 (C-638/23), Austrian Data Protection Authority.

ECLI:EU:C:2025:127.

- *Amt der Tiroler Landesregierung (Office of the Government of the Land of Tyrol, Austria) v Datenschutzbehörde (Data Protection Authority, Austria)*.

- Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).
- (Regulation 2016/679, data protection): EU law does not preclude a regional administration office from collecting the data necessary to carry out a certain public utility campaign, provided that this entity can comply with the duties of the data controller and the scope of that use of personal data has been established.
- (An Office of the Regional Administration sent a reminder to all people of legal age who had not yet been vaccinated against Covid; the Administration turned to two private companies, which used the data of the central vaccination registry and that of patients; a recipient of such letters denounced the Office for having accessed his data).

2025 02 27 (E-647/23), Aeon.

ECJ Judgment of 27 February 2025 (C-647/23), Aeon.

ECLI:EU:C:2025:113.

- *AEON and STAN real estate companies.*
- Request for a preliminary ruling from the Constitutional Court of Slovenia.
- (Art. 16 of the Convention on the Functioning of the European Union, freedom to conduct a business): EU law does not preclude legislation that limits to 4% the amount of the commission that the intermediary company can receive in the event of a sale (on the price) or lease (on the expected cost, not exceeding one month's payment).
- That compatibility is subject to the fact that the limitation does not go beyond what is necessary to achieve the objectives it pursues and cannot be replaced by other less restrictive measures that allow the same result to be achieved.
- (Two real estate companies are filing lawsuits, and the National Council is filing a request, for the Constitutional Court to review the Real Estate Intermediation Act, which limits the fee for brokerage services in the event of the acquisition, sale or lease of real estate.).

2025 02 27 (E-16/24), Sinalov.

ECJ Judgment of 27 February 2025 (C-16/24), Sinalov.

ECLI:EU:C:2025:116.

- *Bulgarian Special Prosecutor's Office against a male and female magistrate.*

- Request for a preliminary ruling from the Criminal Division of the Sofiyski gradski sad (City Court, Sofia, Bulgaria).
- (Random and automatic system for the distribution of judicial cases; A magistrate who considers the assignment of a tax dispute to be anomalous and returns it to the one he believes to be competent).
- (Art. 19 TFEU and Art. 47 CFEU, judicial protection): EU law does not preclude the rules of judicial apportionment from obliging the judge who considers himself incompetent to refer the case back to the body responsible for it, instead of taking the decision that he considers to be the right one.
- EU law requires that, in such cases, the lawfulness of the attribution made by such a person must be subject to judicial review in accordance with the rules of national law.

2025 03 06 (C647/21 and C648/21), Judicial irremovability.

ECJ Judgment of 6 March 2025 (C647/21 and C648/21), Judicial irremovability.

ECLI:EU:C:2025:143.

- *Criminal proceedings against certain persons.*
- Request for a preliminary ruling from the Regional Court of Slupsk (Poland).
- (Article 19.1 TFEU, Judicial protection in areas of EU law): EU law precludes the governing body of a Court from removing a judge from matters assigned to it, without stating the requirements for doing so and without the reasons being set out.
- The national rules governing the procedure for removing judges from cases must lay down clearly formulated objective criteria for the adoption of such decisions, as well as the obligation to state the reasons for such decisions, in particular where the court does not consent to their removal from the cases, in order to ensure that judicial independence is not compromised by undue external influences.
- (Art. 19.1 TFEU): given its primacy, EU law requires the disapplication of a decision of the Governing Chamber that removes a judge from the assigned cases when that resolution violates Art. 19.1 TFEU.
- (Preliminary rulings in two criminal cases from which, after the referral was made, the judge to whom they had been assigned was removed; returns granted by the governing body of the Criminal Court after changing its composition due to the appointments made by the General Council of the Magistracy).

2025 03 06 (C575/23), Belgian National Orchestra (ONB).

ECJ Judgment of 6 March 2025 (C575/23), Belgian National Orchestra.
ECLI:EU:C:2025:141.

- *Musicians of the Belgian National Orchestra against the State.*
- Request for a preliminary ruling from the Conseil d'État, acting as the Supreme Court of Litigation (Belgium).
- (In contrast to the previous practice of negotiating on a case-by-case basis, a rule is approved: the members of the ONB, by means of economic compensation, assign their rights of performance, reproduction or distribution, for the entire duration of the related rights and for the whole world).
- (Directive 2001/29/EC, copyright; Directive 2006/115/EC, intellectual property): EU law precludes national legislation that provides for the transfer, by regulatory means, for exploitation by the employer, of the related rights of performers hired as public employees, for the services provided in the performance of their duties, without the need for prior consent.
- (Directive 2019/790, copyright): for EU law, “performer” is a musician hired as public employees (statutory staff).

2025 03 13 (C247/23), Deldits (Trans person).

ECJ Judgment of 13 March 2025 (C247/23), Deldits (Trans person).
ECLI:EU:C:2025:172.

- *Iranian asylum against the Administration (Hungary).*
- Request for a preliminary ruling from the General Court of the Capital, Hungary).
- (Iranian woman who identifies as male; Hungary welcomes him as a refugee but registers him as a woman; the Registry makes the change of gender conditional on proof of having undergone surgery).
- (Regulation 2016/679, processing of personal data): EU law requires the Civil Registry to rectify personal data relating to the sex of a natural person when they are not accurate.
- The rectification of personal data relating to sex may entail the obligation to provide relevant and sufficient evidence, but without making it conditional on the fact that there has been sex change surgery.

2025 03 20 (C365/23), Arce (Basketball player).

ECJ Judgment of 20 March 2025 (C365/23), Arce (Basketball player).
ECLI:EU:C:2025:192.

- *Sports consulting company for basketball players and their parents.*
- Request for a preliminary ruling from the Supreme Court (Latvia).

- (Minor basketball player who, represented by his parents, hires the services of a specialized company to develop his career; the contract lasts 15 years and includes training, psychological support, legal advice and marketing; the athlete pays 10% of his total income if it exceeds € 1,500 per month; ten years later the agent claims € 1,663,780).
- Directive 93/13/EEC (consumer contracts) applies to the case described because the minor was not engaged in a professional activity when the contract was concluded.
- A remuneration clause such as the one described must be considered unfair if it is not drafted in a clear and understandable way. In this case, it must be considered null and void and cannot be redirected to the payment of the expenses actually borne by the agent, judicial arbitration being possible only when it is validly agreed.
- The clause which provides, in return for the provision of services in support of sporting and career development, that the athlete must pay 10% of his income over the following 15 years, without having been informed, before the conclusion of that contract, of all the information necessary to enable him to assess the financial consequences of his commitment, is invalid.
- In order to assess the unfairness of the agreement, it is relevant that the consumer was a minor at the time of the conclusion of the contract entered into by the parents on his behalf.

2025 04 03 (C431/23), Wibra België.

ECJ Judgment of 3 April 2025 (C431/23), Wibra België.

ECLI:EU:C:2025:232.

- *Former Wibra België workers and the bankruptcy trustees.*
- Request for a preliminary ruling from the Labour Court of Liège (Belgium).
- (Directive 2001/23, business subrogation): EU law on the transfer of a company does not apply to a case of business restructuring with a failed proposal for a partial transfer and which is followed by bankruptcy proceedings (with fewer labour guarantees than bankruptcy) after which some employees and resources of the company end up in the hands of a third party.
- Condition: that the bankruptcy proceedings are actually opened for the purpose of liquidating the assets of the transferor, are under the supervision of a competent public authority and cannot be classified as abusive.
- (Insolvent company whose directors select an offer from a third party to acquire it in part but the Commercial Court rejects it for contrave-

ning the collective agreement and does not guarantee total subrogation; said Court opens bankruptcy proceedings and informs the workers of this; a part of the original company and its workforce ends up being transferred to a third party; non-subrogated workers sue).

2025 04 03 (C710/23), Data on corporate representative.

ECJ Judgment of 3 April 2025 (C710/23), Data on corporate representative. ECLI:EU:C:2025:231.

- *A natural person v. Czech Ministry of Health.*
- Request for a preliminary ruling from the Supreme Administrative Court (Czech Republic).
- (Regulation 2016/679, Data Protection): for EU law, it is data processing to communicate the name, surname, signature and contact coordinates of a natural person representing a legal person.
- EU law allows the controller (even if it is a public authority) to be obliged to consult with the data subject before communicating official documents containing their personal data, provided that this does not involve disproportionate efforts and does not disproportionately restrict the right of access to those documents.
- (Request to the Ministry of Health for information on people who had signed contracts for the sale of tests to detect covid-19; the Ministry provides information but hides data from the signatories).

2025 04 03 (C807/23), Katharina Plavec (Vienna Bar Office).

ECJ Judgment of 3 April 2025 (C807/23), Katharina Plavec (Vienna Bar). ECLI:EU:C:2025:234.

- *Katharina Plavec v Vienna Bar Association.*
- Request for a preliminary ruling from the Supreme Court of Justice (Austria).
- (Art. 45 TFEU, freedom of movement): EU law precludes imposing that part of the internships, necessary for access to the legal profession, be carried out by a professional established in the State.
- (Directive 98/5/EC, practice of law): The time spent as a lawyer in a third country (Germany) but referring to the law of the first country (Austria) must be considered valid for membership if it is proven that he or she can provide training and experience equivalent to that provided by having carried them out with a lawyer established in the competent State (Austria).

- (Lawyer who does an internship in the German firm of Jones Day but under the supervision of an Austrian partner; the Bar Association denies her membership because she did not do the internship with a Professional established in Austria).

2025 04 10 (C584/23), Cashier of Alcampo.

ECJ Judgment of 10 April 2025 (C584/23), Cashier of Alcampo.
ECLI:EU:C:2025:261.

- *Worker against INSS, Asepeyo and Alcampo.*
- Request for a preliminary ruling from the Juzgado de lo Social No 3 de Barcelona, Spain.
- (Directive 79/7/EEC, equality between men and women in Social Security): EU law does not preclude the permanent disability pension resulting from an accident at work from being calculated on the basis of the salary received at that time even if they were enjoying a reduction in working hours to care for a child, a situation mostly activated by women.
- The solution does not change even if the accident occurs beyond the first three years of reduced working hours for child care (during which the contributions are computed as in the previous period: art. 237.3 LGSS) and the regulatory base is calculated with the actual contributions.
- It is relevant that the pension calculation is done the same for the rest of the cases with part-time work.
- EU law does not require social security benefits for people who have taken care of their children.
- (Cashier of Alcampo with a reduction in working hours for eleven years and who suffers an accident at work, as a result of which she is declared in a situation of permanent disability, with the right to a pension).

2025 04 10 (C607/21), Concept of living in charge.

CJEU Judgment of 10 April 2025 (C607/21), Concept of living in charge.
ECLI:EU:C:2025:264.

- *Family member of EU citizen against the Belgian State.*
- Request for a preliminary ruling from the Conseil d'État, acting as the Supreme Court of Litigation (Belgium).
- (Directive 2004/38/EC, free movement of EU citizens and their families): in order to determine whether the direct ascendant of the partner of an EU citizen is dependent, it is necessary to take into account their original situation when leaving their country (on the basis of contem-

porary documents) but also to the reality when applying for the residence card if several years have elapsed between those two dates.

- The right of residence cannot be refused on the grounds that it is applied for from a situation of irregular stay.
- (Moroccan, mother of a Belgian citizen who has a Dutch partner, submits successive applications to reside in Belgium and in charge of her son presents documents proving economic dependence years ago).

2025 04 30 (C313/23, 316/23 and 332/23), Data on Judges and Family Members.

CJEU Judgment of 30 April 2025 (C313/23, 316/23 and 332/23), Data on Judges and Family Members.

ECLI:EU:C:2025:303.

- *Proceedings initiated by the Inspectorate of the General Council of the Judiciary.*
- Request for a preliminary ruling from the Supreme Administrative Court (Czech Republic).
- (Art. 19 CJEU and 47 CEFEU; Rule of law, judicial protection): EU law precludes a judicial inspection whose mandate has expired from continuing in office without an unlimited period and without an express legal basis for doing so.
- (Regulation 2016/679, Data Protection): EU law on data protection applies to the transfer made by a Bank to a judicial body, at the request of the Judicial Inspectorate.
- The judicial body that authorises the transfer of bank details to the Judicial Inspectorate of Services cannot be considered a data controller, nor (unless expressly entrusted by law) a supervisory authority.
- (Those who make up the Inspectorate of the CGPJ are appointed by Parliament for a certain period of time and can request authorization from the judicial bodies to access bank details of Judges and their families; once its mandate has expired, the Inspectorate continues to function until the new members are appointed).

2025 05 08 (C212/24, C226/24 and C227/24), Fixed-term agricultural workers.

ECLI:EU:C:2025:341.

- *Several companies against Istituto nazionale della previdenza sociale (INPS).*
- Request for a preliminary ruling from the Court of Appeal of Florence (Italy).

- (Calculation of company contributions for fixed-term workers: according to daily hours actually worked; for permanent workers: according to the legally established daily working day, regardless of the hours actually worked).
- (Directive 1999/70/EC, fixed-term work): EU law precludes employers' social security contributions for fixed-term agricultural employees from being calculated using a methodology different from that applied to permanent employees.
- Pensions are “employment conditions” with respect to which there cannot be any discrimination on the grounds of the term of employment, a criterion that can be extended to the contributions that generate them.
- The seasonality of agricultural tasks, tradition or regulatory provisions are not objective reasons that justify different treatment.

2025 05 15 (C-623/23 and 626/23), Melbán and Sergamo.

ECLI:EU:C:2025:358.

- *Male pensioners against the National Social Security Institute.*
- Requests for a preliminary ruling from Social Court No 3 Pamplona (Spain) and High Court of Justice, Madrid (Spain).
- Since 2021, Article 60(1) LGSS, in order to reduce the gender gap, has recognized a pension supplement for women who receive a contributory retirement pension and have had one or more children; men in the same situation only earn it if their professional careers have been interrupted or harmed on account of the birth or adoption of their children.
- (Directive 79/7, Equal treatment in Social Security): EU law is contrary to the LGSS since men in an identical situation do not have the right to the supplement, without there being a link between the granting of the supplement and the enjoyment of maternity leave or the disadvantages a woman suffers in her career due to the interruption of her activity during the period following childbirth.
- It entails direct discrimination on grounds of sex because it does not make the right of mothers subject to any of the requirements imposed on men.
- (Article 23(II) of CFREU, advantages for the under-represented sex): the provision is not valid as a positive action since it does not provide any solution to the problems women may face during their professional careers, nor does it compensate for the disadvantages to which they may be exposed.

- EU law allows that if the father must be granted the supplement in order to avoid discrimination, it entails elimination of the supplement already granted to the mother, given that the Law provides that it is received only by one parent and that he is the one who receives the pension of the lowest amount.

2025 06 05 (E-763/23), Severance pay to judges and prosecutors upon retirement.

ECLI:EU:C:2025:400.

- *Retired judicial personnel.*
- Request for a preliminary ruling from the Court of Appeal, Bucharest (Romania).
- (Articles 2 and 19 TEU, Rule of Law and Effective Judicial Protection): judicial independence does not preclude the repeal (after several years of suspension for budgetary reasons) of the benefit of seven monthly seniority allowances when judges or prosecutors retired after twenty years of continuous service.
- Determining whether the remuneration of judges is adequate requires, inter alia, taking into account the economic, social and financial situation of the Member State concerned.

2025 06 12 (E-7/24), Liability in Accidents at Work.

ECLI:EU:C:2025:439.

- *Insurance companies and companies challenging their liabilities.*
- Requests for a preliminary ruling from the District Court of Svendborg (Denmark).
- Widow of an employee working for a German company who dies in an accident at work in Denmark. German legislation provides that the Social Security which pays the pension is subrogated to the rights which the beneficiary has against the person liable to provide compensation for the accident (company or insurer).
- The recoupment action (provided for in German law) is not subject to the provisions of the legislation of the State (Denmark) where the accident occurred.

2025 06 12 (E-219/24), Tallinn Ambulances.

ECLI:EU:C:2025:442.

- *Workers against the City of Tallinn Ambulance Service.*
- Request for a preliminary ruling from the Supreme Court of Estonia.

- (Framework Directive 89/391/EEC and Directive 2000/54/EC on biological agents): EU law does not preclude the rule under which an employer may require workers with whom it has concluded an employment contract to be vaccinated if they are exposed to a biological hazard.
- The Directives provide that when there is an effective vaccine against the biological risk to which workers are exposed, the company must provide it, but they do not provide for (or prohibit) compulsory vaccination: this is a case unrelated to them.
- (After the pandemic was declared, the City Council invoked regulations on protection against biological risks and agreed to require ambulance drivers to prove that they had been vaccinated against Covid; those who do not provide this certificate are dismissed and the nullity of the dismissal is sought by them).

2025 06 19 (C-419/24), Hôtel Plaza.

ECLI:EU:C:2025:464.

- *Plaza Hotel and an employee who is laid off.*
- Request for a preliminary ruling from the Cour de Cassation (Cour de Cassation) (France).
- (Directive 98/59, Collective redundancies): EU law does not envisage whether persons made available by a (auxiliary) service company must be taken into account in the calculation of the collective redundancy threshold (of the main one) which triggers the obligation to provide for an employment protection plan.
- According to French law, in undertakings with at least fifty employees, where the projected redundancies concern at least ten employees within the same thirty day period, the employer shall draw up and implement a plan to protect employment in order to avoid redundancies or to limit their number.
- As the Directive does not regulate the obligation at stake it does not impose obligations in this regard, and hence being a matter of national law, the ECJ lacks jurisdiction to hear the question referred.
- (The Hotel hired a service company so that eleven workers would provide cleaning and maintenance services; months later it communicated that it would remain closed for at least 20 months for renovation work and carried out a collective dismissal, without activating the employment protection plan).

2025 07 03 (E-268/24), Lalfi.

ECLI:EU:C:2025:526.

- *Non-tenured teacher against Ministry of Education and Merit.*
- Request for a preliminary ruling from the District Court of Lecce (Italy).
- (Directive 1999/70/EC; fixed-term work): EU law precludes non-tenured teachers responsible for short-term supply teaching posts from being deprived of the electronic card (euro 500 per year) that enables them the purchase of goods and services intended to support the continuous training of teachers.
- Exclusion of such right would be valid only if it were justified on objective grounds. The mere fact that their activity is not intended to last until the end of the academic year does not constitute such an objective ground.
- Since the tasks performed are similar to those of permanent teachers, the mere temporality cannot justify the deprivation of the right.
- (Non-tenured teacher who has been making discontinuous substitutions of two or more months and requests the electronic card of the last two years in which she has worked; it is denied because she is not an interim of full courses).

2025 07 03 (C-646/23 and 661/23), Lita.

ECLI:EU:C:2025:519.

- *Criminal proceedings against professional military personnel.*
- Request for a preliminary ruling from the Regional Military Court of Warsaw (Poland).
- (Article 19 TEU, on the CJEU; Article 47 CFREU, judicial protection): EU law precludes the rule on compulsory early retirement of a military judge who is unfit for professional military service, without giving reasons for this and without extending the rule to comparable prosecutors.
- EU law obliges (especially the bodies responsible for determining the composition of panels of military courts) to disapply the above rule and to reinstate the retired judge to his post.
- The national court which decides to stay proceedings and to refer questions to the Court for a preliminary ruling is entitled temporarily to suspend the application of national legislation providing for the compulsory early retirement, even if it does not allow it.
- Scope of the “independent and impartial judge, previously established by law”.

2025 07 03 (C-733/23), Bis in idem.

ECLI:EU:C:2025:515.

- *Beach and bar management EOOD against the Regional Tax Agency.*

- Request for a preliminary ruling from the Administrative Court of Burgas, Bulgaria.
- (Article 50 CFREU, Non bis in idem): EU law precludes the imposition of a financial penalty on a company that has already been closed on the basis of the same facts.
- (Article 49(4) CFREU, proportionality of penalties): EU law precludes an administrative sanction of a high amount without the court hearing a challenge to that measure having the chance to reduce it or grant another type of penalty.
- (Hospitality establishment that has concealed 85 sales; penalty of 14 days of closure; subsequent fine for each of the hidden operations).

2025 07 10 (E-715/23), Benedikt.

ECLI:EU:C:2025:548.

- *Pharmacy company against Benedikt City Council.*
- Reference for a preliminary ruling from the State Public Procurement Tribunal, Slovenia).
- (Directive 2014/23, on the award of concession contracts): for EU law, the operation of a pharmacy (supply, for remuneration, of medicines and provide advice on the correct use) is a matter outside the category of “non-economic services of general interest” (which are outside such regulation on concessions).
- This activity is included in the concept of “social services and other specific services” (only subject to publication of call for tenders and concessions).
- (pharmaceutical company challenges the council’s decision to grant, without prior call for concession, a license for a third party to operate a branch of a pharmacy).

2025 07 10 (C-257/24), Aachen Administration (Aachen).

ECLI:EU:C:2025:567.

- *School integration for children with disabilities.*
- Request for a preliminary ruling from the Higher Social Court of North Rhine-Westphalia (Germany).
- (Regulation 883/2004): EU Law on the Coordination of Social Security Systems does not apply to a school integration benefit for a child with disabilities, since its granting does not depend on objective data but on an individualised assessment.

- (Regulation 492/2011, freedom of movement): EU law precludes a school integration grant for a child with a disability (child of a cross-border worker) from being subject to that child residing in the national territory, since such a requirement goes beyond what is necessary to achieve the objectives pursued by said legislation.
- (A minor with a mental disability, living in Belgium; his mother is German and works in Germany full time; his father, Irish and an EU official, is stationed in the Netherlands; he is seeking help from the German administration in Aachen).

2025 08 01 (C-600/23), Real Seraing Football Club.

ECLI:EU:C:2025:617.

- *Royal Seraing Football Club against FIFA, UEFA and Belgian Federation.*
- Question referred for a preliminary ruling by the Cour de cassation (Court of Cassation, Belgium).
- (Articles 19, 267 TFEU and CFREU, effective judicial protection): EU law precludes the attribution of res judicata to a CAS award that is related to the practice of a sport as an economic activity.
- In order to give that effect to the award, it must have been reviewed beforehand, in an effective manner, by a court of that Member State which has the power to refer to the Court for a preliminary ruling.
- EU law precludes such an award from having probative value in the relations between the parties to that dispute and third parties.
- Article 47 CFREU guarantees effective judicial protection for any individual who relies, in a particular case, on a right or freedom conferred on him or her by EU law. Article 19 TEU ensures that the system of remedies established by any Member State ensures effective judicial protection.
- Apart from the rules applicable to the arbitration body, its awards must be capable of being subject to judicial review that ensures effective judicial protection (in the areas covered by EU law).
- The Belgian club (Royal Football Club Seraing) obtains financing from a Maltese company in exchange for transferring part of the federative rights of some of the players; FIFA imposes a fine and temporary transfer ban).

2025 08 01 (E-68/24), Commission v Belgium (Family Life).

ECLI:EU:C:2025:607.

- *European Commission v. Kingdom of Belgium.*

- Transposition of Directive 2019/1158 (work-life balance) ten months late violates the uniform and effective application of EU law, undermining equal treatment in the workplace between men and women.
- It is necessary for the State to adopt positive acts of transposition, without being a valid excuse the fact that its legal system already complies with the requirements of the Directive.
- Belgium is required to pay the Commission an amount of Euro 2 352 000.

2025 08 01 (E-68/24), Commission v Ireland (Family Life).

CJEU judgement of 1 August 2025 (C-69/24), Commission v Ireland (Family life).

ECLI:EU:C:2025:612.

- *European Commission v. Ireland.*
- (Directive 2019/1158, work-life balance): the lack of transposition of the figures on flexible work for childcare is serious as it impacts on the female workforce and their level of employment, but also on the promotion of a high level of employment in general.
- Ireland is required to pay the Commission the sum of Euro 1 540 000.

2025 08 01 (E-70/24), Commission vs Spain (Family Life)

ECLI:EU:C:2025:615

- *European Commission v. Kingdom of Spain,*
- (Directive 2019/1158, work-life balance): Parental leave of four months (two of which are non-transferable) must be taken before the child reaches the age of eight at the latest. The Member State or the social partners shall define the remuneration or financial benefit, in such a way as to facilitate its enjoyment by both parents.
- Failure to transpose Directive 2019/1158 completely and on a timely manner violates the uniform and effective application of EU law, undermining equal treatment in employment between men and women, and is therefore considerably serious.
- Failure to fulfil obligations must be assessed in light of the situation where the Member State is at the end of the period set in the reasoned opinion, irrespective of possible subsequent changes (RDL 9/2025).
- Spain must pay the Commission an amount of Euro 6,832,000 and Euro 19,700 per day, from the date of the judgement until the date the breach disappears.

2025 09 04 (E-249/24), Ineo.

ECLI:EU:C:2025:661.

- *Workers who terminate their contract as a result of their relocation*
- Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France).
- (Directive 98/59/EC, collective redundancies): the worker's refusal to transfer counts towards the purposes of collective redundancies if the employer's decision is binding or the change has been adopted by the company.
- Information and consultation of workers' representatives on geographical mobility may be regarded as constituting a consultation within the meaning of the Directive provided that the information obligations laid down in the Directive are complied with.
- (Company that loses a significant customer and proposes temporary geographical mobility to the 82 people affected; several of them reject it and seek termination of their contracts with severance).

2025 09 04 (C-253/24), Pelavi.

ECLI:EU:C:2025:660.

- *Honorary member of the judiciary against the Ministry of Justice.*
- Request for a preliminary ruling from the Court of Appeal of L'Aquila (Italy).
- (Directive 1999/70/EC, temporary employment): EU law precludes national law (intended to penalise the misuse of successive fixed-term employment contracts) which makes the application for serving honorary members of the judiciary (to participate in an assessment procedure in order to be confirmed up to the age of 70), subject to the requirement to waive the right to paid annual leave arising from EU law, relating to their previous honorary employment relationship.
- (Honorary judge with a long career who is stabilized, without ever having enjoyed paid vacations; simultaneously she is a lawyer in another district).

2025 09 04 (E-543/23), Gnattai.

ECLI:EU:C:2025:653.

- *Public teacher against the Ministry of Education.*
- Request for a preliminary ruling from the District Court of Padua.
- (Directive 1999/70/EC, fixed-term work): EU law does not preclude the law from not taking into account previous working time periods developed at equivalent education centres when the employees access a permanent position in public employment.

- There is no discrimination, even if previous experience in State educational establishments, in particular as permanent staff, is taken into account in such cases.
- (Teacher who gains a permanent position after providing temporary services in equivalent centres; the Ministry does not recognise his previous experience in those institutions).

2025 09 11 (C-5/24), Pauni.

ECLI:EU:C:2025:689.

- *Employee dismissed on absenteeism grounds against his company*.
- Request for a preliminary ruling from the District Court of Ravenna (Italy).
- (Directive 2000/78/EC, non-discrimination): EU law does not preclude the Law from maintaining the employment of the sick person for 180 days (paid) per calendar year, extendable (without remuneration) as long as it is considered necessary to ensure the worker's professional availability and it can be considered as a reasonable accommodation.
- It cannot be considered "reasonable accommodation" for employment to be maintained for 120 days (without pay) after the end of the first 180 days.
- (Waitress dismissed on absenteeism grounds due to illness which takes place for six months, which is the maximum legally provided for common cases; it can be extended for certain pathologies).

2025 09 11 (E-38/24), Berdivi.

ECLI:EU:C:2025:690.

- *Employee who looks after her child with disability and requests reasonable adjustments from her company*.
- Request for a preliminary ruling from the Supreme Court of Cassation (Italy).
- The protection of the rights of persons with disabilities also includes the prohibition of indirect discrimination by association.
- Employees without disabilities are protected when they are treated less favourably in employment when taking care of a child with disability.
- The employer's obligation to make reasonable accommodations extends to these workers who are associated with a person with a disability provided that (1) they provide essential assistance to that person and (2) the measures do not place an undue burden on the employer.
- (Metro Station Manager; lives with a minor son affected by serious disability and needs to attend evening treatments; the plaintiff applies

for a job with a fixed morning schedule; the company offers a provisional and partial solution).

2025 09 11 (C-115/24), Cross-border health.

ECLI:EU:C:2025:694.

- *Dentist against her Professional Association.*
- Request for a preliminary ruling from the Austrian Supreme Court.
- (Directive 2011/24/EU, cross-border healthcare): for the purposes of EU law, the concept of cross-border healthcare provided in the case of telemedicine, corresponds solely to healthcare provided, exclusively via information and communication technologies, to a patient by a healthcare provider established in a Member State other than that patient's Member State of affiliation, at a distance and therefore without that patient and that provider being simultaneously physically present in the same location.
- Telemedicine services must be provided in accordance with the legislation of the Member State in which the provider is established.
- (The Professional Association asks the Dentist to cease her remote collaboration with German entities that are not licensed in Austria, for example, by evaluating abnormal dental positions or performing an intra-oral scan, on behalf of these societies).

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Fide is a legal-economic think tank, an operational centre of practical knowledge, made possible thanks to the active participation of all sectors of civil society that have something to say on the matter: from senior management in companies to law firms, from university professors to courts of justice, from all levels of government to professionals in different fields related to the world of law and business. All of them have a place, and a privileged place, at Fide.

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The National Association of Labor Law Specialists has, for over twenty-five years, constituted the principal forum for Spanish labor law professionals, accompanying them both in their access to and subsequent practice of the profession. It stands as the most representative association at the national level, incorporating lawyers as well *graduados sociales*.

Among its core purposes are the advancement of specialization within the field of labor law, through the formalization of cooperation agreements with related legal actors, both domestic and international; the promotion of scholarly training activities and the dissemination of specialized publications; and the enhancement of the professional image, market visibility, and institutional participation of labor law specialists before public authorities, the judiciary, and civil society at large.

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The “*Foro Español de Laboralistas*” (Spanish Forum of Labour Lawyers) is an independent association, made up of prominent lawyers and jurists in the field of Labour and Employment Law, which fosters specialised knowledge of labour law, providing a meeting place that allows the exchange of professional experiences and the analysis –mostly from a juridical perspective –of the evolution of labour relations in Spain.

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34. La resolución del contrato de trabajo por voluntad del trabajador. El artículo 50 del Estatuto de los trabajadores
Antonio V. Sempere Navarro
(Director)
35. Problemas y retos pendientes en el ejercicio de los derechos de conciliación
Carolina Blasco Jover
36. Metaverso y relaciones laborales
Íciar Alzaga Ruiz y Francisco Javier Hierro Hierro
(Directores)
37. El contrato de trabajo
María Antonia Castro Argüelles

The application of European social law by the Court of Justice of the European Union, whose case law has been of great interest to legal practitioners in the Member States, some of which have been incorporated into legislative reforms of different European states' legal systems and all of them, necessarily, into domestic case law, even reinterpreting it on occasions, underlines the importance of the publication of this book, especially as it is written in English, a language commonly known and used by European jurists. Issues such as the concepts of worker and employer, equality and non-discrimination, collective dismissal, effective judicial protection, temporary employment, social security, the posting of workers, social dialogue, disability, and public procurement, along with many others of equal importance (notably the increase in references for a preliminary ruling from national courts on the application of the Charter of Fundamental Rights of the European Union), have been the subject of decisions by the judges of the ECJ. With this accumulation of new developments, the publication of this work on European Union social law offers clear and indisputable proof that knowledge of the case law of the ECJ is essential for anyone working in the field of labour law and social security and protection, whether in teaching, research, legal defence, administration, jurisdiction, collective bargaining, social dialogue and consultation, or legislation. It is well known that the case law of the ECJ, even when handed down in response to inquiries from courts in other states, has an immediate impact on the interpretation and application of EU legal systems. It is no exaggeration to say that, even at this point in time, its contribution to "Europeanization," to the integration of the Union's legal system into those of the different EU states, is so dense and relevant that it is unmanageable for any operator without knowledge of the Union's social law as interpreted by the ECJ.

