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Employment Newsletter

March 2005

CMS Employment and Pensions Group

This is the third in a series of European Newsletters to be issued by the CMS Employment Group. The objective of our Newsletters is to give information on different aspects of European labour law. They also contain aspects of national law. This third Edition gives an overview of the current labour and social security law projects being considered for European legislation and an update of the new Italian Employment law regulations and case law.

CMS is an alliance of at present nine major European law firms with a work force of approximately 2000 lawyers present in 24 jurisdictions. The CMS Practice Group Employment and Pensions consists of more than 140 partners and associates representing the labour law departments of the various CMS member firms.

The labour law departments of each CMS firm have a long history of close association and command strong positions, both in our respective homes and on the international market. Individually we bring a strong track record and extensive experience. Together we have created a formidable force within the world's market for professional services. The member firms operate under a common identity, CMS, and offer clients consistent and high quality services.

Members of the Practice Group advise on labour law and social security issues affecting business across Europe. The group was created in order to meet the growing demand for integrated, multi-jurisdictional legal services.

Employment and pensions issues can be particularly complex as there is such a wide range of different laws and regulations affecting them. The integration of our firms across Europe can simplify these complexities, leaving us to concentrate on the legal issues without being hampered by additional barriers. In consequence we offer coordinated European advice through a single point of contact.

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I. Temporary workers

Proposal for a Directive of the European Parliament and the Council on the working conditions for temporary workers - Overview of the main principles of the proposed directive

This Proposal aims to protect temporary workers who are bound by contracts of a limited duration. It sets out the principle of non-discrimination in working conditions: temporary workers shall be granted, for the duration of their posting at a user undertaking, at least the same basic working and employment conditions that would apply if they had been recruited directly by the undertaking to carry out the same job.

I.1. Aim

The purpose of this Directive is:

1. to ensure the protection of temporary workers and to improve the quality of temporary work by ensuring that the principle of non-discrimination is applied to temporary workers and by recognizing temporary agencies as employers;

2. to establish a suitable framework for the use of temporary work so that it can contribute to creating jobs and the smooth functioning of the labour market.

I.2. Scope

The Directive will be applicable to workers with an employment contract or employment relationship with a temporary agency who are posted to user undertakings to work temporarily under the supervision of those undertakings.

The Directive will apply to public and private undertakings engaged in economic activities whether or not they are operating for gain, and which are temporary agencies or user undertakings.

In very specific situations indicated by the Directive, Member States could provide that the Directive does not apply.

I.3. Review of restrictions or prohibitions

Prohibitions or restrictions on the use of temporary work are justified only on the grounds of general interest relating in particular to the protection of temporary workers, the requirements of health and safety at work and the need to ensure that the labour market functions properly and abuses are prevented.

Therefore the Member States have the obligation to review any restrictions or prohibitions mentioned above in order to establish whether they are justified on the above grounds. If they are not justified, the Member States cannot continue to impose such restrictions or prohibitions.

I.4. Employment and working conditions

I.4.1. The principle of non-discrimination

The **basic working and employment conditions** of the temporary workers shall be, for the duration of their posting at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to carry out the same job.

As regards **pay**, the Member States may, after consulting the social partners, provide that an exemption is made to this principle when temporary workers who have a permanent contract of employment with a temporary agency continue to be paid in the time between postings.

The Member States could derogate by collective agreement from the principle of non-discrimination as long as an adequate level of protection is provided for temporary workers.

An exception could be made for assignments which last less than six weeks.

I.4.2. Access to permanent quality employment

Temporary workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment.

I.4.3. Representation of temporary workers

Temporary workers shall count, under the conditions established by the Member States, for the purposes of calculating the threshold above which bodies representing workers (provided for under Community and national law and collective agreements) are to be formed **at the temporary agency**.

Member States may provide that, under conditions they define, these workers count for the purposes of calculating the threshold above which bodies representing workers (provided for under Community and national law and

collective agreements) are to be formed **in the user undertaking**, in the same way as if they were workers employed directly for the same period of time by the user undertaking.

I.4.4. Information of workers' representatives

The bodies representing the workers are entitled to receive from the user undertaking appropriate information on the use of temporary workers when providing information on the employment situation in that undertaking.

I.5. Minimal requirements

The Directive sets the minimal requirements. It does not prejudice the Member States' rights to introduce or apply provisions which are more favourable to temporary workers. However, the implementation of the Directive shall under no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of temporary workers in the field covered by this Directive.

I.6. Implementation

In principle a period of two years after adoption of the Directive is stipulated for its implementation.

Status of legislative work

The key difficulty regarding this Directive is disagreement within the Council regarding the moment as from when the Directive will apply to the temporary worker. Initially a threshold period of six months had been decided. However, since most of the temporary contracts are of a duration of 6 months or less, most of the temporary workers would be excluded from the application of the Directory. Debate on this is on going.

II. Working time

Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time - Overview of the main principles of the proposed directive

This Proposal amends Directive 2003/88/EC concerning certain aspects of the organisation of working time on two grounds:

1. The review of some provisions of the Directive 2003/88/EC is imposed by the Directive itself. These provisions concern the derogations to the reference period for the application of Article 6 (maximum weekly working time) and the possibility not to apply Article 6 if the worker gives his agreement to carry out such work ("*opt-out*").
2. The interpretation of certain provisions by the European Court of Justice on the occasion of several requests for preliminary rulings had a profound impact on the concept of "*working time*" and consequently on essential provisions of the Directive. The Commission considered that it was necessary and convenient to analyse the effects of this case law, in particular of the rulings of the SIMAP[1] and Jaeger[2] cases, which held that on-call duty performed by a doctor when he is required to be physically present in the hospital must be regarded as working time.

II.1. Definitions

The definitions of "*working time*" and of "*rest period*" given by the Directive 2003/88/EC remain unchanged. The proposal however inserts two new definitions: "*on-call time*" and "*inactive part of on-call time*".

These two new definitions introduce a concept into the Directive which is not strictly speaking a third category of time, but a mixed category incorporating, in different proportions, the two concepts of "*working time*" and of "rest period". The proposed notion of "*on-call time*" covers situations in which the worker must stay at the workplace.

The new definitions provided for by the Proposal are:

> *"on-call time": period during which the worker has the obligation to be available at the workplace in order to intervene, at the employer's request, to carry out his activity or duties.*

[1] Court of Justice, 3 October 2000, case C-303/98, Sindicato of Médicos of Asistencia Publica (SIMAP) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana, ECR 2000, p. I-07963.

[2] Court of Justice, 9 October 2003, case C-151/02, Reference for a preliminary ruling: Landesarbeitsgericht Schleswig-Holstein (Germany) in the proceedings pending before that court between Landeshauptstadt Kiel and Norbert Jaeger, not yet published.

"inactive part of on-call time": period during which the worker is on call within the meaning of on-call time but not required by his employer to carry out his activity or duties.

II.2. Working time

The inactive part of on-call time shall not be regarded as working time, unless national law or, in accordance with national law and/or practice, a collective agreement between the two sides of industry decide otherwise.

The period during which the worker carries out his activity or duties during on-call time shall always be regarded as working time.

II.3. Reference period

(article 16)

The standard reference period would remain 4 months. However, Member States could extend this period up to one year, subject to the consultation of concerned social partners and to the encouragement of social dialogue in this matter.

It is also specified that, whenever the duration of the employment contract is less than one year, the duration of the reference period can under no circumstances be longer than the duration of the employment contract.

II.4. Periods of rest

Periods of daily and weekly rest are established by Articles 3 and 5 of the Directive: 11 consecutive hours per period of 24 hours and 24 hours plus the 11 hours of daily rest for each seven-day period.

It is however possible to derogate from these two provisions. In such cases, workers must, in principle, be granted an equivalent period of compensatory rest. The modification aims to clarify that the periods of compensatory rest have to be granted within a reasonable time and in all the cases, within a time limit not exceeding 72 hours.

II.5. Maximum weekly working time (article 22)

The Directive 2003/88/EC establishes the principle of the maximum weekly working time (48-hours week - Article 6).

The existing Article 22 is modified in order to establish the conditions to be met by the Member States who want to make use of the option not to apply Article 6.

If Article 6 is not to apply, this must be authorised by a collective agreement or an agreement between the social partners at the appropriate level. However, this authorisation is not required when a collective agreement is not in force and there is no collective representation of workers within the undertaking or the business that is empowered, in accordance with national law and/or practice, to conclude a collective agreement or an agreement between the two sides of industry on this issue. In such cases, an agreement between the employer and the worker can be concluded, in accordance with the established conditions.

In any case, the employer will have to obtain the worker's consent to work more than 48 hours a week, calculated as an average for the reference period referred to in Article 16.

The worker's agreement has to be given in writing, not at the beginning of the employment relationship nor during any probation period, its validity is limited in time, an absolute maximum limit of weekly working hours is fixed and the obligation of keeping registers is imposed on the employers.

Status of legislative work

Three points are still in discussion:

a) There is an agreement in the Council on the principle that there should be a mention of "*on-call time*".

   In the medical sector this notion is very well known. Doctors are often on "*on-call time*". In the SIMAP and Jaeger cases (see footnotes 1 and 2) this on-call time has been considered as working time when performed by a doctor who is required to be physically present in the hospital. There is much opposition against these decisions. Many employers want to change this principle. However, there is much opposition from the doctors' unions who want to maintain the principle.

b) The reference period for the calculation of the "average" working time. Initially this reference period was fixed at four months, with the possibility of extension up to 1 year by collective bargaining agreement. However, some Member States do not have a tradition of (national) collective bargaining agreement (for example the UK).

   Therefore the proposition has been made to modify the possibilities of extension. The basic reference period of four months cannot only be extended by collective bargaining agreement but also by the government of the Member States. There exists more or less an agreement on this point.

c) The 48 hours-week: discussion remains on the question of whether

or not to maintain the maximum limit of 48 hours. One third of the Member States is in favour of the maintaining of the limit, one third want to abolish it, the last third want to have it adapted as provided for in Article 8 of the proposal.

III. Social security

III.1. Migration of workers

III.1.1. A new Directive on the coordination of social security systems

Regulation N° 1408/71 on the application of social security systems to employees and self-employed workers and to their family members, who move within the Community, coordinates the social security systems of the different Members States in order to protect the rights of the persons who move within the EU.

Regulation N° 1408/71 was adopted in 1971. It has over the years been subject to many changes as a result of the rulings of the European Court of Justice or changes in the national legislation of the Member States. Due to these changes, the provisions of the Regulation have been extended and have become more complicated.

A Corrigendum to Regulation (EC) n° 883/2004 on the coordination of social security systems has been adopted by the European Parliament and the Council of the European Union on 29 April 2004.

The new Regulation simplifies and replaces the Regulation N° 1408/71. It is the basic text for questions about the statute of migrating workers. The Regulation is not yet in force. Therefore an implementation regulation by the Council is required, which is planned in 2006.

III.1.2. Some important changes

In the framework of this Newsletter an overview of the main changes with regard to the scope of application, applicable law and secondment will be given.

1. The scope of application

Persons covered (Article 2)

1. The new regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.
2. It also applies to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.

Change: persons who do not belong to the "active" population but who are or have been subject to a social security system are also covered.

Since 1 June 2003 the provisions of Regulation N° 1408/71 and N° 574/72 also apply to the nationals of third countries who legally reside in the territory of a Member State. For Denmark, Iceland, Norway, Liechtenstein and Switzerland, this extension of the scope to nationals of third countries does not apply. For this reason, the text of the new Regulation has kept the mention of "nationals of a member state". Except for the aforementioned countries, the new Regulation thus also applies to nationals of third countries.

Matters covered (Article 3)

The new Regulation has adopted an exhaustive list of the branches of social security that come under the Regulation. The material scope of application has been extended to include pre-retirement benefits and paternity benefits equivalent to maternity benefits.

2. Applicable law

The principle of the exclusive application of one social security system has been confirmed and re-enforced. This means that only one social security system of one Member State can apply at any one time.

The current Regulation provides for exceptions to this principle: if a person works as an employee in one Member State and as a self-employed worker in another

Member State, in a number of situations, it is still possible that more than one social security system applies. These situations are regulated in the appendix VII of the current Regulation.

Under the new Regulation it will no longer be possible to be subject to more than one social security system. The appendix VII has been abolished.

3. Secondment

The maximum period of secondment which, under the current Regulation is 12 months (extendable in certain circumstances) is extended to 24 months.

The possibility for the Member States to depart from the secondment period by mutual agreement (Article 17 of the current Regulation) is maintained.

III.2. European Health Insurance Card

From 1 June 2004 onwards, European citizens who are travelling within the European Economic Area, (i.e. the European Union, Norway, Iceland and Liechtenstein) and Switzerland, for private or professional reasons will be given a European Health Insurance Card, which will simplify the procedure when receiving medical assistance during their stay in a Member State.

This card will be in force in June 2005 in half of the Member States and by the end of 2005 year in all of the Member States.

It replaces certain forms a migrating worker is supposed to carry with him when moving within the Community (E111 and E111bis, E110, E128, E119).

III.3. Free movement

As from 1 May 2004, ten new Member states (Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia) joined the EU.

With regard to the access to the labour markets of the old Member States, the rules of free movement of workers only apply to the nationals of the new Member States subject to a transitional period (Act of Accession, Part Four, Title 1).

For the first two years following the accession of the new Member States (1 May 2004), access to the labour markets in the old Member States will depend on the national law and policy of those states as well as any bilateral arrangements they may have concluded with the new Member States. In practical terms this means that the workers of the new Member States may need a work permit during the period in which national measures stipulated by the old Member States still apply.

At the end of the first two years following the accession (1 May 2006), the Commission will draft a report, on the basis of which the Council will review the functioning of the transitional arrangements set out in the Act of Accession. Moreover, it will be necessary for each of the old Member States to make a formal notification to the Commission indicating whether they intend to continue to apply national measures for a maximum of three more years (i.e. work permit needed) or whether they will apply the Community law regime that grants full free movement of workers (i.e. no need for a work permit).

At the end of 2005 (or beginning of 2006) the Commission will issue a report on the situation in the employment markets.

Sweden, UK and Ireland are the only countries which did not apply restrictions.

On 1 May 2006 the old Member States will decide whether they continue to apply the restrictions.

2006 will be the European Year of Mobility for workers. Campaigns will be organized in order to encourage companies to organize the moving of workers and to encourage workers to move. Questions remain however on issues like housing, resident cards etc.

III.4. Portability of pensions

A proposal for a Directive will be issued in May or June 2005, regarding the portability of pensions.

The pensions' issue is often a problem for migrating workers when moving from one Member State to another.

The difficulty remains in the fact that a trans-national situation is being regulated, where also the national legislation should be examined.

The important issue in this respect is the tax issue.

IV. Health and Safety

IV.1. Telework and work-related stress

The social partners have concluded (voluntary) agreements on telework and stress.

IV.1.1. Telework

The social partners signed on 16 July 2002 a cross-industry framework agreement on telework (the European Trade Union Confederation, UNICE, UEAPME and CEEP).

This agreement defines telework and its scope and sets up a general framework at European level for teleworkers' working conditions. It aims to ensure that teleworkers are afforded a general standard of protection equivalent to workers on employers' premises.

It is a voluntary agreement which aims at establishing a general framework at the European level to be implemented by the members of the signatory parties in accordance with national procedures and practices specific to management and labour. The signatory parties also invite their member organizations in candidate countries to implement the agreement.

The agreement lists the issues that should be clarified between employer and employee to ensure satisfactory telework.

The implementation of the agreement will be carried out within three years after the date of signature of the agreement.

Member organisations will report on the implementation of the agreement.

The social partners will review the agreement five years after date of signature if requested by one of the signatory parties.

IV.1.2. Work-related stress

On 8 October 2004 the four major European social partner organisations signed a framework agreement on work-related stress. The agreement was then presented to the European Commission. It is to be implemented by the members of the social partners ETUC (European Trade Union Confederation), UNICE/EEAPME (Union of Industrial and Employers' Confederations in Europe, European Association of Craft, Small and Medium-sized Enterprises), and CEEP (European Centre of Enterprises with Public Participation and Enterprises of General Economic Interest), rather then by European legislation.

The agreement focuses on work-related stress and aims at increasing the understanding of employers and workers of work-related stress and proposes a method for identifying problems and dealing with them.

The agreement contains a commitment on the part of the aforementioned social partners to implement the agreement in accordance with the practices specific to management and labour in the member States.

Comments

According to Article 138 of the EU Treaty, the Commission has to consult the European social partners before submitting proposals in the social policy field. On the occasion of such consultations, the social partners can then decide to deal with the subject under consideration through negotiations at EU level. According to Article 139 of the EU Treaty, to implement an agreement concluded at European level, the social partners can:

- either ask the Commission to transmit their agreement to the Council who then turns it into EU legislation;
- or rely on their members to implement it in accordance with the procedures and practices specific to the social partners in the Member States.

Five framework agreements have been concluded so far by the European social partners respectively on parental leave, part-time work, fixed-term contracts, telework and work-related stress. The first three were implemented by a Council Directive.

After telework, work-related stress will be the second issue leading to an autonomous agreement to be implemented by the members of the European social partners. In its communication on enhancing the contribution of European social dialogue (MEMO/04/211) the Commission highlighted the importance of such autonomous agreements and the European role of the social partners.

The voluntary agreements are considered as a new way to regulate certain

issues. They are meant to encourage the Member States to take actions on national level.

The objective is now to see how these agreements work in practice. If they make no difference, consideration will be given to whether legislation is still required in this respect.

IV.2. Optical radiation

A proposal was adopted by the Council in December 2004 with regard to protection against optical radiation (laser, bright sunlight etc.)

IV.3. Musculoskeletal disorders

The Advisory Committee on Safety, Hygiene and Health protection at work (ACSHH) has made several recommendations to the Commission with regard to musculoskeletal disorders (MSD). These disorders include back pain and repetitive strain injuries (RSI) and are the biggest health and safety problem facing European workers today. In an Opinion (Doc. 0983/1/01, adopted 15 May 2001) as a result of a study made by the Ad hoc group "MSD", the members of the group have recorded that MSD constitutes a serious health problem for employees and for the development of European companies. MSD accounts for between 40 and 50% of all work-related ill-health and affect over 40 million workers in the EU (in 2000). As a result, the EU's competitiveness is being considerably reduced by the social and economic impact of MSD.

Therefore, the Advisory Committee has recommended that the Commission gives consideration to further regulatory initiative on this issue.

In November 2004, the Commission issued a consultation document asking the workers and employers what actions should be taken to combat musculoskeletal disorders. They were being asked whether they would like to see new Community legislation or whether they would prefer voluntary measures or a combination of binding and non-binding measures and what the main focus of the preventive measures should be. The Commission awaits for the results of the consultation.

V. Equality and non-discrimination

In May 2004 the European Commission issued a Green Paper on Equality and non-discrimination. The introduction says:

"Five years ago, huge impetus was given to the fight against discrimination in the European Union when new powers were granted to tackle discrimination on grounds of sex, racial or ethnic origin, religion or belief, age, disability and sexual orientation.

This Green Paper sets out the European Commission's analysis of the progress that has been made so far. It seeks views about how the EU can continue and reinforce its efforts to combat discrimination and to promote equal treatment. In so doing, it responds to calls from the European Parliament and others to organize a public consultation on the future development of policy in this area. (...)

Section 2 of this Green Paper takes stock of what the EU has done during the last five years to combat discrimination and to promote equal treatment. It looks at how these initiatives relate to other policy developments at European and international levels.

Section 3 examines new challenges that have emerged in recent years, including those linked to the enlargement of the EU. It assesses the implications of this changing context for policy development in the field of non-discrimination and equal treatment.

The results of the consultation exercise will help to shape the European Commission's future policy strategy with regard to non-discrimination and equal treatment. They will feed into the reflections of the new Commission that will take office in November 2004. They will be taken into account in the drafting of the EU's new Social Policy Agenda which should be approved during 2005. (...)"

Responses to this Green Paper were collected principally using an on-line questionnaire. The public consultation period began on 1 June 2004 and ended on 31 August 2004.

1443 responses were collected from over 30 countries.

45% of those who responded found that the impact of European legislation was limited on the level of protection in the EU against discrimination on grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation.

Incomplete national implementation legislation and the continued existence of discriminatory attitudes and behaviours were found to be the main obstacles to the effective implementation of European anti-discrimination legislation.

The main areas on which future activities should concentrate were identified as discrimination outside the employment field (education, social security, health care, access to goods and services, housing) (81,2%) and employment and the workplace (65,9%).

The majority agreed strongly on the fact that efforts to tackle sex discrimination in the EU should be linked more closely to efforts to tackle discrimination on grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation. In the same way the majority agreed strongly on the fact that is remains necessary to tackle specifically sex discrimination and the promotion of gender mainstreaming.

A communication will come out at the end of 2005 which will follow up the Green Paper and will also look into the legislative site of discrimination. It will examine if there is a need to strengthen certain areas. There is strong demand for that resulting from the public consultation.

VI. Areas subject to possible changes - no proposals yet

VI.1. Economically dependent workers

In the year 2000 the Commission raised the issue of economically dependent work in the consultation of the social partners on the modernisation and improvement of employment relations. The social partners and the Commission agreed that more information and research was necessary.

A study was made on the subject (by Adalberto Perulli): *"Economically dependent/quasi-subordinate (parasubordinate) employment: legal, social and economic aspects"*.

In legal terms economically dependent workers are self-employed workers. The basic and common characteristic of these workers is that they are self-employed in so far as they work at their own risk and are not subordinate to an employer. At the same time they are economically dependent in the sense that they are more or less exclusively reliant on just one client enterprise.
At this stage there are no specific plans yet with regard to this issue.

VI.2. Data protection for workers

In the summer of 2001 the Commission launched a first stage consultation of the social partners on the protection of workers' personal data. The social partners were asked to give their opinion on the possible direction of a Community action in this field.

There are currently, at Community level, two Directives in the field of Data Protection: the general Directive 95/46/EC concerning the protection of individuals with regard to the processing of personal data and the free movement of such data, and the Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the telecommunication sector.

However, there is a concern that these Directives are not specific enough (regarding for example health, disability...). With one exception these Directives do not contain any sector specific provisions on the processing of data in the employment context. Taking this into account, the social partners

were asked if, in their opinion, these Directives, as implemented in the Member States, adequately address the protection of workers' personal data. They were in particular asked if it is advisable that the Community takes an initiative in this field.

There is a widespread consensus among the social partners as regards the importance of the question of personal data processing in the employment context.

The employers' organisations do not see any need for Community legislation, namely a Directive, on this subject. The existing Directive 95/46/EC is considered adequate and sufficient to ensure high quality protection of workers' personal data. However, all employees' organisations are in favour of a Community Directive on this matter.

The Commission has come to the conclusion that a European framework of common principles and rules is needed aiming at the protection of workers' personal data while striking a balance between the employers' legitimate interests and the workers' right to privacy.

Discussions are continuing within the Commission with regard to whether this issue should be brought onto the social political agenda (on 9 February 2005 the Commission will decide on the issue of broadening the agenda).

VI.3. Social aspects of corporate restructuring

A communication will be issued by the Commission to consult with the social partners on how to deal with situations of restructuring (collective dismissal, insolvency of the employer etc.).

One issue is how companies can be encouraged to invest in training programs, outplacement services etc. in order to prepare the workers who would be confronted with situations of dismissal because of corporate restructuring.

Source

Website of the European Union: www.europa.eu.int

VII. Additional information

VII.1 Mass dismissals - European Court of Justice in Junk v. Kühnel, C-188/03

The German view

The European Court of Justice (ECJ) has recently had to judge whether the interpretation of regulations in the German Termination Protection Act (TPA, Kündigungsschutzgesetz) by the Federal German Labour Court complies with the EC regulations on mass redundancies. With its decision Junk v. Kühnel (27 January 2005, C-188/03) the ECJ concluded that they did not comply. The impact on recent and forthcoming mass redundancy proceedings is now uncertain and will have to be considered carefully by companies who have recently dealt with such procedures in Germany or are planning to do so.

Mass redundancies are subject to the Council Directive 98/59/EC. The directive demands information and consultation procedures with the workers representatives (cp.Art.2) as well as the notification of public authorities (cp. Art.3, 4) prior to any mass dismissal. The latter condition has been implemented by German legislation under Section 17, 18 TPA. According to these regulations employers have to notify the so called "Agentur für Arbeit", if they plan to make a relevant number of employees, which depends on the size of the company in question, redundant within a 30 day period. Usually notifiable redundancies may not become effective prior to the expiration of one month following the date of notification.
Until now it was accepted that the meaning of "redundancy" in Sections 17, 18 TPA does not refer to the act of giving notice of the dismissal to the respective employee or to the act of concluding a termination agreement, but rather to the date at which the employment relationship comes to an end. In normal cases this is the date at which the notice period expires. According to this interpretation there was no obligation to notify the public authorities, even though the total number of employees to be made redundant exceeded the crucial number, if less than such number of employment relationships came to an end within any 30 day period following the announcement of the need for redundancies. Therefore, it was to some extent possible to avoid mass dismissal procedures by using different notice periods. Beyond

this the Federal Labour Court held that a dismissal which was part of a mass dismissal shall not be null and void if the employer failed to duly inform the authorities, but would not be effective if notification was missing.

With its recent decision the ECJ overruled this long standing German interpretation of Art. 2 - 4 of the Council Directive 98/95/EC. "Redundancy" according to the meaning of the directive shall refer to the employer's announcement of his intention to bring employment to an end. To be consistent with this decision, it is to be expected that German labour courts will interpret Sec. 17, 18 TPA accordingly from now on. In consequence the date at which each single employment relationship comes to an end may no longer be relevant. Moreover it is not certain whether the labour courts will still accept that mass dismissals issued or (mass) termination contracts concluded without prior notification of the "Agentur für Arbeit" are not void.

However, for the time being employers who fail to duly notify might still have some hope. Referring to a decision of the Federal Labour Court pronounced 18. 9. 2003 (2 AZR 79/02) the regulations of the Directive 98/59/EC do not directly apply to employment relations but need to be implemented by the German legislation into the national laws. Furthermore, as to the wording of the national law and to the intention of the German legislator it shall not be possible to interpret the current wording of Sec. 17, 18 TPA in line with the ECJ judgment. However, keeping in mind the supremacy of Community law as well as the obligation to interpret national laws - if possible - in line with the principles of Community law one may nevertheless doubt whether the labour courts will still follow this interpretation in the future. In any event the fact that each Member State of the EC must abstain from any measure which could jeopardize the attainment of the Community's objectives means that the German legislator is called up to take action!

The UK View

This decision is likely to have a significant impact on the way mass dismissals (collective redundancies) are carried out in the UK.

UK employers must consult appropriate employee representatives when they are "proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less" (s188 Trade Union and Labour Relations (Consolidation) Act 1992). The consultation must begin in good time and in any event at least 30 days before the first of the dismissals takes effect. Where 100 or more employees are to be made redundant the consultation period is at least 90 days before the first of the dismissals takes effect.

It is well established that it is vital to start the consultation process before giving any notices of dismissal to employees as this reinforces the fact that consultation is genuine. However it had been decided that it is lawful to give employees notice of dismissal before the end of the relevant consultation period, provided that notice does not expire before the end of the "consultation" period.

The ECJ judgment means that the consultation period and the notice period should no longer run concurrently. According to this judgment, consultation must now begin at least 30 days (or 90 days if appropriate) prior to the date when notice of dismissal is given. This means that collective redundancies are likely to take longer as employers allow employees to work out their notice in addition to the consultation period.

Although it is likely that employment tribunals will do their best to interpret UK legislation in line with this decision, as in Germany, there will be considerable debate whether UK redundancy legislation properly implements the Directive and therefore how this judgment affects UK redundancy law and practice.

VII. 2 New Publication

Cross-Border Transfers and Redundancies, *General Editor Susan Mayne, CMS Cameron McKenna, with a team of specialist contributors, Tottel Publishing 2005 ISBN: 1845920163.*

The CMS alliance is often called upon to advise international clients on the legal and commercial implications of their businesses transferring or being reorganized across European borders. However, there is still a great deal of confusion regarding the precise effect of the relevant European legislation and case law in this area.

In response to this the CMS Employment Group has written "Cross-Border Transfers and Redundancies", a practical guide to managing the employment aspects of business transfers and reorganisations across different European jurisdictions.

"Cross-Border Transfers and Redundancies" was published on 21 January 2005. It includes introductory chapters on the common legal and regulatory framework that has been established across the European Union, dealing with the current position in relation to business transfers, collective redundancies, the information and consultation of employees and jurisdictional and conflicts of laws issues. The principal pieces of European legislation in relation to these issues are reproduced in full.

The CMS Employment Group has used its knowledge of the difficult employment law-related issues that commonly arise in relation to cross-border transfers and reorganizations in practice to draft three case studies. In addition to summarizing the manner in which the governments of their respective countries have implemented the relevant European legislation into their domestic law, each CMS firm has produced responses to these case studies from its own national perspective. In this way, the country-by-country guides that make up the bulk of the book allow the reader to compare and contrast the different approaches that have been taken in the different European jurisdictions and see the effect this has in practice.

If you would like more information about this book or how the CMS Employment Group can advise your business on cross-border employment issues, please contact your regular CMS adviser or Bernd Roock, the Chairman of the CMS Employment Group, at bernd.roock@cmslegal.de

Italian Employment Law Update

I. New Italian employment law regulations

I.1. New rules for the Italian Employment Law System

In accordance with European employment policy, new rules for the Italian employment legal system have been introduced which aim at bringing into the Italian job market modern forms of flexibility, using both brand new as well as amended employment instruments.

These new regulations were provided for by Legislative Decree n. 276 dated 10 September 2003. This Legislative Decree, also known as the "*Marco Biagi Law*", is made up of eighty-six articles, divided into nine sections.

The main innovations concern: new rules for a better balance between the demand and the supply of work in the Italian employment market; new/ partially-new employment contracts; new business transfer rules; more flexible employment contracts and the new possibility of certifying (with a specific and totally new procedure) any employment contract in order to prevent potential, but very common disputes, arising out of the nature of the agreement.

The key points of Legislative Decree 276/2003 (L.D. 276/2003) and the current status of the new and/or amended employment instruments are:

- **New employment services** - the Legislative Decree provides for new rules in order to improve meeting the demand versus the supply of work in the Italian job market. New agencies for the supply of employees have been established and need to be authorized at a national and regional level. Agencies have been connected to a more widespread and technological system ("*Borsa Nazionale del Lavoro*") coordinated by the Ministry of Employment.

  Various circulars and Decrees have contributed to the construction of the new employment services. The system is currently in its initial stages, since all authorizations (national and local) have yet to be achieved by the agencies.

  New regulations are also in place for work supply contracts, employee's transfers and business transfers:

- **Work supply** has been liberalized and may now be provided for pre-fixed term employment contracts (only to meet technical/productivity needs or temporary needs provided for by collective bargaining) and even for non-fixed term employment contracts (only for specific activities listed in L.D. 276/2003). New rules for work supply contracts have been fully operative since 2 July 2004.

- **Employee's transfers** are expressly regulated in detail in the Italian Law 276/2003 (Article 30 L.D. 276/2003). Beforehand no specific rules were in place.

- **Business transfers** - Article 2112 of the Italian Civil Code (employee's rights in business transfers) has been modified by the Italian decree. According to article 32 of L.D. 276/2003 the transferor and transferee may now freely identify the branch which will be transferred; on the other hand a more strict liability is provided for the transferor and transferee. New rules for business transfers have been fully operative since 24 October 2003.

In order to achieve greater flexibility within the Italian employment system, L.D. 276/2003 amended part time work contracts and provided for two other new contractual forms:

- **Job sharing contract** ("*contratto di lavoro ripartito*") - with this contract two employees take on a single joint work obligation. Job sharing was originally governed by the 1999 collective bargaining agreement for service and it has been now fully operative since 24 October 2003.

- **Job on call contract** ("*contratto di lavoro a chiamata*") - with this contract the employee is at the employer's disposal to carry out discontinuous and intermittent work

activities (work categories are fixed by National Collective Bargaining Agreement), or for carrying out work only during predetermined periods (periods are provided for in L.D. 276/2003). This particular contract may be stipulated as being with or without an "indemnity for availability" to be granted to the employee in the event the employee chooses to stay bound to the employer's call. Only unemployed workers younger than twenty five years or older than forty five may enter into this contract. New rules for this particular kind of contract are now fully operative.

The two Italian apprenticeship agreements ("*contratto di apprendistato*"; "*contratto di formazione e lavoro*") have also been modified:

- Apprenticeship agreement ("*contratto di apprendistato*") - the training purpose has been focused on and the agreement is now possible in three different forms, according to the age and the target the employee wants to achieve (i. school decree; ii. work experience; iii. specialist decree). The new apprenticeship agreement, in order to be fully operative in Italy, requires the local/regional implementation, to be agreed upon together with the Trade Unions. At the moment few Regions have approved the new apprenticeship agreement.

- "Contratto di inserimento" (old "*contratto di formazione e lavoro*") - is now used only to introduce future employees to the job market. Beforehand this contract ("*contratto di formazione e lavoro*") also had a training finality. The employee's introduction to work is carried out via an "*individual project*" with the employer (an essential element of the contract). Only a specific list of employees and employers, provided for by Article 54 of Legislative Decree 276/2003, may enter into this contract.

  The features of the "individual project" must be fixed by the Trade Unions. At this moment no national collective bargaining agreement provides for the individual project. An agreement between Trade Unions regulates this transitory phase and gives this new contract effect.

  Significant changes are also carried out by another new contractual form and a new specific procedure used to strengthen the validity of contracts:

- "Contratto di lavoro a progetto" - this new kind of contract has a relevant role to play in the new employment system. Article 61 of L.D. 276/2003 regulates the most common Italian work contracts for self-employed workers ("*contratto di collaborazione coordinata e continuativa*"). Previously, these widespread work contracts were not governed by any specific regulation and were therefore subject to frequent illegitimate use. The "*lavoro a progetto*" contract is a specific cooperation contract for self-employed workers ("*contratto di collaborazione coordinata e continuativa*") which is distinguished by a work project or program (or phase of a project) essential for the validity of the contract. L.D. 276/2003 expressly lists the workers which cannot subscribe to a "*contratto di lavoro a progetto*". The new contract rules are now fully effective.

- A Certification procedure has been provided for employment contracts, in order to prevent potential, but very common disputes, arising out of the nature of the agreement (subordinate contract; pre-fixed term contract; management contract, etc). This procedure is voluntary (requested by both employee and employer) and experimental (the effectiveness will be verified by the Ministry of Employment in October 2005). The procedure ends with a motivated certification act, which may be appealed before Employment Courts. The procedure has been effective since 15 December 2004 (Ministry of Employment Circular n. 48/2004).

I.2. New working-time rules

With Legislative Decree 213/2004, the Italian Government amended the previous Legislative Decree (66/2003) which had implemented the Directives of the European Parliament and Council n. 93/104/CE and n. 2000/34/CE dealing with the regulation of working hours. Legislative Decree 213/2004 entered into force on 1 September 2004.

The new Decree mainly focuses on the penalties for violating working-time rules. Such punitive provisions were only mentioned generally in the previous Italian Legislative Decree (66/2003).

Furthermore, a specific new provision for untaken holidays must be highlighted. A new rule, indeed, states that holidays (four paid weeks per year) may be spent consecutively, for at least two weeks, if the employee so demands.

II. Case Law

II.1. European Case Law on working time rules

With reference to working time rules, a recent European judgement must be pointed out: **Judgement of the European Court (Grand Chamber) of 5 October 2004 in joined Cases C-397/01 to C-403/01**

References for a preliminary ruling under Article 234 EC, from the Arbeitsgericht Lorrach (Germany), made by orders of 26 September 2001, received at the Court on 12 October 2001, in the proceedings Bernhard Pfeffer (C-397/01), Wilhelm Roith (C-398/01), Albert Sufi (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01), Matthias Dobele (C-403/01) v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV.

In the above cases the Court established the following principle.

The rule provided for by Directive 93/103/EC which regulates the maximum duration for which one may work (forty-eight hours per week), may not be derogated from by any collective bargaining agreement, because such derogation is subject only to the verification of the existence of the employee's consent, expressly and freely given.

In order to determine the total working time period, all working phases must be taken into account, including all non-working time periods during which the employee is in the office.
Regulations provided for by a Directive of the European Parliament and Council, which have direct effect, may by brought before national Courts only in trials against the Member State. Rules provided for by any EC Directive may not apply to trials between private citizens, but national Courts must take into consideration the principles laid down by the Directive in the interpretation of their national law.

The first part of this decision will have an important impact on Italian working time rules. Indeed, Italian regulations with regard to working time (Legislative Decree 66/2003; Legislative Decree 213/2004) often delegate relevant aspects to collective bargaining agreements. In particular, Article 4 of Legislative Decree 66/2003 states that collective bargaining agreements determine the maximum weekly working time. Article 4, from now on, will be read in accordance with the Court's latest interpretation and therefore, a collective bargaining agreement will not modify the maximum weekly working time.

II.2. Italian case law on employees dismissal and reinstatement

An Italian employee, working for the American branch of an Italian company, who is dismissed in the United States, may be reinstated by the Italian Court. This principle has been stated by the **Court of Appeal of Aquila, in decision n. 669 dated 22 July 2004** in accordance with the Italian Supreme Court's guidelines.

According to the above decision a foreign law (i.e. New York Law) - recalled by both parties to govern their work relationship - which allows the employer to freely dismiss the employee (dismissal "at will"- without just cause or justified objective cause), is contrary to Italian laws of public interest. In such a case, the Italian regulations for dismissal and reinstatement are applicable.

This judgment may be easily traced back to the case when the employee's work relationship was governed by a Member State law, and therefore the dismissal had been carried out in a Member State. Indeed, in such a case - according to the above Court of Appeal's decision - the Italian regulations for dismissal and reinstatement would probably apply in case the employer dismisses the employee without any just cause or justified objective cause.

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