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EELC's Academic Board Review of the Year 2023

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Introduction to the Final Edition of the EELC Academic Board Review

The *EELC Academic Board Review* has been a great overview for academics, legal practitioners, and policy-makers seeking for a concise description of developments within European labour law. For the final time, we are happy to provide you with such an overview.

This year's edition maintains its tradition of covering pivotal issues in labour law across Europe. The contributions from authors cover a wide range of topics, underscoring the dynamic nature of labour law and its ability to adapt to economic, technological, and societal changes.

Luca Calcaterra and Francesca Maffei explore *fixed-term and part-time work*, focusing on the principle of equal treatment and its application in recent cases. From the landmark Lufthansa CityLine case to developments in Italy and Slovakia, their analysis highlights the balance courts must strike between the protection of workers and the operational flexibility of employers.

In the realm of *collective redundancies*, Daiva Petrylaitė examines the nuanced interplay between information, consultation, and public interest as reflected in cases such as G GmbH and Brink's Cash Solutions. Her discussion underscores the critical role of employee representatives in enabling meaningful dialogue between employers and workers during periods of organizational transition.

Health and safety, as addressed by Andrej Poruban, was an issue in light a recent CJEU ruling on employers' obligations to provide prescription glasses for screen work. Andrej also discusses *whistleblowing protections* and delves into an interesting Belgian case which predates the full implementation of Directive (EU) 2019/1937.

In her analysis of *the transfer of undertakings*, Zef Even provides a thorough exploration of a few cases, emphasizing the enduring challenge of determining when an economic entity retains its identity.

Anthony Kerr's discussion on *working time* offers a detailed look at on-call and stand-by duties, focusing on decisions from Finland, Germany, and France. His insights underscore the importance of factual context in assessing whether such periods qualify as working time, reflecting broader trends in flexible and hybrid working arrangements.

The right to *annual leave*, underwent no major changes but rather some subtle refinements. *Jan-Pieter Vos and Luca Ratti* go through the implications of BMW for garden leave to the impact of quarantine on vacation entitlements in Sparkasse Südpfalz.

Jean-Philippe Lhernould's examination of *free movement and social insurance* highlights the interplay between labor mobility and social security coordination.

The Academic Board thanks all contributors and readers for their unwavering support over the years. While this marks the end of the Review's journey, we hope that ongoing evolution of labour law in Europe will inspire you for years to come.

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Fixed-term and part-time work

Luca Calcaterra[1] *and Francesca Maffei*[2]

An analysis of the most recent ECJ judgments or national judgments concerning fixed-term and part-time employment contracts shows very interesting data from a legal point of view.

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Regarding decisions concerning part-time work, the main focus of the Court of Justice is always on upholding the principle of equal treatment between part-time and full-time workers (as provided in clauses 4.1 and 4.2 of the Framework Agreement on part-time work, concluded on 6 June 1997 and annexed to Council Directive 97/81/EC of 15 December 1997).
An important case is C-660/2020 (*MK – v – Lufthansa CityLine GmbH*), which stands out for the originality of the decision. In particular, the Court of Justice was asked to verify whether a provision of a German collective agreement applicable to flight pilots was compatible with the principle of equal treatment between full-time and part-time workers. Article 6 of the collective agreement indeed provided that when flight pilots performed work exceeding a certain monthly threshold of 'additional' hours, they must receive additional remuneration. The issue was that the thresholds, beyond which this additional economic treatment was triggered, were the same for part-time workers as for full-time workers. However, while for the latter the threshold was immediately surpassed as soon as additional working hours were performed beyond the normal working hours, for part-time workers, whose normal working hours were reduced, the threshold was reached only after many 'additional' hours of work for which only ordinary remuneration was received.
The Court recalled that two different approaches can be used to solve this case.
According to the first approach (used by the CJUE in the following cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, EU:C:1994:415, para. 26 *et seq*.), there is a difference in treatment wherever the overall pay of full-time employees is higher than that of part-time employees for the same number of hours worked on the basis of an employment relationship. According to that approach, applied to the situation in the main proceedings, that comparison of overall remuneration leads to the finding that there is no 'less favourable' treatment of part-time workers, given that part-time pilots and full-time pilots receive the same remuneration for flight duty periods exceeding the individual trigger thresholds of part-time workers.
On the other hand, according to the second approach (used in the judgment C-285/02, EU:C:2004:320), the Court called for each element of the remuneration to be examined separately in the light of that principle of equal treatment and not solely for a general overall assessment to be carried out. In the judgments in which this approach was used, the Court found that part-time workers were treated 'less favourably' because the number of additional hours giving entitlement to additional remuneration was not reduced for part-time workers in proportion to the length of their working hours.
The Court decided to follow the second approach in the case of the main proceedings. According to this approach a difference in treatment results from the fact that pilots working part time benefit from additional remuneration only when they have completed, without increased remuneration, the flying duty hours comprised between their working hours which are reduced according to their part-time percentage and the fixed trigger thresholds to obtain additional remuneration.
The principle of equal treatment significantly impacts, as a principle of social law, also within the framework of fixed-term contract regulations.

In Case C-270/22, the Court of Justice was tasked with examining the application of the principle of equal treatment between fixed-term and permanent workers. The legislation under scrutiny hails from Italy and pertains to teachers, representing a notably intricate and fragmented legal area. Specifically, it provides that if a teacher, following years of precarious employment, secures a permanent position at a school, the prior period spent as a temporary replacement does not count fully towards their seniority of service. Fixed-term contracts are considered in the calculation of seniority only if they have spanned at least 180 days of work within a school year and have held a continuous employment relationship from 1 February until the conclusion of scrutiny operations. However, even when contracts meet these criteria, their impact on seniority diminishes, notably from the fourth year of precarious employment onward.
According to the Court, this legislation (under which the work performed by precarious workers is worth less, in terms of seniority of service, compared to that performed by a permanent worker) violates clause 4 of the Framework Agreement. Such clause, indeed, prohibits, with regard to employment conditions, treating fixed-term workers less favourably than comparable permanent workers solely because they have a fixed-term contract or employment relationship. Clause 4, moreover, expresses a principle of Union social law that cannot be interpreted restrictively.
Remaining within the sphere of regulations governing fixed-term contracts, it is noteworthy to emphasize how the steady reinforcement of principles delineated by the European Court of Justice now empowers national judiciaries to interpret domestic legislation in accordance with EU principles, obviating the need for explicit referrals. Indeed, in some cases, the consolidation of EU principles has provided the opportunity, within judicial proceedings, to introduce additional rules for the protection of fixed-term workers, especially aimed at preventing abuses stemming from this contractual arrangement.
This was exemplified in Slovakia, where the Supreme Court, in the case *Najvyšší súd Slovenskej republiky*, guided by precedents from the Court of Justice, asserted that the situations described in a collective agreement which justify a further extension of a fixed-term employment relationship must also justify the temporary nature of their performance. Moreover, the collective agreement must specify the reasons for the temporary need to carry out those works. It is not allowed that the employer states in the employment contract the reason for the renewal of the fixed-term employment relationship merely by reference to the fact that the employee is

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performing the works defined in the collective agreement without stating a substantive reason satisfying the justification for doing so. The temporary nature of the justification for a fixed-term contract has to be substantial, not merely formal.

Collective redundancies: information and consultation

Prof. Daiva Petrylaitė[3]

Collective redundancies

In 2023, EELC referred to two judgments of the ECJ in which information aspects in cases of collective redundancies were addressed. The Court essentially decided how far Directive 98/59/EC relating to collective redundancies could affect the situation of an individual employee. In its judgment of 13 July 2023 (C-134/22, *G GmbH*) the ECJ ruled that the employer's obligation to inform the competent authority about contemplated collective redundancies provided for in Directive 98/59/EC is not related to the protection of the individual employee from dismissal, but to the public interest, i.e. to enable that authority to anticipate as far as possible the negative consequences of projected collective redundancies in order to be able to seek solutions to the problems raised by those redundancies when it is notified of them.

The ECJ clarified that the information and consultation duty provided for in the Directive is not associated with an individual but a collective right (C-496/22, *Brink's Cash Solutions*). Therefore, the employer does not have the obligation to supply information to workers individually and particularly in such cases where national laws do not provide for the obligation to organize (elect) employee representatives. In this judgment, the Court, following the principle of proportionality, determined that employees cannot expect social dialogue if they do not initiate and appoint representatives who could communicate with the employer. Therefore, in order to exercise the right to information and consultation, employees themselves must be active, i.e. establish a trade union or appoint other representatives according to national law.

Information and consultation

In 2023, two national cases were presented in EELC on issues concerning European Works Council ('EWC') activity.

An Irish Workplace Relations Commission as a pre-trial institution in its ruling (**EELC 2023/24**) admitted the right of the EWC to call upon the services of an expert. The Commission stressed that 'means required' involves not only an expert per meeting with central management, but can also involve an expert assisting an EWC. This decision gives the EWC greater access to impartial expert assistance, both in direct information and consultation procedures (participation in meetings with central management) and in other areas requiring specific (in this case legal) expertise. In the same case, the Commission stressed that the adequacy of training to EWC members should be assessed over the course of a calendar year, and that it ordinarily includes regular, ongoing training. They found that the right to training in Directive 2009/38/EC on the establishment of European Works Councils encompasses both training provided by or via the employer, and training where the EWC asserts the right to obtain particular training which can include training by a third-party provider. However, the Commission took the position that the training must be relevant and indispensable to the EWC, and that participation in and payment for the training could not be inconsistent with central management.

A particularly important aspect of this decision is that, while the Commission did not call into question the EWC's right to expert assistance and training, it stressed the importance of cooperation and agreement between the EWC and central management, and the fact that the EWC may not, in any event, dictate its own terms to the employer, or even make them retroactively.

The Austrian Supreme Court in its judgment of 29 August 2023 (**EELC 2023/33**) also interpreted the EWC's right to qualified expert assistance. The Court in interpreting Annex I paragraphs 5 and 6 of Directive 2009/38/EC "[t]he European Works Council or the select committee may be assisted by experts of its choice, in so far as this is necessary for it to carry out its tasks" and "[t]he operating expenses of the European Works Council shall be borne by the central management. The central management concerned shall provide the members of the European Works Council with such financial and material resources as enable them to fulfil their duties in an appropriate manner …" stated that the fact that the costs of the experts are paid by central management does not automatically mean that the EWC must always give preference to advice that is available free of charge (from trade unions or other authorised public bodies). On the contrary, from the Court's point of view, EWCs must have the right to choose the expertise they need and, within the bounds of reasonableness and proportionality (including in the context of the individual situation), to expect that central management will cover the expenses of such expertise.

Both cases follow the same position that the EWC and central management must cooperate not only in carrying out information and consultation procedures, but also in increasing the competences of the EWC, and that the expert assistance of the EWC must be available at the level that is most necessary in a specific situation.

In its judgment of 6 July 2023 (C-404/22, *Ethnikos Organismos Pistopoiisis Prosonton & Epangelmatikou Prosanatolismou*) the ECJ ruled that Directive 2002/14/EC establishing a general framework for informing and consulting employees applies to a legal entity which acts as a legal person governed by public law and exercises

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public powers, where it also provides, for remuneration, services which are in competition with those provided by market operators. Also emphasized was the important aspect that the duty of information and consultation established in the Directive does not apply to individual cases of dismissal (demotion) when they have no significance affecting the situation, structure or probable development of employment within the undertaking concerned, or placing employment more generally under threat.

Free movement and social insurance

Jean-Philippe Lhernould[4]

The principle of free movement of workers has been challenged by the **COVID-19 crisis**. In the context of Austrian legislation, the CJEU has held that Article 45 TFEU and Regulation (EC) No. 492/2011 preclude national legislation which excludes frontier workers from the coverage of wages paid by their employer to confined employees. It was indisputable that the residence clause constituted indirect discrimination on grounds of nationality. This case is another illustration that Article 45 TFEU can be invoked by employers. A business aid measure can be subject to a free movement of workers test (Case C-411/22, *Thermalhotel Fontana*).

The *social rights of a migrant worker's family member* gave rise to a groundbreaking ruling. The CJEU considered that Article 45 TFEU, as implemented by Article 7(2) of Regulation 492/2011, read in combination with relevant articles of Directive 2004/38/EC, precluded Irish legislation which permits refusal to grant a social assistance benefit to a direct relative in the ascending line who, at the time the application for that benefit is made, is dependent on a worker who is a Union citizen, or even to withdraw from him or her the right of residence for more than three months, on the ground that the grant of the said benefit would have the effect that that family member would no longer be dependent on the worker who is a Union citizen and would thus become an unreasonable burden on the social assistance system of Ireland. Indeed, the status of 'dependent' relative in the ascending line within the meaning of Directive 2004/38/EC cannot be affected by the grant of a social assistance benefit in the host Member State. To decide otherwise would amount to accepting that the grant of such a benefit could result in the person concerned forfeiting the status of dependent family member and, consequently, justify the withdrawal of that benefit or even the loss of his or her right of residence. Such a solution would, in practice, preclude that dependent family member from claiming that benefit and would, for that reason, undermine the equal treatment accorded to the migrant worker (Case C-488/21, *GV*).

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The CJEU has held once again that Article 45 TFEU and Article 3(1)(b) of Regulation 492/2011 precludes national legislation that provides in essence that a Member State excludes *professional experience gained in other Member States* from consideration in admitting candidates to a candidate list for the recruitment of staff in national public higher education institutions, as this puts both foreign applicants and domestic applicants with foreign experience at a disadvantage. Somewhat confused on the concepts since it mixes indirect discrimination and obstacles to free movement, this judgment joins the long list of cases condemning national regulations that refuse to give the same value to periods of experience acquired in another Member State, whether for access to a job or for advancement within it (Case C-132/22, *BM, NP)*.

Professional sports have been strongly affected by free movement of workers rules. In another cornerstone case, it was recalled that Article 45 TFEU precludes rules adopted by an association responsible for the organisation of football competitions at a national level which require each club taking part in such competitions to include in its list of players and to include on the match sheet a minimum number of players trained within the country, unless it is established that those rules are suitable for ensuring, in a consistent and systematic manner, the attainment of the objective of encouraging, at a local level, the recruitment and training of young professional football players, and that they will not go beyond what is necessary to achieve that objective. That objective may indeed, in certain cases and under certain conditions, justify measures which, without being designed in such a way as to ensure, in a certain and quantifiable manner in advance, an increase or intensification of the recruitment and training of young players, nonetheless create real and significant incentives in that direction. The Belgian referring court must take into account the fact that, by placing on the same level all young players who have been trained by any club affiliated to the national football association in question, those rules might not constitute real and significant incentives for some of those clubs, in particular those with significant financial resources, to recruit young players with a view to training them themselves. On the contrary, such a recruitment and training policy, the costly, time-consuming and uncertain nature of which had been highlighted, is placed on the same level as the recruitment of young players already trained by any other club also affiliated to that association, regardless of the location of that other club within the territorial jurisdiction of that association. However, it is precisely local investment in the training of young players, in particular when it is carried out by small clubs, where appropriate in partnership with other clubs in the same region and possibly with a cross-border dimension, which contributes to fulfilling the social and educational function of sport (Case C-680/21, *Royal Antwerp FC*).

In a case dealing with an Estonian nursery school teacher who was denied the recognition of her professional qualification obtained in another Member State, the

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Court held that a 'regulated profession' within the meaning of Directive 2005/36/EC does not include a profession for which national regulations require aptitude conditions for access, but leave employers a discretionary power to assess whether these conditions are met. Indeed, a profession is deemed regulated where access to the professional activity constituting that profession or its exercise is governed by provisions creating a system under which that professional activity is expressly reserved to those who fulfil certain conditions and access to it is prohibited to those who do not fulfil them (Case C-270/21, *A*).

British citizens residing in the United Kingdom and in various Member States unsuccessfully challenged the *Brexit withdrawal agreement*, claiming that those acts had deprived them of rights that they had exercised and acquired as European Union citizens. Indeed, since possession of the nationality of a Member State constitutes, in accordance with Article 9 TEU and Article 20(1) TFEU, an essential condition for a person to be able to acquire and retain the status of citizen of the European Union and to benefit fully from the rights attaching to that status, the loss of that nationality therefore entails, for the person concerned, the loss of that status and of those rights. Accordingly, the loss of the status of citizen of the European Union, and consequently the loss of the rights attached to that status, is an automatic consequence of the sole sovereign decision taken by the United Kingdom to withdraw from the European Union (Case C-499/21 P, *Silver and others*).

Concerning social security coordination rules, in the stream of CJEU rulings on the scope of *A1 certificates*, the case under review, dealing with road transport, addressed a new issue: the value of a 'provisional' withdrawal of an A1 certificate by the issuing institution. In essence, the Court considered that such a certificate, despite having been provisionally suspended by a decision of the issuing institution, does not cease to have binding effects during that period of provisional suspension, with the result that it continues to be binding upon the institutions and courts of the Member States. However, a court in the Member State in which the work is carried out, seized in the context of criminal proceedings brought against persons suspected of having fraudulently obtained or used the A1 certificate, may establish the existence of fraud and consequently withdraw the certificate. The CJEU added that the fact that a company holds a Community licence for road transport may be a factor to be taken into consideration when determining its registered office or place of business, for the purpose of determining the national social security legislation applicable in accordance with Article 13(1)(b)(i) of Regulation (EC) No. 883/2004, but cannot automatically constitute proof of this, nor, *a fortiori*, irrefutable proof, nor can it be binding upon the authorities of the Member State in which the work is carried out. In other words, the Community licence does not offer absolute security to transport companies that set up a structure in a social paradise (Case C-410/21, *DRV Intertrans BV*).

Still in the field of social security, Article 14 of Protocol (No. 7) on the privileges and immunities of the European Union and the provisions of the Staff Regulations of Officials of the European Union precludes the *compulsory affiliation to the social security scheme of a Member State of an EU official* who has remained in the service of an EU institution until pensionable age and who pursues a self-employed professional activity in the territory of that Member State. Indeed, an official whose employment relationship with the European Union has lasted until pensionable age continues to be covered by the EU social security scheme, unlike an official who has left the institutions before reaching pensionable age to take up gainful employment in a Member State. The latter is no longer covered by the EU social security scheme and the applicable social security scheme is determined in accordance with the provisions of Regulation (EC) No. 883/2004. Although Member States retain the power to organise their social security schemes, they must nonetheless, when exercising that power, observe EU law, including the provisions of the Protocol and the Staff Regulations which relate to the social security rules governing the legal position of EU officials, both during their service with an institution and after pensionable age (Case C-415/22, *Acerta*).

Overlapping of old age and survivors' pensions is a highly technical matter in the social security coordination regulations. In a case where the claimant was receiving two pensions from two Member States and three survivors' pensions from three Member States, the Court held that Article 55(1)(a) of Regulation 883/2004 means that, where the receipt of benefits of a different kind or of other income entails the application of national rules against overlapping with regard to independent benefits, it allows each Member State concerned to provide, in its legal system, for the purpose of calculating the amount of benefit to be paid, either that the total amount of income taken into account by those national rules must be divided by the number of benefits concerned or that it is appropriate to divide by that same number the proportion of income which exceeds the ceiling in respect of overlapping laid down by those national rules. This case is not fully convincing. The correct response in this case would have been to confirm that Article 55(1)(a) contains a single rule obliging each Member State concerned, when applying its own anti-cumulation rule, to divide the amount of resources taken into account for this purpose by the number of benefits subject to anti-cumulation rules (Case C-45/22, *HK*).

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Transfer of undertaking

Prof. Zef Even[5]

Six cases involving the (implementation of) *Council Directive 2001/23/EC on transfers of undertakings* (the 'Directive') were published in EELC in 2023: two deriving from the Court of Justice of the European Union ('ECJ') and four from national courts.

Most cases concern the question whether a transfer of undertaking occurred. As known, the applicability of the Directive is subject to three conditions: (1) there must be a transfer that results in a change of employer; (2) this must concern an economic entity; and (3) it must be the result of a contract. Whether a transfer occurs depends on whether the economic entity kept its identity after being taken over by the new employer. In order to assess that, one needs to consider all the facts characterising the transaction concerned, including in particular the so-called Spijkers factors: (i) the type of undertaking; (ii) whether its tangible assets are transferred; (iii) the value of its intangible assets; (iv) whether the majority of its employees are taken over; (v) whether its customers are transferred; (vi) the degree of similarity between the activities carried on before and after the transfer; and (vii) the period, if any, for which those activities were suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (ECJ 18 March 1986, C-24/85, *Spijkers*). The assessment whether there is a transfer of undertaking can be challenging. This can be seen in cases ECJ 16 February 2023, C-675/21 (*Strong Charon*); the Portuguese Supreme Court case *EELC 2023/36*; ECJ 16 November 2023, C-583/21–586/21 (*Spanish notary*); the Irish Labour Court case *EELC 2023/9*; and the Austrian Supreme Court case *EELC 2023/25*. Just one case involved the consequences of a transfer of undertaking, in that particular case the dismissal protection granted to employees who transferred. This is the case of the Court of Appeal in Bucharest, case *EELC 2023/37*.

Transfer of undertaking or not

Let's start with the Portuguese case *Strong Charon*, the facts of which are commonplace. Strong Charon rendered security services for a client with four of its employees: opening and closing of the premises, registering persons and cars that entered, operating video security and alarm systems and performing surveillance rounds at night. The client awarded the security services to another company, Empresa. Empresa performed the same services also with four employees, one derived from Strong Charon. Empresa used the facilities belonging to the premises of the client, such as gates, video surveillance and alarms systems, computers and telephones. Does this transaction constitute a transfer of undertaking? The referring court *inter alia* asked whether (1) the lack of a contract between Strong Charon and Empresa precluded a transfer of undertaking and whether (2) a transfer of undertaking had taken place, even though just one employee from Strong Charon was hired by Empresa and the material assets used by Empresa (put at its disposal by the client) were limited in value whilst not using these assets would, from an economic point of view, not be sensible. The ECJ's answer to the first question was to be expected: there is no need for a direct contract between the (alleged) transferor and the (alleged) transferee in order for a transfer of undertaking to take place, mere 'contractual relations' suffice (see for instance ECJ 19 October 2017, C-200/16, *Securitas*, para. 23). When answering the second question, the ECJ pointed out that all facts and the Spijkers factors need to be taken into account, including the type of undertaking concerned. The degree of importance to be attached to each factor for determining whether there has been a transfer of undertaking will vary according to the activity carried on. Where the activity is based essentially on manpower ('employee reliant'), the identity of an economic entity cannot be retained if the majority of its employees are not taken on by the alleged transferee. Where, however, the activity is based essentially on equipment ('asset reliant'), the fact that the former employees of an undertaking are not taken over by the new contractor to perform that activity is not sufficient to preclude the existence of a transfer of an economic entity which retains its identity. According to the ECJ, rendering security services in a case like this doesn't require specific equipment and should be regarded as an activity that is essentially based on manpower. Therefore, the identity of the entity cannot be retained if the majority of its employees are not taken on by the alleged transferee.

The second case from the Portuguese Supreme Court (*EELC 2023/36*) closely resembles the *Strong Charon* case. The facts are almost identical, as is the decision: in a case where a new contractor performs the surveillance activities for a client but does not take over a majority of the employees from the previous contractor, there is not a transfer of undertaking.

In the third case, the *Spanish notary*, it was noted that notaries in Spain are both public officials and employers of the persons in their service, with whom they freely enter into employment contracts. Several employees were employed in a notarial practice in Madrid. The notary for whom they worked offered them the possibility of working with him at his new practice in another city, or of terminating their employment contracts. The employees chose the second option. A new notary took over the same notarial practice. He took over the staff employed by the previous notary, retained the same material structure and continued to carry out notarial activity at the same place of work as where the records defined by national legislation as constituting the set of public acts and other documents added to that set every year were kept. The employees concluded employment contracts with a six-month probationary period with

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this new notary. The new notary dismissed a number of them in their probationary period. The employees argued that a transfer of undertaking had taken place, and that they should receive the protection granted in that regard. The referring court asked the ECJ whether the Directive applies to this situation.

The ECJ first assessed whether the activities of a notary fall within the ambit of the Directive. It noted that the Directive applies to both public and private undertakings engaged in economic activities. An 'economic activity' encompasses any activity consisting in offering goods or services in a given market, except for activities which fall within the exercise of public powers. Services which are in competition with those offered by operators who seek to make a profit may be classified as 'economic activities'. The ECJ *inter alia* held that Spanish notaries carry on their activities in a competitive situation. They therefore engage in an economic activity within the meaning of the Directive.

The ECJ then examined whether the entity retained its identity. The notary firm is a stable economic entity, an organised grouping of persons and of assets enabling the exercise of an economic activity pursuing a specific objective, and which is sufficiently structured and autonomous. A change in the holder of a notarial practice must according to the ECJ be regarded as constituting a change of employer. In order to determine whether the entity retained its identity, all facts need to be considered, including the Spijkers factors. The degree of importance to be attached to each factor will vary according to the activity carried on: is that asset or employee reliant? The activity of the notarial practice at hand is based essentially on the manpower of that practice. Therefore, it retains its identity after it has been transferred if a major part of the workforce, in terms of number and skills, is taken over by its new holder, enabling the new holder to continue the activities of the notarial practice. In conclusion: when a notary succeeds the previous holder of such a practice, takes over their records and an essential part of the staff who were employed by them and continues to carry out the same activity on the same premises with the same material resources, the Directive applies, provided that the identity of that practice is retained.

In the fourth case, the Irish Labour Court (*EELC 2023/9*) assessed the insourcing of dog warden services. The contract between Dublin City Council and a company called Ashton for the provision of these services expired. Ashton was unsuccessful in the tendering process and the City Council resumed the dog warden services itself. It took into its possession five dogs, documentation, notice books and records that Ashton held. It did not, however, employ the dog warden Williamson. Williamson claimed that he should be employed by the City Council as a result of a transfer of undertaking. That claim was denied. According to the court of first instance, no assets transferred save for five dogs and some paperwork. Company assets such as vans, uniforms, the containment area of the dogs and other capital assets did not transfer. The Irish Labour Court confirmed this ruling in appeal: there was no transfer of an undertaking, no employees entered into the service of the City Council, insufficient assets were transferred, so basically just the activity transferred. According to the ECJ in *Süzen* (ECJ 11 March 1997, C-13/95), that does not constitute a transfer of undertaking.

The fifth case from the Austrian Supreme Court is very specific and concerns the alleged transfer of a temporary work agency. A temporary work agency had a major client, to which it assigned up to 40 temporary agency workers. The client itself recruited most of these workers. Others were recruited by the agency based on job profiles provided by the client. Each year, the client hired about five to ten temporary agency workers as permanent staff. Due to exclusivity clauses, the workers could only be assigned to the client. The agency was no more than a formal employer, managing the financial aspects of the employment relationship with specialized software developed specifically for the client: a payrolling construction. The client ceased its collaboration with the agency. That agency stopped its activities and terminated most of its employment contracts. The temporary agency workers who were assigned to the client, however, continued working there. Some of them were hired as permanent staff by the client, others entered into the service of a new temporary work agency (the alleged transferee) that replaced the old one. There was no transfer of other personnel between the former temporary work agency and the alleged transferee and no documents or software previously used was provided. Is this a transfer of undertaking? This seemed questionable. The ECJ previously held in the case *Jouini* (C-458/05) that the Directive applies to a situation where "part of the administrative personnel and part of the temporary workers are transferred to another temporary employment business in order to carry out the same activities in that business for the same clients and … the assets affected by the transfer are sufficient in themselves to allow the services characterising the economic activity in question to be provided without recourse to other significant assets or to other parts of the business" (para. 38). In the case at hand the alleged transferee only hired a number of employees previously employed by the temporary work agency and assigned them to the client. Still, the Austrian Supreme Court held that a transfer of business took place. When assessing whether the identity of the economic entity was preserved, all facts should be considered, giving particular attention to the type of the enterprise: is it asset or employee reliant? Here, the core economic activity of the temporary work agency was the assignment of temporary agency workers to one major client. These workers were specifically selected or even recruited by the client. The temporary work agency was no more than the formal employer, while all other employment functions were carried out by the client. The considerable number of up to 40 temporary agency workers managed for a single user undertaking was deemed to constitute the essential characteristics of the economic entity. If a new temporary work agency employed (most of) these

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temporary agency workers, that new temporary work agency continued without interruption the services previously provided. The Supreme Court considered that by doing so the identity of the economic entity was preserved, regardless that no material assets or personnel management resources were transferred.

Consequences of the transfer of undertaking

The last case concerns the dismissal protection following a transfer of undertaking (*EELC 2023/37*). An employee was employed by a food delivery company as a customer support manager. That company was taken over by a similar company. Just 18 days after this transfer of undertaking the transferee fired the employee, due to the fact that the transferee had an externalized call centre service and the position of the employee was therefore not needed. The employee sought to annul the dismissal. The Court of Appeal in Bucharest held the termination in violation of the dismissal protection granted to employees under the Directive. The transferee knew from the outset that the position of the employee would become redundant. There was no factual or legal basis for the termination and the employee did not even have time to familiarize himself with the new employer in order to prove his value. The dismissal was according to the Court exclusively caused by the transfer of undertaking and therefore null and void.

Final remarks

The case law discussed proves that it remains difficult to pinpoint exactly when a transfer of undertaking takes place. Most cases emphasize the type of undertaking: is it asset or employee reliant? Apparently, security and notary services are employee reliant. This means that a transfer of undertaking can be prevented if the new company refuses to employ (a majority) of the employees who were assigned at the entity concerned. This happened in the 'security services' as discussed. On the other hand, the importance attached to the employees actually resulted in a transfer of undertaking in the Austrian Supreme Court. The coin can flip either way. In the meantime, one thing is sure: we will have many more cases concerning transfer of undertaking to come.

Working time

Anthony Kerr[6]

The issue of stand-by or on-call time, and whether it constitutes 'working time', continues to come before national courts. During 2023, two cases were reported – from Finland and Germany – which address this issue in different factual contexts. The related issue of 'commute time' arose in France.

It is now well established in CJEU case law that periods of stand-by or on-call time only constitute 'working time' when the constraints imposed on the worker during those periods are such as to affect, 'objectively and very significantly', the ability the worker has to freely manage his or her time when their services are not required and to pursue their own interests.

Conversely, where the constraints 'do not reach such a level of intensity' and allow the worker to manage their own time and pursue their own interests, only the time linked to the provision of work actually carried out during those periods will constitute 'working time': see Case C-344/19, *Radiotelevizija Slovenija*; Case C-580/19, *Stadt Offenbach*; and Case C-214/20, *Dublin City Council*.

This means that each case will be 'fact specific' and will involve the national court or tribunal having to make an assessment both of the individual circumstances of the case and of the personal situation of the worker. This will involve consideration being given, *inter alia*, to the following questions:

i. Where is the worker required to be during stand-by or on-call periods?
ii. What activity is the worker free to carry out during such periods?
iii. What is the time limit within which the worker must respond to a call-out?
iv. What sanctions can be imposed on the worker for failure to respond?
v. What is the average frequency/duration of call outs?

This process is well illustrated by the decision of the Finnish Labour Court (*EELC 2023/11*). Here, it was reported that firefighters had regular working hours, outside of which they were obliged to perform periods of stand-by duty. Firefighters who were 'officers' were usually able to spend their stand-by time at their home, where they also kept their control unit vehicle which they were free to use provided that the vehicle always had sufficient power in case of an alarm. Firefighters who were 'unit leaders', however, were required to stay within such distance from the fire station that they would be able to take off with the first unit that left from the station within five minutes after the alarm. This time limit in practice required unit leaders on stand-by to stay at the fire station or in its immediate vicinity.

The Labour Court, after referring to the CJEU decisions in *Radiotelevizija Slovenija* and *Stadt Offenbach*, ruled that whether stand-by time was to be considered 'working time' depended on 'the limiting effect of stand-by duty on the use of leisure time'.

The response time for all firefighters was five minutes. The key difference between the two categories was that officers needed to react to an alarm within five minutes from the location where they were at that time and start the transition to the scene of the fire whereas unit leaders were required to take off within five minutes with the first unit that left the fire station.

In evaluating the constraints imposed by the stand-by duty on the firefighters' ability to manage their leisure

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time, the Court did not consider the stand-by time of the officer firefighters to be sufficiently restrictive as to constitute 'working time'. They were able to spend stand-by time at their home and drive around relatively freely. In addition, the realised response times for stand-by officer firefighters were neither monitored nor sanctioned.

The required response time for unit leader firefighters, however, significantly affected what they were able to do during their stand-by time. The response time was short and the work duties started almost immediately after an alarm. These obligations were considered to 'significantly affect' their ability to manage their time freely and use it for their own purposes. Given that unit leaders did not have a genuine opportunity to make plans for their stand-by time, such time did constitute 'working time'.

It would appear from the comments from other jurisdictions that similar decisions would have been reached in both Greece and Italy. Similar decisions were also reached in Ireland: *Dublin City Council* and, more recently, *Walsh – v – Kerry County Council* [2023] IEHC 719. Here, the Labour Court had ruled that a firefighter was not 'working' for his employer during stand-by periods. He did not have to remain at any specific place during stand-by time; he was free to engage in other professional activities; there was a response time of ten minutes; he would not be disciplined or sanctioned as long as he responded to a minimum of 75% of alerts; and the average annual number of alerts was 52.

On appeal, the High Court held that the Labour Court had properly assessed the overall impact of the constraints on the firefighter and was entitled to conclude that the stand-by time did not constitute 'working time'.

A slightly different issue arose in Germany (*EELC 2023/28*). Here, the worker was employed in the Federal Criminal Police Office as a bodyguard in the security unit and assigned for the protection of federal ministers. He filed an objection to his monthly statement of hours and applied to have his rest breaks credited as 'working time'. This was rejected but the Federal Administrative Court ruled in his favour. After evaluating all of the circumstances, the Court found that the constraints placed on the worker deprived him of the opportunity to relax during breaks or to use the time for activities of his own choosing. His responsibility to provide uninterrupted protection to federal ministers implied an obligation to end the break immediately in order to fulfil his duties and exposed him, in effect, to a 'permanent state of alarm'.

The CJEU decision in *Radiotelevizija Slovenija* also featured in the case from France (*EELC 2023/12*) concerning the status of commute time. It is generally accepted that time spent travelling between one's home and one's place of work does not constitute 'working time'. In Case C-266/14, *Tyco*, the company employed security technicians who did not have a fixed or habitual place of work, but who had the use of a company vehicle in which they travelled from their homes to the places where they were to instal or maintain security systems. The company counted the time spent travelling between customers as 'working time' but not the time spent travelling between home and the first and last customers. The CJEU ruled, however, that that time did constitute 'working time'.

A similar factual scenario arose before the Cour de Cassation. Here, the worker was employed as an 'itinerant' salesperson who met with customers using a company vehicle and only 'occasionally' went to company headquarters. The evidence was that, while driving from his home to his first customer and then from his last customer back to home, he made business calls to organise appointments and respond to customers through the integrated hands-free car kit provided by the company.

Because it was established to the Court's satisfaction that during this 'commute time' the worker was at the disposal of the company and was unable to attend to his 'personal obligations', this time 'should be deemed as effective working time and remunerated as such'. As is noted by the reporter, the decision is more 'nuanced' than that of the CJEU in *Tyco*. Central to the decision was that the worker, during his commute time, was 'effectively working'.

It would appear from the comments from other jurisdictions that, under German law, the commuting time in the case at hand could be counted as 'working time', even if the worker had not made business calls. Indeed, in a 2018 decision of the Federal Labour Court (5 AZR 39/19), it was held that, if workers have to perform their work at an off-site location by travelling to the customer and back, this time must be counted as working time irrespective of whether the workers start their work at the employer's premises or at their home.

At issue in the cases from France and Germany was whether the contested times should be remunerated. The CJEU, however, has consistently ruled that Directive 2003/88/EC is limited to regulating certain aspects of the organisation of working time and, save in the context of annual leave, does not apply to the remuneration of workers. Accordingly, it does not automatically follow from a finding that such time constitutes 'working time' that the worker is entitled to be paid in full for the entirety of that time.

As the comments from Germany make clear, whether and to what extent the time spent on business travel must be remunerated continues to be a 'subject for discussion'. Reference is made to the decision of the Federal Labour Court (5 AZR 533/17) that travel time should be considered as 'paid working time', unless otherwise agreed, if:

i. the trip is exclusively in the interest of the employer;
ii. there is an inseparable connection between the travel time and the work performance owed under the employment contract; and
iii. it is necessary.

Consequently, it would be possible to agree upon a different remuneration arrangement for travel time by

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means of a collective agreement or an individual employment contract.

Finally, mention must be made of the two-part article (*EELC 2023/26 & 27*) on the 'aftermath' of the CJEU decision in Case C-55/18, *CCOO* ruling that Member States were required to oblige employers to introduce "an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured". This was to ensure the effectiveness of the Working Time Directive, which implies, according to the authors, that there is an obligation on the employer to check or monitor the information to be generated. As the authors point out, "an uncontrolled working time recording system offers no guarantee whatsoever that the working times recorded correspond to those actually worked". This impacts on so-called 'trust based' working time arrangements and situations where a worker may have multiple employments.

The former arises particularly in the context of remote or hybrid working. Jon Messenger's 2019 research – *Telework in the 21st Century: An Evolutionary Perspective* – revealed the same pattern for such workers in 15 different jurisdictions: "longer total hours of work combined with much greater discretion for workers regarding the organisation of their working time (i.e. work schedules), often referred to as 'time sovereignty'." The challenge for employers over 2024 will be to develop a regulatory framework which balances their right to manage the length and volume of teleworkers' working time against those workers' right not to be subjected to intrusive monitoring of their personal and domestic life.

Annual leave

Jan-Pieter Vos[7] *and Luca Ratti*[8]

2023: Subtle refinements

2023 marked the 30th anniversary of the right to annual leave. While it was adopted almost without any discussion, it has developed into a front runner exploring the frontiers of European social law. Indeed, the Court of Justice has demonstrated a rather expansive interpretation of the right to annual leave.

In our previous review, we raised concerns regarding the apparently expansive regulatory framework that the Court appeared to be establishing. However, in 2023 the Court took a more nuanced approach. This is not to say that there were no relevant developments.

European Commission

On 15 March 2023, the European Commission published its evaluation of the Working Time Directive (SWD(2023) 40 final). It found that the core right to paid annual leave is generally transposed satisfactorily. It mentioned two main problems:

- Some Member States impose conditions on acquiring or taking annual leave in the first year which are too strict.
- In some countries, the carry-over period for annual leave in case of sick leave seems too short (i.e. shorter than one year).

The working document (COM(2023) 72 final) elaborates more in-depth on several issues. It seems however to lack a comprehensive overview. The document, in fact, relies on information provided by Member States, which may sometimes be inaccurate. Take the application of the *Kreuziger* and *Max-Planck* judgments, for example. According to the report, only Germany has reported a change in its rules or jurisprudence in response to this judgment (p. 26). However, based on the case reports submitted to EELC *before* the EC Working Document was published, it appears that the judgment has also influenced case law in Latvia (*EELC 2019/22*), the Netherlands (*EELC 2020/26*), Slovenia (*EELC 2021/12*) and Romania (*EELC 2023/10*).

Another example: the Commission's working document reports that all Member States provide for an allowance in lieu in case of termination of the employment contract. But in Case C-218/22 (*Comune di Copertino*), the ECJ assessed an Italian provision which denied such allowance in some cases.

Several aspects covered by the working document could be dug into more in-depth. Having shown that it contains information which arguably is wrong, the main issue is whether we can trust its contents.

Interpretative Statement

The European Commission also updated its Interpretative Communication on the Working Time Directive (OJ 2023/C 143/06). This document contains 70 pages. The right to annual leave, one single article with two syllables, takes up 13 pages. Quite a lot for a topic which should be so straightforward.

Not only does this demonstrate how complex the right to annual leave has become it also raises questions. Do we really need all this case law? And if so, wouldn't it be an idea to update the Directive? And, if the Working Time Directive is too difficult to agree upon, why not fix this issue in a separate Directive? Right now, there is extensive case law on what should be two simple provisions. One could argue what this means for legal certainty. Especially for employers, who still are responsible for the employees' annual leave.

ECJ case law

Onto the case law. Each year, we wonder: is there still something to add to the expansive case law on annual leave? And apparently, there is – and the ECJ manages to raise new questions as well.

- *BMW*

Case C-192/22 (*Bayerische Motoren Werke*, '*BMW*') is a notable example. The case concerned a worker on a progressive retirement scheme, who was released from work from 1 June 2016 to 30 September 2019, after

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which he retired on 1 October 2019. Effectively retiring earlier, the worker took his annual leave in May 2016. However, he fell ill and therefore missed 2.67 days of leave. As he was released from work, he could not take these days later. After he retired, he claimed payment of these days. Apparently, the retiree sought some pastime and was happy to plead his case before four(!) courts. Successfully, as the ECJ held that he was indeed entitled to an allowance in lieu.

The case is significant for a few reasons. Firstly, the ECJ discussed the implications of its *KHS* judgment (C-214/10) in which it had held that untaken leave can lapse in specific circumstances as, at some point, the double function of annual leave (rest and relaxation) evaporates to leave being only useful as an employee's relaxation. It is not surprising that employers have raised similar concerns in other cases. However, the Court very much limits the scope of *KHS* to long-term sickness. This is significant, as employees lose their right to annual leave by operation of law only under severe circumstances.

A second issue is the Court's consideration that an employee on garden leave cannot take annual leave. It is not immediately apparent whether the Court just 'described' the applicable German law. It could also really mean that an employee cannot take annual leave when being put on garden leave. In fact, the latter presumption wouldn't be too strange. But then, there could be serious implications for negotiations on terminations of employment as it is not uncommon to 'exchange' untaken annual leave for a (much) longer period of garden leave prior to the termination date. If these two don't go together, parties might have to agree that an employee first takes their remaining leave before being put on garden leave. But then, the employer risks that the employee calls in sick, like in *BMW*. Food for thought.

- *Ředitelství silnic a dálnic*

Case C-57/22 (*Ředitelství silnic a dálnic*) revisited the question whether an unlawfully dismissed employee accrues annual leave in the period between the dismissal and their re-instatement. In fact, in its judgment in Joined Cases C-762/18 and C-37/19 (*Varhoven kasatsionen sad na Republika Bulgaria* and *Iccrea Banca*). Does it make any difference that, other than in those cases, the Czech case law provides for full salary compensation in the meantime? Long story short: the Court said no.

- *Keolis Agen*

In *Keolis Agen* (C-271/22–C-275/22), the Court of Justice continues on a path previously embarked upon: Article 52(1) of the EU Charter of Fundamental Rights. The case is not very complicated in essence. Since *Schultz-Hoff* (C-350/06), employees accrue vacation during their sick leave. This accrual does not have to be unlimited, as we have known since *KHS* (C-214/10). A Member State may determine that unused vacation, even during sickness, may expire at some point. In France, it appears that *Schultz-Hoff* has still not been correctly implemented. The accrual during (certain cases of) sickness is capped at one year. According to the Court, this situation was contrary to the Charter and the Directive (paras. 16–28).

With its second question, the referring court asked the Court to establish a transitional period. The Court declared itself incompetent to do so: that is a procedural aspect reserved for the Member States. The Court considered itself competent to answer the third question: does the Directive preclude Member States from not establishing any transitional period at all? That is an interesting question. Vacation is meant to be taken. The best incentive to do so is the threat of losing those rights. However, the Court does not go that far. It approaches the question differently. Member States may establish a transitional period. However, the limitations of Article 52(1) of the Charter apply: the right to vacation may only be restricted under strict conditions: they must be provided for by law, respect the essential content of that right, and be necessary and genuinely meet the objectives of general interest recognized by the Union. In some situations, this is the case, but notably, this implies the requirement that such restrictions must be provided for by law.

- *Sparkasse Südpfalz*

If there was one case we were looking forward to this year, it was *Sparkasse Südpfalz* (C-206/22). The case arose during the COVID-19 crisis and concerned an employee who had to quarantine a day before his scheduled vacation. He was not sick himself. How to deal with this? The case has already received extensive attention in EELC. First in a case report, but also in our chronicle last year.

It is a rather fundamental case because the Court of Justice had to further address the purpose of vacation. If that is 'rest and relaxation', what about situations where that opportunity is clearly absent? The justification for protecting vacation during sickness is similar to that of quarantine – partly because illness is an unforeseeable event beyond the control of the employee.

The Court considered that while quarantine affects the circumstances in which an employee can enjoy their free time, it does not necessarily undermine the right to vacation: 'During the period of annual leave, workers cannot be made subject, by their employer, to any obligation which may prevent them from pursuing freely and without interruption their own interests in order to neutralise the effects of work on their safety or health.' (Paragraph 44).

There may be various reasons to view this differently, but the CJEU held that quarantine differs from an employee on sick leave, who is 'physically or mentally' hindered by illness. Perhaps the judges were spared from this, but we recall at least some psychological hindrance arose during quarantine. At the same time, we understand the reasoning. Overall, the CJEU draws a clear line: vacation primarily means that your employer cannot bother you.

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- *Comune di Copertino*

It has become a tradition that we can also include judgments from the new year. Thus, we can still say something about Case C-218/22 (*Comune di Copertino*). The question in this Italian case was whether applicable regulations may stipulate that unused vacation days at the end of the employment relationship may not be paid out. This provision served (mostly) as a cost-saving measure. At the same time, this provision was also intended to incentivize the actual taking of vacation.
The Court once again clarified that Article 7(2) sets only two conditions: (1) the employment relationship must have ended, and (2) the employee still has outstanding vacation days. At the same time, the Court pointed out that Member States may impose conditions that may result in an employee losing their right to vacation. However, in such cases, the employee must have been given the opportunity to enjoy their vacation, in accordance with the provisions of the *Max-Planck* judgment. Interestingly, Advocate General Ćapeta had explicitly considered that such a lapse provision could only affect 'old' vacation. The CJEU considered that the request in this case also concerns current vacation; without, however, drawing any consequences from this.

Outlook

In past years there were always some cases to anticipate. A quick look into the pending cases suggests that so far 2024 could be a quiet year for the right to annual leave. Taking some time off, one might say!

Miscellaneous

Andrej Poruban[9]

Health and safety

In early 2023, headlines and social media buzzed around a CJEU decision asserting that companies must cover the cost of prescription glasses for employees working with computer screens. This information followed from the case *Inspectoratul General pentru Imigrări* (C-392/21), which addressed the interpretation of Article 9 of Directive 90/270/EEC on the minimum safety and health requirements for work with display screen equipment. The decision followed a reference for a preliminary ruling from the Court of Appeal, Cluj, Romania. However, the apparent strictness of this obligation is not absolute. Upon a detailed reading of the reasoning, it is evident that the prescribed glasses, as special corrective appliances, must be used to correct or prevent visual problems specifically linked to work and not vision difficulties or pathologies of a general nature unrelated to the working conditions. Moreover, special corrective appliances including glasses are not limited to appliances used exclusively for professional purposes. They can also be used outside of working hours. The key takeaway from the decision is that an employer has either to provide these or reimburse expenses and a general salary supplement will not suffice. It remains difficult to determine exactly where the line is drawn between special and normal corrective appliances. Following the CJEU decision, the referring Court awarded the employee all requested costs (approximately EUR 530). Anyway, the mentioned obligation will still depend on each specific case and according to the evaluation and results obtained from a medical examination. In addition to that, in *EELC 2023/23* national correspondents raised some practical questions, and colleagues from other jurisdictions brought some insights worth reading. In another way, it is intriguing that this issue has surfaced only now, considering the Directive dates back to 1990 – an era characterized by CRT computer monitors and TVs.

Whistleblowing

Last year brought forth another interesting whistleblowing case from the Labour Tribunal of Brussels. An employee had been managing an EU-funded project, which was subject to an audit. Her employer seemingly accepted fees from the auditing company that exceeded the planned budget, in exchange for a freeze on other general fees. Advised by legal counsel, she feared that this behaviour could amount to potential passive corruption to the detriment of the European Union. After reporting suspicions to her employer, she was initially suspended during the investigation and subsequently dismissed for serious cause, based on the allegation that she had made slanderous accusations. It is noteworthy that at the time of these events Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law was not yet applicable in Belgium. Despite the fact that most provisions of the European Convention on Human Rights apply solely to Member States only and not between private persons, the Court found that the employee had a right to special protection for blowing the whistle in light of the case law of the ECtHR. As it was clear that her dismissal was connected with her status it was found unjustified. Additionally, the Court also referred to the non-binding 2014 recommendation adopted by the Committee of Ministers of the Council of Europe on protection of whistleblowers. This decision presents an excellent opportunity to assess the situation of whistleblowers before and after the implementation of the Directive in Belgium. Remarks about the Court's conclusions are truly food for thought in *EELC 2023/29*. Last but not least, the ECtHR approach more or less differs from the EU law. Perhaps it is the right time for the Strasbourg Court to take into consideration the Directive criteria and start to create a similar level of protection within both European jurisdictions.

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