

# Newsletter EUSOCP project

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### *European Labour Law Perspectives - Enhancing the Social Pillar*

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**Coordinators/Editors:** University of Amsterdam – Hugo Sinzheimer Institute

Prof. Dr. R.M. Beltzer - [R.M.Beltzer@uva.nl](mailto:R.M.Beltzer@uva.nl)

Dr. N. E. Ramos Martín - [N.E.RamosMartin@uva.nl](mailto:N.E.RamosMartin@uva.nl)

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**Partner institution:** University Carlos III - Madrid

Prof. Dr. J. Mercader Uguina - [jesus.mercader@uc3m.es](mailto:jesus.mercader@uc3m.es)

Dr. A. B. Muñoz - [anabelen.munoz@uc3m.es](mailto:anabelen.munoz@uc3m.es)

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Within the Jean Monnet action EUSOCP, the Labour Law Departments at the University of Amsterdam and the University Carlos III-Madrid are issuing a monthly newsletter summarizing the development of the EU Pillar of Social Rights and including comments on EU legislation and case law in the field of Labour and Social Security Law. The newsletter is available via the following links:

- <http://hsi.uva.nl/en/jean-monnet/test.html>

The European Pillar of Social Rights is divided into three main categories in the field of employment and social policies. Each of these categories contains a number of policy domains, to which different principles are attached. The three categories are:

- Equal opportunities and access to the labour market;
- Fair working conditions (adequate and reliable balance of rights and obligations between workers and employers);
- And adequate and sustainable social protection.

For a further description of the pillar see:

EN: [https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights\\_en](https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en)

NL: [https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights\\_nl](https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_nl)

ES: [https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights\\_es](https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_es)

## European Pillar of Social Rights

### **Communication from the Commission to the European Parliament: ‘Monitoring the implementation of the European Pillar of Social Rights.’**

*March 13, 2018*

Delivering on the European Pillar of Social Rights is a shared responsibility of EU Institutions, Member States, public authorities, social partners and civil society organisations, in line with their competences.

At EU level, the Commission is fully committed to mainstreaming the priorities of the European Pillar of Social Rights in all EU policies. It has already started to make use of existing tools and processes to that effect, and it has also presented several dedicated initiatives within the framework of EU competences, some of which remain to be adopted by the EU co-legislators.

The Commission is also committed to supporting Member States, social partners and civil society organisations in the implementation of the European Pillar of Social Rights at national, regional and local level. With that purpose the Commission has published a Communication on ‘Monitoring the implementation of the European Pillar of Social Rights and a working document recalling the legal framework, the respective roles of the national and EU levels, as well as the action already taken on each of the principles of the European Pillar of Social Rights.

Monitoring the implementation of the European Pillar of Social Rights is essential for ensuring tangible progress on the ground. With this Communication, the Commission proposes, as a complement to initiatives already taken and still to come at EU level, to strengthen the monitoring of implementation of the European Pillar of Social Rights in the European Semester of policy coordination.

Read on (Communication): [https://ec.europa.eu/commission/sites/beta-political/files/communication-monitoring-implementation-european-pillar-social-rights-march2018\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/communication-monitoring-implementation-european-pillar-social-rights-march2018_en.pdf)

Read on (Staff Working Document): <https://ec.europa.eu/commission/sites/beta-political/files/staff-working-document-monitoring-implementation-european-pillar-social-rights-march2018.pdf>

### **Commission takes action to better protect workers against cancer-causing chemicals**

*April 5, 2018*

The Commission proposes to limit workers' exposure to five cancer-causing chemicals, in addition to the 21 substances that have already been limited or proposed to be limited since the beginning of this mandate. Estimates show that today's proposal would improve working

conditions for over 1,000,000 EU workers and prevent over 22,000 cases of work-related illness.

The proposed changes intend to limit exposure to five cancer-causing substances, in addition to the 21 substances that are already covered. The Commission proposes to include new exposure limit values for five chemicals in the Carcinogens and Mutagens Directive. These limit values set a maximum concentration for the presence of a cancer-causing chemical in the workplace air. In so doing, the Commission is pursuing its ongoing efforts to improve continuously the protection of workers from harmful chemicals in order to prevent further cases of workplace-related cancer as well as other health problems.

Commissioner for Employment, Social Affairs, Skills and Labour Mobility, Marianne Thyssen, said that this proposal: "The Commission has taken another important step towards fighting work-related cancer and other relevant health problems on the work floor. We propose to limit workers' exposure to five additional cancer-causing chemicals. This will improve protection for over 1 million workers in Europe and help create a healthier and safer workplace, which is a core principle of the European Pillar of Social Rights."

Read on:

<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=9076&furtherNews=yes>

### **Revision of the Europass framework: ‘Making skills and qualifications more visible across the EU’.**

*April 12, 2018*

In April 2018, the EU Member States have adopted the Commission's proposal to revise the Europass framework. The revision, which aims at simplifying and modernising the Europass CV and other skills tools for the digital age, will enable people across the EU to make their skills and qualifications more visible, and will help policy makers to anticipate labour market needs and trends. With this agreement, the Commission has now delivered on all ten actions announced under the Skills Agenda for Europe, launched in June 2016.

For over a decade, Europass has been a key tool to support better communication and understanding of skills and qualifications. It has served as a crucial bridge between the worlds of work and education and training. There are over 55,000 visits a day to the Europass portal and over 100 million downloads of the Europass CV since 2004. Europass has clearly demonstrated its added value as a vehicle to communicate skills across the EU, but it has to evolve in parallel to challenges and opportunities in the digital age. This revision process will modernise Europass; the framework will offer an e-portfolio for storing and sharing information, tools for people to self-assess their skills and tools for describing formal and informal learning as well as qualifications. For the first time, Europass will also offer information to support career management including information on trends and demands in the labour market and on guidance and learning opportunities across Europe.

Read on:

<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=9087&furtherNews=yes>

## Commission evaluation confirms the importance of European Works Councils

May 14, 2018

The European Commission has published in May 2018 an evaluation of the recast European Works Council Directive. The report sets out how the Member States have implemented the recast elements of the Directive, the main evaluation findings, and the corresponding policy responses from the Commission. European Works Councils (EWCs) are bodies representing the European employees of a larger transnational company. Through them, management informs and consults workers on the progress of the business and any significant decision at European level that could affect their employment or working conditions.

The Commission finds that the large majority of Member States have **properly transposed** the EU legislation, which aims to strengthen employees' right to such transnational information and consultation. Most stakeholders agree that the Recast Directive has improved the clarity of the legal framework. The **EU value added** of the Directive was confirmed: All stakeholders consider the rules **relevant** and a **significant** contribution to ensuring transnational social dialogue at company level.

According to the report, information for workers improved in terms of **quality** and **scope** but the Directive has not increased the rate at which new EWCs are set up. In order to reinforce the creation and effectiveness of EWCs, the Commission proposes to pursue the following measures:

- creating and sharing a practical **handbook** for EWC practitioners,
- providing **funding** to social partners to support the implementation and effectiveness of EWCs, and
- ensuring the full **implementation** of the Directive in Member States.

Read on:

<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=9102&furtherNews=yes>

## European Reports/Studies

### A Report recognises efforts to ensure adequate pensions in the EU

April 30, 2018

The 2018 Pensions Adequacy Report analyses how current and future pensions help prevent old-age poverty and maintain the income of men and women for the duration of their retirement. It underlines that Member States pay more and more attention to sustainable, adequate pensions in their reforms, but further measures will be needed in the future.

Nowadays, there are 1.9 million fewer older Europeans at risk of poverty or social exclusion than a decade ago, while the number of older workers in employment has increased by 4.1 million in the last three years alone. According to the report, today some 17.3 million or 18.2% of older people (aged 65 and over) in the EU remain at risk of poverty or social exclusion.

In addition, significant differences between countries and population groups remain. For instance, women's pensions are still 37% lower than men's due to lower salaries and shorter working lives linked to caring responsibilities. Similarly, people in non-standard or self-employment often face less favourable conditions for accessing and accruing pension rights than those in standard employment. The risk of poverty and social exclusion in old age also increases with age. More than half of all older people at risk of poverty or social exclusion in the EU are aged 75 or over. This is due to the fact that while needs increase with age, the value of pensions decreases during retirement.

Member States have put measures to safeguard adequacy of pensions more prominently at the heart of their policy efforts, in particular for low-income pensions, but more needs to be done.

To ensure the adequacy and sustainability of current and future pensions, pension systems need to promote longer working lives, in accordance with continuously increasing life expectancy. This can be done by:

- encouraging life-long learning,
- providing a safe and healthy work environment,
- adjusting pensionable ages, rewarding later retirement, and
- discouraging early exit.

Flexible working options, including the possibility to combine pension with income from work, and tax incentives promoting later retirement are becoming increasingly widespread and will continue to be important.

Member States should also take further steps to close the gender gap in pensions, by putting in place equal opportunity policies targeted at women and men of working age, for instance, promoting the work-life balance and equal distribution of caring responsibilities, addressing labour market participation, work intensity and career breaks. In particular, pension policies should adequately protect care-related breaks.

In line with the European Pillar of Social Rights, the Commission aims at supporting Member States in these efforts, for instance with its proposal for a better balance between private life and professional career for working parents and careers.

Finally, it is also important to continue to extend pension coverage to people in non-standard or self-employment, and to promote supplementary pension saving. In this vein, and also under the banner of the Pillar of Social Rights, the Commission has recently put forward a proposal for a Recommendation on access to social protection.

Read on:

<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=9096&furtherNews=yes>

## **OECD reports on taxing wages**

April 26, 2018

The OECD has published a brochure on wage and income taxation. The brochure is based on the annual report with details of taxes paid on wages in OECD countries. A summary is available in 8 languages. The brochure provides information on the income taxes paid by workers, their social security contributions, the family benefits they receive in the form of cash transfers as well as the social security contributions and payroll taxes paid by their

employers. The average tax wedge decreased by 1.1 percentage points from 37.0% to 35.9% for the single taxpayer on average earnings and by 1.8 percentage points from 27.9% to 26.1% for the one earner married couple on average earnings with two children.

Read on: <http://www.oecd.org/tax/tax-policy/taxing-wages-20725124.htm>

The report online: [https://read.oecd-ilibrary.org/taxation/taxing-wages-2018\\_tax\\_wages-2018-en#page1](https://read.oecd-ilibrary.org/taxation/taxing-wages-2018_tax_wages-2018-en#page1)

### **Minimum wages in the EU**

April 18, 2018

A revised Eurofound report provides information on statutory minimum wages that are generally applicable and not limited to specific sectors, occupations or groups of employees. The term ‘minimum wage’ refers to the various legal restrictions governing the lowest rate payable by employers to workers, regulated by formal laws or statutes. While the scope of the report covers all 28 EU Member States, the main findings relate to the 22 countries that had a statutory minimum wage in place in 2018. In the majority of countries, the social partners have been involved in the setting of the minimum wage in 2018 – in marked contrast to the beginning of the decade when minimum wage-setting was characterised by strong government intervention. The highest increases in the minimum wage were recorded (in nominal and real terms) in Bulgaria and Romania. However, both countries – as well as several others – have a long way to go to catch up with the minimum wage levels prevailing in western European countries.

Read on: <https://www.eurofound.europa.eu/news/news-articles/minimum-wages-continue-to-climb-across-europe>

The report:

[https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef18005en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef18005en.pdf)

### **Rising inequality and democracy**

April 18, 2018

Economist Branko Milanović published a blog on rising inequality and the threats it poses to democracy. When it comes to inequality within nations, Western countries have responded to China’s rise by slashing the jobs or wages of people working in industries that have to compete with China. His remedy is, rather than just raising taxes for the rich, to pour energy into creating better educational opportunities for everyone, no matter what their background. That means people will start off in the jobs market on a more level playing field.

Read on: <http://www.ips-journal.eu/in-focus/whats-gone-wrong-with-capitalism/article/show/playing-fair-2683/>

### **Robots, employment and wages**

April 18, 2018

Think-tank Bruegel published a working paper that studies the impact of industrial robots on employment and wages in six European Union countries, that make up 85.5% of the EU industrial robots market. In theory, robots can directly displace workers from performing specific tasks (displacement effect). But they can also expand labour demand through the efficiencies they bring to industrial production (productivity effect). The authors’ estimates

do not point to robust and significant results on the impact of robots on wage growth, even after accounting for possible offsetting effects across different populations and sectoral groups.

The working paper: [http://bruegel.org/wp-content/uploads/2018/04/Working-Paper-AB\\_25042018.pdf](http://bruegel.org/wp-content/uploads/2018/04/Working-Paper-AB_25042018.pdf)

### **ILO on inequality in Europe and on bargaining in the gig economy**

April 17, 2018

Two recent ILO publications address the root causes of inequality and the challenges in the gig economy. A first book examines the possible role of social dialogue and the social partners – and more generally industrial relations – in reducing inequalities. It addresses wage inequality as well as inequalities in the distribution of working time and access to jobs, training and career opportunities, social protection and pensions by looking at various labour market policies and industrial relations' systems. It identifies ways to carry out necessary transformations without generating further inequalities and social exclusion. A second ILO-publication looks at the representation and bargaining needs in the gig economy.

Read on: [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_625820/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_625820/lang--en/index.htm)

Chapter of the book: [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_625241.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_625241.pdf)

Bargaining in the gig economy: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_624286.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_624286.pdf)

### **Evolution of employee share ownership**

April 10, 2018

The annual Economic Survey of Employee Share Ownership in European Countries in 2017 provides a lot of information on the financial participation of workers. The report includes an overview of the evolution over the period 2006-2017, with main findings, tables and graphs and a list of the most remarkable companies. According to the report, 2017 was a new record year for employee share ownership in Europe, with nearly 400 billion euro held by employees in their company or 3.20%. 86.6% of all large European companies have employee share plans. Their number increased by 3 to 4% on average each year since 2006, a solid growth.

The report:

<http://www.efesonline.org/Annual%20Economic%20Survey/2017/Survey%202017.pdf>

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## **EU Case Law**

### **Again: Uber is a transport service, not a tech company**

April 10, 2018

Judgment of the Court of Justice of 10 April 2018 ( C-320/16) Uber France SAS

For the second time the ECJ has ruled that Uber is a transport service and not an 'information society service'. Four months ago, the ECJ has given a similar ruling in the Spanish Uber case (ECJ 20 December 2017 (C-434/15) Asociación Profesional Élite Taxi/Uber Systems Spain

SL). In the latter case the relevance of the classification issue lies in the fact that transport services are exempted from the scope of Article 56 TFEU, directive 2006/123 and directive 2000/31. Therefore, national law may case require prior administrative authorization in order to provide transport services, without being in contravention with European law.

In the French case that has been decided in April, the background was different although in both cases it was in Uber's interest to be considered an 'information society' service and not a transport service. In both cases the Uber activity at stake is the service consisting of connecting a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey (Uber Pop). National French legislation in short penalizes the services of Uber Pop. According to Directive 98/34 national regulations (including prohibitions) of information society services should be immediately communicated to the European Commission. Non-notification means that the regulation is unenforceable against individuals. The relevant French provision has not been communicated to the Commission and the national court was uncertain whether the provision should be regarded as establishing a rule on information society services or as a rule on services in the field of transport.

In its decision the ECJ refers to the aforementioned Spanish case and follows the same reasoning, with the same conclusion: an intermediation service as provided by Uber in this case, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as 'a service in the field of transport'.

Read the full judgment on:

<http://curia.europa.eu/juris/liste.jsf?pro=&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=C-320%252F16&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=195293>

## **Social policy - Fixed-term work - Contracts concluded with a public sector employer - Measures to penalise the misuse of fixed-term contracts**

*March 7, 2018*

Judgment of the Court of Justice of 7 March 2018, C-494/16, Giuseppa Santoro v. Comune di Valderice and Presidenza del Consiglio dei Ministri

### **Facts**

Ms. Santoro worked from 1996 to 2002 as a provider of “socially useful services” for the municipality of Valderice. She was then employed by that municipality under a continuous and coordinated contractual relationship until the end of 2010. On 4 October 2010 she entered into a part-time contract of employment with that municipality, which was due to end on 31 December 2012. The contract was extended three times until 31 December 2016 (so, a total period of four years).

Ms. Santoro brought an action before the Tribunale di Trapani (District Court, Trapani, Italy), seeking a declaration that those fixed-term contracts were unlawful, an order that the municipality of Valderice compensate in kind the loss suffered, by ordering the establishment of an employment relationship of indefinite duration, and, in the alternative, an order that the municipality award her financial compensation for that loss by compensating her and by



granting her treatment, in legal terms, identical to that of a worker of that municipality employed for an indefinite period and having the same length of service as her. The Tribunale di Trapani decided to stay the proceedings and to refer the following two questions to the Court of Justice EU (CJEU) for a preliminary ruling on the interpretation of Council Directive 1999/70/EC:

(1) Is the granting of compensation of between 2.5 and 12 times the last monthly salary payment (Article 32(5) of Law No 183/2010) to a public sector employee who is a victim of the unlawful successive renewal of fixed-term contracts and who may obtain full compensation only by proving the loss of other employment opportunities or by proving that, if he had participated in an open competition, he would have been successful, an equivalent and effective measure for the purpose of the judgments of 7 September 2006, *Marrosu and Sardino* (C 53/04, EU:C:2006:517), and of 26 November 2014, *Mascolo and Others* (C 22/13, C 61/13 to C 63/13 and C 418/13, EU:C:2014:2401)?

(2) Must the principle of equivalence referred to by the Court of Justice (inter alia) in the judgments of 7 September 2006, *Marrosu and Sardino* (C 53/04, EU:C:2006:517), and of 26 November 2014, *Mascolo and Others* (C 22/13, C 61/13 to C 63/13 and C 418/13, EU:C:2014:2401), be interpreted as meaning that, when the Member State decides not to apply the conversion of the employment relationship (as awarded in the private sector) to the public sector, it must nevertheless provide the worker with the same benefit, if necessary in the form of compensation which must relate to the value of the employment contract of indefinite duration?

### **Considerations of the EU Court of Justice**

The CJEU recalled that the purpose of clause 5(1) of the Framework Agreement (which is set out in the annex to Council Directive 1999/70/EC) is to implement one of the objectives of that agreement, namely to place limits on successive recourse to fixed-term employment contracts or relationships, which are regarded as a potential source of abuse to the detriment of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure.

It follows that clause 5(1) of the Framework Agreement requires Member States, in order to prevent the misuse of successive fixed-term employment contracts or relationships, to adopt one or more of the measures listed in that provision, where their domestic law does not include equivalent legal measures. The measures listed in clause 5(1)(a) to (c), of which there are three, relate, respectively, to objective reasons justifying the renewal of such contracts or relationships, the maximum total duration of successive fixed-term employment contracts or relationships, and the number of renewals of such contracts or relationships.

The Member States enjoy a certain discretion in this regard since they have the choice of relying on one or more of the measures listed in clause 5(1)(a) to (c) of the Framework Agreement, or on existing equivalent legal measures, while taking account of the needs of specific sectors and/or categories of workers. In that way, clause 5(1) of the Framework Agreement assigns to the Member States the general objective of preventing such abuse, while leaving to them the choice as to how to achieve it, provided that they do not compromise the objective or the practical effect of the Framework Agreement.

Furthermore, where, as in the present instance, EU law does not lay down any specific penalties in the event that instances of abuse are nevertheless established, it is incumbent on the national authorities to adopt measures that are not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the provisions adopted pursuant to the Framework Agreement are fully effective.

### **Ruling**

Clause 5 of the framework agreement on fixed-term work concluded on 18 March 1999 (which is set out in the annex to Council Directive 1999/70/EC of 28 June 1999) must be interpreted as not precluding national legislation which, on the one hand, does not punish the misuse of successive fixed-term contracts by a public sector employer through the payment of compensation to the worker concerned for the lack of conversion of the fixed-term employment relationship into an employment relationship of indefinite duration, but, on the other hand, provides for the grant of compensation of between 2.5 and 12 times the last monthly salary of that worker together with the possibility for him to obtain full compensation for the harm by demonstrating, by way of presumption, the loss of opportunities to find employment or that, if a recruitment competition had been duly organised, he would have been successful, provided that such legislation is accompanied by an effective and dissuasive penalty mechanism, a matter which is for the referring court to determine.

Read the full judgment on:

<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-494/16&td=ALL>

### **Social policy - Principle of non-discrimination on grounds of age - Charter of Fundamental Rights of the European Union**

*March 14, 2018*

Judgment of the Court of Justice of 14 March 2018, C-482/16, Georg Stollwitzer v ÖBB Personenverkehr AG

### **Facts**

Mr Stollwitzer began working on 17 January 1983 for one of the predecessors in law of ÖBB. In view of the periods of service completed by Mr Stollwitzer before he took up his post, the reference date for the purpose of his advancement was established as being 2 July 1980. That date determines the pay grade in the pay scales within which a worker obtains, at regular intervals, advancement to a higher step. At that time, it was determined by calculating the periods completed before entry into service, though it did not include periods completed before reaching the age of 18. The period required for advancement was two years for all steps. By adopting Paragraph 53a of the 2015 Federal Law on Railways, the Austrian legislature opted for a complete retroactive reform of the rules under which earlier periods of activity are taken into account, in order to eliminate discrimination on grounds of age, as the Court had found to exist in its judgment of 28 January 2015, ÖBB Personenverkehr (C 417/13, EU:C:2015:38). Relying on a couple of earlier judgments (Hütter - C 88/08, EU:C:2009:38) and ÖBB Personenverkehr - C 417/13, EU:C:2015:38), Mr Stollwitzer brought proceedings against ÖBB before the Landesgericht Innsbruck (Regional Court, Innsbruck, Austria) for an order that it pay him an amount corresponding to the difference

between the salary he received between 2008 and 2015 and the sum which, in his view, would have been payable if the periods required for advancement had been calculated on the basis of the legal situation that existed before the entry into force of Paragraph 53a of the 2015 Federal Law on Railways but included the periods of service completed before his 18th birthday. The Landesgericht Innsbruck (Regional Court, Innsbruck) dismissed the claim, taking the view that the retroactive application of Paragraph 53a of the 2015 Federal Law on Railways had put an end to all discrimination on grounds of age. Mr Stollwitzer lodged both an appeal against that decision before the referring court, the Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck, Austria, and proceedings before the Verfassungsgerichtshof (Constitutional Court, Austria), at the conclusion of which that court declared Paragraph 53a of the 2015 Federal Law on Railways compatible with the Austrian constitutional system. The Verfassungsgerichtshof (Constitutional Court) indicated in that regard that, as a result of the judgment of 28 January 2015, ÖBB Personenverkehr (C 417/13, EU:C:2015:38), the reference dates for the purpose of the advancement of all the undertaking's workers had been recalculated scrupulously. If a change to the reference dates for the purpose of advancement were to have the effect of placing some of those workers at a disadvantage, existing salaries would be maintained, in accordance with Paragraph 53a(6) of that law ('the safeguard clause'), in order to ensure compliance with the principle of legitimate expectations. In these circumstances, the Oberlandesgericht Innsbruck decided to stay the proceedings and to refer two questions to the Court for a preliminary ruling. The first question can be summarized as follows:

(1) Are Article 45 TFEU and Articles 2, 6 and 16 of Directive 2000/78 to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in order to end discrimination on grounds of age arising as a result of the application of national law that took into account, for the purpose of the categorisation of the employees of an undertaking within pay scales, only periods of activity completed after the age of 18, retroactively abolishes that age limit in respect of all such workers and allows only experience acquired with other undertakings operating in the same economic sector to be taken into account? (The second question is not answered by the Court)

### **Considerations of the EU Court of Justice**

The Court sets out that it is clear from the title of, and preamble to, Directive 2000/78, as well as from its content and purpose, that that directive is intended to establish a general framework for ensuring that everyone benefits from equal treatment in matters of employment and occupation by providing effective protection against discrimination based on any of the grounds referred to in Article 1 thereof, which include age.

The effect of ensuring that national legislation complies with the judgment of 28 January 2015, ÖBB Personenverkehr (C 417/13, EU:C:2015:38) is not necessarily to confer the right to a salary increase on workers who have been the subject of the discrimination identified by the Court. As the Court stated in paragraphs 43 to 45 of that judgment, although Member States are obliged, in accordance with Article 16 of Directive 2000/78, to ensure that any laws, regulations or administrative provisions contrary to the principle of equal treatment are abolished, that article does not require Member States to adopt specific measures to be taken in the event of a breach of the prohibition of discrimination but leaves them free to choose, between the different solutions suitable for achieving its intended objective, the one which appears to them to be the most appropriate for that purpose, depending on the situations which may arise. Such compliance will not therefore necessarily have the consequence of enabling a worker whose periods of activity completed before reaching the age of 18 have not been taken into account in the calculation of his advancement, as a result of the application of

the discriminatory national legislation, to obtain financial compensation corresponding to the difference between the salary he would have received but for the discrimination and that which he actually received. That will be the case only if, and as long as, measures to restore equal treatment have not been adopted by the national legislature.

It was therefore permissible for the Austrian legislature to decide, as it did, to amend with retroactive effect the entire system by which previous periods of activity are taken into account. The simple removal of the prohibition on taking into account practical experience gained before the age of 18 was but one of the options available to that legislature for compliance with the provisions of Directive 2000/78. It should also be noted that, as the amendment in question entered into force with retroactive effect, the criterion based on age was formally abolished, thus making it possible to take account of experience gained, irrespective of the age at which it was acquired. Furthermore, Paragraph 53a of the 2015 Federal Law on Railways is applicable without distinction to all ÖBB employees and thus to both those who were discriminated against under the old scheme and those treated favourably by that scheme, and it transferred all those workers to the new remuneration scheme which it introduced.

As regards the relevant experience before the age of 18, according to the Court's established case-law, rewarding experience acquired in a particular field, which enables the worker to perform his duties better, constitutes a legitimate objective of pay policy (see, to that effect, judgment of 3 October 2006, *Cadman*, C 17/05, EU:C:2006:633, paragraph 34 et seq., and of 18 June 2009, *Hütter*, C 88/08, EU:C:2009:381, paragraph 47 and the case-law cited). The employer is therefore, in principle, free to take into account only such previously completed periods of activity when determining remuneration. Second, the Court has taken the view that while a provision of national law that takes into account only certain previous periods of activity and disregards others is undoubtedly likely to entail a difference in treatment among workers according to the date of their recruitment by the undertaking concerned, such a difference is not, directly or indirectly, based on age or on an event linked to age. It is the experience acquired with other undertakings which is not taken into account, irrespective of the age at which it was acquired and the age at which the worker concerned was recruited (see, to that effect, judgment of 7 June 2012, *Tyrolean Airways Tiroler Luftfahrt Gesellschaft*, C 132/11, EU:C:2012:329, paragraph 29). In the third place, with regard to the safeguard clause, it is apparent from the documents available to the Court that that clause provides workers with the guarantee that they will be transferred to the new scheme without any financial loss, in accordance with their acquired rights and with the protection of legitimate expectations, which is a legitimate employment policy and labour market aim. In any event, such a clause is directed only at workers who are no longer able to have their non-relevant experience taken into account. Therefore, the alleged discrimination linked to the consequences of the application of the safeguard clause is not, in any event, based on the criterion of age but on the ways in which account is taken of previous experience. It is apparent that such a basis cannot be called into question in this case.

The Court finds that the change that had to be made to the law in force does not cease to be non-discriminatory by virtue of the fact that it does not have the effect, in the transfer of all workers to a new system for taking account of previous experience which does not entail different treatment on the basis of age, of conferring a benefit on all workers. It is therefore clear, in that context, that the Austrian legislature did not exceed the limits of its powers in this field. In those circumstances, it must be concluded that, in view of the broad discretion enjoyed by Member States in the choice not only of the pursuit of a specific social policy and employment aim but also in the determination of measures for achieving that aim, the

Austrian legislature, in adopting Paragraph 53a of the 2015 Federal Law on Railways, had due regard for the balance to be struck between the elimination of discrimination on grounds of age on the one hand and the preservation of rights acquired under the former legal system on the other. Lastly, with regard to Article 45 TFEU, as Paragraph 53a of the 2015 Federal Law on Railways expressly provides that previous periods of activity in the railway sector completed in other Member States are to be taken into account, there is nothing before the Court to justify any finding of infringement of the freedom of movement for workers enshrined in that article.

### **Ruling**

Article 45 TFEU and Articles 2, 6 and 16 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation are to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which, in order to end discrimination on grounds of age arising as a result of the application of national law that took into account, for the purpose of the categorisation of the employees of an undertaking within pay scales, only periods of activity completed after the age of 18, retroactively abolishes that age limit in respect of all such workers and allows only experience acquired with other undertakings operating in the same economic sector to be taken into account.

Read full text on:

<http://curia.europa.eu/juris/liste.jsf?pro=&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=C-482%252F16&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=198108>

### **Coordination of social security**

*March 21, 2018*

Judgment of the Court of Justice of 21 March 2018, C-551/16, Klein Schiphorst/ UWV

This request for a preliminary ruling concerns the interpretation of Article 64(1)(c) of Regulation (EC) No 883/2004. The request was brought in proceedings by Mr. J. Klein Schiphorst, concerning the refusal by het Uitvoeringsinstituut werknemersverzekeringen (UWV) of his request for an extension of the period of export of his unemployment benefits beyond three months.

### **Legal context**

Article 64 of Regulation No 883/2004, provides that a wholly unemployed person who satisfies the conditions of the legislation of the competent Member State for entitlement to benefits, and who goes to another Member State in order to seek work there, shall retain his/her entitlement to unemployment benefits in cash. The provision is limited to a period of three months from the date when the unemployed person ceased to be available to the employment services of the Member State which he/she left, provided that the total period for which the benefits are provided does not exceed the total duration of his/her entitlement to benefits under the legislation of that Member State. The competent services or institutions may extend the period of three months up to a maximum of six months. The person will remain to be entitled to benefits under the legislation of that Member State, if he/she returns on or before the expiring of the period during which he is entitled to benefits. If he/she does not return before the expiring of this period, he/she shall lose all entitlement to benefits under

the legislation of the competent Member State, unless the provisions of that legislation are more favourable. In exceptional cases the competent services or institutions may allow the person to return at a later date without loss of his/her entitlement to benefits.

### **Main proceedings and questions for a preliminary ruling**

The referring court doubts the compatibility with EU law of the decision by the UWV to refuse to use the power that Article 64(1)c provides them with as the UWV is a competent service or institution, and therefore can use this power to extend the duration of export of unemployment benefits beyond three months. The referring court is uncertain whether a Member State can decide not to use the power granted to them, regardless of the circumstances. If the ECJ decides negative, the referring court wishes to know whether Member States, in regard to the objective and scope of the regulation, can refuse to exercise that power and limit the use of the power to specific circumstances. If the ECJ answers negatively again, the referring court wonders how the Member States are ought to make use of that power.

The Centrale Raad van Beroep (Higher Social Security and Civil Service Court) instructed to stay the proceedings whilst referring the questions for a preliminary ruling. The preliminary questions are:

- May the power conferred by Article 64(1)(c) of Regulation No 883/2004, having regard to Article 63 and Article 7 of that regulation, the objective and scope of that regulation and the free movement of persons and workers, be exercised by refusing, as a matter of principle, to grant any application unless, in the view of the UWV, given the particular circumstances of the case such as a concrete and demonstrable prospect of work, it would be unreasonable to refuse the extension of the export?
- If not, how should Member States apply the power conferred by Article 64(1)(c) of Regulation No 883/2004?

### **Consideration of the EU Court of Justice**

The questions concern the interpretation of the conditions on which a wholly unemployed person who satisfies the conditions of the legislation of the competent Member State for entitlement to unemployment benefits and who goes to another Member State in order to seek work, restrains his entitlement to unemployment benefits in cash. In the main proceedings, the dispute concerns the preservation of an entitlement to receive unemployment benefits by a Dutch national who went to the Swiss Confederation to seek work there. The Swiss Confederation is a third country, and no Member State of the European Union. The situation however does fall within the scope of the regulation. Article 8 of the EC-Switzerland Agreement provides the contracting parties to coordinate their social security systems to determine the legislation applicable and paying benefits to persons residing in the territory of the contracting parties. Section A(1) of Annex II of the EC-Switzerland Agreement allows the parties to apply Regulation No 883/2004. The term “ Member State(s)” contained in the legal acts referred to in section A of Annex II shall be understood to include Switzerland.

By its first question, the referring court asks, whether Article 64(1)(c) of Regulation No 883/2004 must be interpreted as precluding a national measure, which requires the competent institution to refuse, any request to extend the unemployment benefit export period beyond three months, provided the institution does not consider that refusing that request would lead to an unreasonable result. Recitals 4 and 45 of Regulation No 883/2004 show that the purpose of the regulation is to coordinate Member States’ social security systems in order to guarantee that the right to free movement of persons can be exercised effectively. Regulation No 883/2004 modernised and simplified the rules contained in Regulation No 1408/71, but the objectives remain the same.

Article 64(1)(c) provides the entitlement to benefits to retain for a period of three months after the unemployed person ceases to be available to the employment services of the Member State that person left. The entitlement is limited in a way, since the total duration of the provided benefits cannot exceed the total duration for the period of his entitlement of benefits under the legislation of that Member State. The second limb of Article 64(1)(c) however, states that the competent services or institutions ‘may’ extend the period of three months up to a maximum of six months.

When interpreting provisions of EU law, not only the wording of the provision, but also the context and objectives of the Regulation should be taken into account (Ognyanov, EU:C:2016:835, paragraph 31). The Netherlands, Danish, Swedish and Norwegian Governments stated in their written observations, that the word ‘may’ indicates that the provision does not require the competent institutions to extend the period of three months to a maximum of six months. All of the intervening parties and the Advocate General agreed, as he noted in point 34 of his Opinion, since the fact that the Commission’s initial proposal to make the six-month export period compulsory failed to win the endorsement of the Council of the European Union, the Member States agreed on the second limb of Article 64(1)(c) of Regulation No 883/2004. The provision therefore allows the competent services or institutions to extend, in ‘exceptional circumstances’, the period of three months during which the person concerned is entitled to benefits, in order to prevent the loss of all entitlements to benefits, in the event of his late return following the expiry of that period, from giving rise to disproportionate results. This power is a right, but no obligation. The competent services or institutions can use this possibility, but it is not required. This finding is supported by the fact that Regulation No 883/2004 does not fix the conditions for extending the given period for unemployment benefits from three to six months. Under Regulation No 1408/71 the Court already stated that the right to retain unemployment benefits for a period of three months helps to ensure the free movement of workers (Testa and Others, EU:C:1980:163, paragraph 14).

In points 80 and 81 of his Opinion, the Advocate General noted that the disparities between the regimes and measures applied by the Member States cannot be regarded as restrictions of the free movement of workers. Article 48 TFEU provides for coordination but not for harmonisation of the legislation of the Member States.

With regard to the criteria on the basis of which the competent service or institution may extend the period up to a maximum of six months, the Member State must specify the conditions on which extension of the period is or is not to be granted.

### **Ruling**

Concluding, the answer to the first question is that Article 64(1)(c) of Regulation No 883/2004 must be interpreted as not precluding a national measure, such as that at issue in the main proceedings, that requires the competent institution to refuse, as a matter of principle, any request to extend the unemployment benefit export period beyond three months, provided the institution does not consider that refusing that request would lead to an unreasonable result.

The ECJ decided there is no need to answer the second question.

Read the full judgment on:

<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-551/16&td=ALL>

## Events of the Project

- The seminar: European Labour Law Perspectives – Enhancing the Social Pillar, took place at the University Carlos III-Madrid on 18 & 19 January 2018, Madrid, Spain. The recordings of the presentations at this Jean Monet Seminar are available at the following links:

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1. [https://arcamm.uc3m.es/arcamm\\_3/item/show/5fd5d75416103ff3185db4aab0b7c357](https://arcamm.uc3m.es/arcamm_3/item/show/5fd5d75416103ff3185db4aab0b7c357)
  2. [https://arcamm.uc3m.es/arcamm\\_3/item/show/a7262a469e9bff226605a8bc26a9b6b0](https://arcamm.uc3m.es/arcamm_3/item/show/a7262a469e9bff226605a8bc26a9b6b0)
  3. [https://arcamm.uc3m.es/arcamm\\_3/item/show/ea080356e304ed054ce60a231b0d7006](https://arcamm.uc3m.es/arcamm_3/item/show/ea080356e304ed054ce60a231b0d7006)
  4. [https://arcamm.uc3m.es/arcamm\\_3/item/show/fb3050d315154d8ffe923d28d8107e18](https://arcamm.uc3m.es/arcamm_3/item/show/fb3050d315154d8ffe923d28d8107e18)
  5. [https://arcamm.uc3m.es/arcamm\\_3/item/show/6220166b54f76e83283bdfd1985bdc04](https://arcamm.uc3m.es/arcamm_3/item/show/6220166b54f76e83283bdfd1985bdc04)
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### Future events:

- **Summer Course: European Labour Law Perspectives – Enhancing the Social Pillar**, 20-22 June 2018 at the Law Faculty - University of Amsterdam, the Netherlands. Venue: Nieuwe Achtergracht 166, 1018 WV, Amsterdam.

This course aims at keeping employment specialists and labour law practitioners up -to -date by providing an overview of the latest policy developments, legislative initiatives and case law in the field of EU labour law.

#### Key topics

The European Pillar of Social Rights

Workers protection in insolvency proceedings

Labour law and the on-demand economy

EU social security law

Update on the revision of the Posting of Workers legislation

Temporary agency work and flexible employment

Working time Directive

Workers involvement in the undertaking

EU Antidiscrimination Law and protection of atypical workers (fixed-term contracts, part-time workers), discrimination on grounds of gender, religion and age at work, etc.

Other recent legislative and policy developments at EU level: work -life balance and proposal on a Directive on transparent and predictable working conditions.

This conference is aimed at academics, lawyers specialised in employment and labour law, and other legal practitioners.

#### Keynote speakers

Prof. dr. Catherine Barnard

Prof. dr. Anthony Kerr

Prof. dr. Jaap van Slooten

Prof. dr. Frank Hendrickx

Prof. dr. Manfred Weiss

Prof. dr. Ronald Beltzer

Prof. dr. Evert Verhulp

Prof. dr. Mies Westerveld

Prof. dr. Irene Asscher

#### Credits info

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1 ECTS

Professional Legal Training total:19 hours

Concerning the acknowledgment of points for the Dutch Order of Lawyers, the course can be followed per day or as a whole – 3 days (see applicable fees below)

**Course Fee**

For practicing lawyers:

150 euro per day or 400 euro for the whole course (three days);

The same fee applies for academics, judges, and other legal practitioners;

Exception: for young academics (PhD candidates, junior lecturers, post-docs and lecturers up to 4 years after their PhD defence) there is no fee due.

For the payment of the course fee after your registration, please send the due amount to the following bank account number: NL27DEUT0430547013

Important: please mention "Jean Monnet summer course Enhancing the Social Pillar WBS element: C.2127.0210"

More information and application on: UvA website

<http://uva-aias.net/nl/news/jean-monnet-summer-course-2018>

Or contact:

Nuria Ramos Martín - [N.E.RamosMartin@uva.nl](mailto:N.E.RamosMartin@uva.nl)

or Hanneke Bennaars – [j.h.bennaars@uva.nl](mailto:j.h.bennaars@uva.nl)

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