



# European labour law bulletin

A round-up of developments in employment law across Europe over the past quarter. News from: Belgium, the EU, France, Germany, Italy, the Netherlands, Russia, Spain and the UK.

## BELGIUM

### Existing anti-crisis measures to promote employment adapted and extended

Since 1 July 2009 (and initially expected to run until 31 December 2009 but then extended until 30 June 2010), companies have been able to implement three distinct anti-crisis measures to adjust temporarily the volume of work carried out in their business and so avoid, if at all possible, the dismissal of staff and safeguard employment:

- temporary collective reduction in working time;
- collective system of full or partial suspension of white-collar workers' employment contracts; and
- temporary individual reduction in working time.

All three measures are advantageous from a social security perspective (eg reduced employer contributions etc).

These measures have once more been adapted and extended: they will now run until 30 September 2010.

In addition to the above measures, blue-collar workers who are dismissed by their employer between 1 January 2010 and 30 June 2010 can still benefit from a special 'crisis premium' (in addition to their normal severance rights), subject to certain adaptations.

It is likely that the above-mentioned anti-crisis measures will be renewed or further extended.

### Mandatory implementation of preventive alcohol and drugs policy

Since 1 April 2010, all employers in Belgium are required to prepare and implement an adequate alcohol and drugs policy at company level, whose purpose is to prevent dysfunctional behaviour at work as a consequence of the use by employees of alcohol and/or drugs and to provide an adequate remedy should such behaviour occur.

### Corporate governance in listed companies

The newly adopted law on the reinforcement of corporate governance, which applies to listed companies and autonomous state enterprises, was published in the *Belgian State Gazette* of 26 April 2010. Some of its provisions have already entered into force as of the current financial year; others will have effect only from the next fiscal year starting after 31 December 2010. Importantly, for listed companies, the annual board report must contain a corporate governance statement, which has to include a detailed remuneration report. This report must be prepared by the remuneration committee and contain specific information on the company's remuneration policy as well as details of the remuneration and compensation packages for departing directors and senior managers.

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EU

## Share schemes exemption to be extended to all European companies and to non-European companies traded on equivalent markets

The European Parliament has adopted the revised prospectus directive.

The so-called ‘employee share schemes exemption’ (meaning there is no obligation to publish a prospectus for offers to employees and directors) will be extended to all European companies (and not only those with securities traded on a regulated market).

The exemption will also cover non-European companies with securities traded on a market outside the EU, if the supervisory regime of the home country of that market has been formally declared to be equivalent to the EU supervisory regime for regulated markets.

The revised directive also proposes changes to other exemptions (the 100 person and €2.5m thresholds).

The European Council now needs to approve the directive, which will then be published.

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FRANCE

## Redeployment offers in case of redundancies

Companies implementing a redundancy exercise must offer internal redeployment opportunities to the affected employees – ie another job within the group, whether in France or abroad. A new law on the issue was enacted on 18 May 2010 and entered into force on 20 May 2010. Its primary objective is to avoid offers to employees of positions in countries where the remuneration is very inferior to their current compensation.

At first, a change was introduced specifying that a redeployment offer of an identical or equivalent position must provide for equivalent remuneration. This seems to prevent offers of redeployment in countries with a much lower standard of remuneration. However, in the absence of redeployment opportunities in an identical or equivalent position, with the consent of the employee the company may still offer redeployment to a position in a lower professional category.

Now, a new procedure has been introduced for companies and groups that are established abroad and may have worldwide redeployment opportunities. In summary, the employer will make offers of redeployment abroad only to employees who have agreed to receive them and subject to the restrictions that they have voiced.

The government has already stated that it will issue an instruction to clarify certain aspects of this legislation, which has not yet been published.

## Reforming the pensions system

The objective of this reform is to change the legal retirement age from 60 to 62 years by 2018 by increasing the active work life by four months per year. At the same time, the retirement age that qualifies for a full pension will be progressively changed from 65 to 67 years by 2023. These measures would apply to both civil servants and private sector employees. The government white paper setting out this proposed reform will be presented to the Cabinet on 13 July 2010.

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GERMANY

## Varying bonus payments does not automatically prevent the establishment of an individual claim to a bonus payment

The German Federal Labour Court has held that an employee may have a claim to a bonus payment on the basis of an implied contract, even though the amount of the bonus payment is not determined in advance and varies from year to year. The Federal Labour Court states that only the non-determination of the bonus payment amount does not automatically prevent the conclusion of an implied individual contract. In this respect the court differentiates between the entitlement to a bonus payment and the determination of the bonus amount. Claims may thus arise not only from a collective company practice (*betriebliche Übung*), but also from implied individual contracts.

Voluntary or discretionary bonus payments should always be accompanied by a statement from the employer explaining that both the payment as such and the amount are voluntary and discretionary.

## More than one collective bargaining agreement may apply in an operation

In a judgment announced via press release on 23 June 2010 the German Federal Labour Court has changed its previous jurisprudence, allowing the collective applicability of different collective bargaining agreements in one operation. This may lead to the establishing of new trade unions representing only certain specialist groups of employees.

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### ITALY

## Recent Supreme Court decision about video-recording devices in the workplace

The Italian Supreme Court has recently issued a decision on the use of information collected using video-recording devices in the workplace against employees. Italian law forbids the use of electronic devices to monitor employees' working activity. Moreover, the installation of electronic devices must be agreed with the works council or authorised by the Employment Office. Failing to comply with such a rule may be a criminal offence and render any evidence collected against employees unusable in implementing disciplinary actions.

Nonetheless, the Supreme Court stated that evidence collected by means of video-recording devices can be used to ground a criminal action against employees if it proves criminal behaviour on the part of an employee, even if the devices' installation had not been agreed or authorised.

The Supreme Court has not dealt with the issue of using evidence collected by means of electronic devices to ground a disciplinary action when the installation was not agreed or authorised.

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### NETHERLANDS

## Legislative proposals declared uncertain

Some legislative proposals have been declared uncertain due to the fall of the Dutch government, including the increase of the pension age from 65 to 67 and the limitation of the severance payment to one year's salary

for people earning over €75,000 per annum. These proposals and other suggested amendments to Dutch employment and social securities law (eg easing the rules on dismissals) will form part of the negotiations of the coalition agreement for the new government. It is important to note that while the legislative proposal on the pensionable age is on hold, the social partners on 4 June 2010 agreed on the increase of the pensionable age for state pensions from 65 to 66 in the year 2020 and a potential increase from 66 to 67 in 2025, depending on the increase in life expectancy. Furthermore, they agreed that the pensionable age for supplementary pensions will also be increased in line with the pensionable age for state pensions.

## Successive fixed-term employment agreements

A legislative proposal for a temporary widening of the provision in Dutch employment law on the basis of which successive fixed-term employment agreements are converted into indefinite agreements by operation of law has been sent to the Dutch Senate.

The proposal temporarily adds a paragraph stating that employers can hire new employees under 27 years old for whom fixed-term agreements will automatically become indefinite agreements only if fixed-term employment agreements have succeeded each other with intervals of less than three months and have exceeded a period of 48 months (instead of the regular 36), or if more than four (instead of the regular three) fixed-term employment agreements have succeeded each other with intervals of less than three months. The reason for this temporary adjustment is to stimulate the labour participation of young people. This adjustment will expire on 1 January 2012.

## Holiday and leave

Following case law rendered by the European Court of Justice, a legislative proposal was recently sent to the Dutch Council of State on amending the rules on holiday and leave. In the Netherlands, employees who are long-term ill currently accrue less holiday than employees who are not ill. The proposal's purpose is to ensure that employees who are long-term ill accrue the same holiday as those who are not. In addition, the proposal stipulates

that statutory holidays (ie 20 days in the case of a full-time employee) lapse after 1.5 years (currently they lapse after five years). This does not apply to non-statutory holidays and, furthermore, employers and employees can by mutual agreement extend the time period.

### Extended powers for works councils

The Public Company Works Council Act came into force on 1 July 2010. It extends the powers of existing works councils of Dutch public companies (*naamloze vennootschappen*), whether listed or not, in the corporate decision-making process. The new clauses grant works councils rights to form and to express their opinions on contemplated resolutions of the general meeting of shareholders on:

- important resolutions by the management board;
- the remuneration policy for the management board; and
- the appointment, suspension and dismissal of a member of the management board or the supervisory board in a company where the general meeting of shareholders is the competent body in this respect.

The general meeting of shareholders in a Dutch listed company must be announced no later than 42 days before the meeting. This means that the works council's point of view must be available before the announcement can be made.

The general meeting of shareholders is not obliged to act on the opinion of the works council and does not have to give reasons for not doing so. The works council is not obliged to give an opinion and the absence of an opinion from the works council will, therefore, not affect the corporate decision-making process.

As a transitional measure, a works council will not have the right to express its opinion in a general meeting that is held within 90 days of the entry into force of the Public Company Works Council Act. Consequently, the first possible date for a general meeting to which the above applies is 30 September 2010.

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### RUSSIA

#### Changes in Russian immigration law

From 1 July Russian immigration law provides for significant benefits to so-called 'highly qualified professionals'. Under this term the law includes foreign citizens who have attained experience and skills in a specific area and whose annual salary for their work in Russia for a particular position is or exceeds RUB2m (approximately \$66,000 or €52,000).

Such foreigners will be able to obtain work permits for the term of their employment agreements subject to a limit of three years (previously one year). The quotas governing invitations to foreign citizens for the purposes of employment and issue of work permits no longer apply. Neither are employers obliged to obtain a permit to engage foreign employees who are 'highly qualified professionals'.

These employees will be subject to the same tax rate as Russian tax residents (currently 13 per cent) for income generated through their employment in Russia, regardless of the number of days they spend in Russia per tax year (previously, foreign citizens were required to spend at least 183 days per tax year in Russia to qualify for the 13 per cent tax rate; otherwise they were taxed at 30 per cent).

A number of other benefits are provided to such employees and their family members.

Also from 1 July 2010, representative offices of foreign companies duly accredited in Russia no longer have to obtain work permits for their foreign employees.

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### SPAIN

#### Labour law reform

The Royal Decree Law approving the labour law reform in Spain came into force on 18 June.

Terminating a contract for economic, technical or organisational reasons is being made easier: failure to meet the formalities set out by law will now render a redundancy unfair, instead of null and void as was the case before. The sanction will thus be only financial. This is likely to spread the use of redundancies with

acknowledgement of unfairness (insufficient grounds) for some categories of employees.

The reform also aims at improving flexibility, with the conditions for temporary suspension of employment agreements (whether partial or in full) being eased and the possibility of not applying certain salary terms being introduced. Negotiating significant changes to employment terms and conditions is also being made easier.

On a less positive note, the reform introduces measures aimed at limiting fixed-term employment and encouraging permanent employment.

It is very likely that amendments will be brought to the reform in the near future.

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UK

## UK Corporate Governance Code

The Financial Reporting Council (FRC) has published the new UK Corporate Governance Code, which replaces the 2008 Combined Code for accounting periods beginning on or after 29 June 2010. The new Code is largely in the form of the FRC's December 2009 consultation draft, but with a new recommendation that all directors of FTSE 350 companies be put up for re-election every year and an express reference to gender diversity in the Code principles on board appointments.

## Equality Act 2010

The long-awaited Equality Act 2010 was passed by the Labour government in an attempt to harmonise the different strands of discrimination law and, where appropriate, to adopt a unified approach to 'protected characteristics'.

The Act introduces a number of changes to discrimination law, including:

- broadening the scope of permitted positive action in the context of recruitment or promotion;
- harmonising the definitions of direct discrimination and harassment to make reference to 'associations' and 'perceptions';

- allowing claimants to bring combined claims (ie claims based on discrimination because of two protected characteristics – eg age and gender);
- introducing a new claim for gender pay discrimination based on hypothetical comparators;
- limiting the enforceability of 'pay secrecy' clauses and introducing a power to require larger organisations to report on their gender pay gap; and
- prohibiting employers' pre-employment health enquiries other than in prescribed circumstances.

Although the Act received royal assent on 8 April 2010, it is unknown when its provisions will come into force. The Labour government's intention was for the Act to come into force in October 2010, but it is not yet clear whether the new coalition government will follow this timetable.

## New legislation

Various new pieces of employment legislation came into force on 6 April 2010, the most significant of which relate to:

- 'fit notes' – the sick note was replaced with the 'statement of fitness to work', or the 'fit note', which enables doctors to describe a patient as 'not fit for work' or 'may be fit for work taking account of the following advice...': eg a phased return, altered hours, amended duties or workplace adaptations. The stated aim of this legislation is getting individuals back into work. Businesses need to consult closely with affected employees in implementing 'fit note' recommendations;
- training time – employees with more than 26 weeks' continuous service now have a right to request time off to train in certain circumstances. Employers are under a duty to consider such requests and must follow a prescribed procedure when doing so. The employer is entitled to refuse the request but only for certain prescribed reasons (eg lack of resource). Breaches of the procedural requirements by the employer may give rise to a claim in the employment tribunal and compensation of up to eight weeks' pay. This legislation currently applies to businesses with 250 or more employees but is expected to apply to all employers from next year;

- alerting regulators to protected disclosures (whistleblowing) – where a claimant alleges on a claim form to the employment tribunal that he has made a protected disclosure, provided the claimant has indicated his consent on the claim form, the tribunal may now send all or part of the claim form on to a prescribed regulator (eg the Financial Services Authority); and
- paternity leave for babies due on or after 3 April 2011 – eligible male employees may have up to 26 weeks’ maternity leave transferred to them, which may be taken as paternity leave before the child’s first birthday, if their partner (the child’s mother) returns to work without exercising her full entitlement to maternity leave. This leave may be paid if it is taken during the mother’s 39-week statutory maternity pay period.

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