February 1, 2011

ADVISORY | European Employment Law Update

A summary of recent employment law developments in Europe, with contributions from leading local law firms in the following countries:

- Belgium;
- France;
- Germany ;
- Italy ;
- Netherlands;
- Russia;
- Spain; and
- United Kingdom

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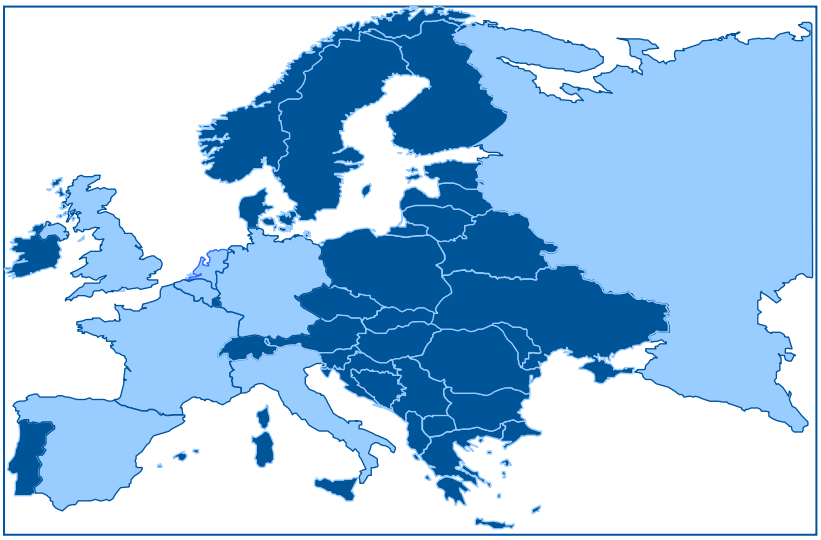

EUROPEAN UNION

Tougher Rules on Bankers' Remuneration and Capital Requirements

On 11 October 2010 , the Council of the European Union adopted a Directive, known as CRD III, to amend the Capital Requirements Directive. The final text of CRD III was published in the Official Journal on 14 December 2010.

The provisions on bank remuneration policies took effect from 1 January 2011 and include:

- a limit on the payment of upfront bonuses to 30% of the total bonus (20% for particularly large bonuses);
- a requirement that banks defer at least 40% of the total bonus for at least three years (60% for particularly large bonuses), and an option to recover (or forfeit) bonus if investments do not perform as expected;
- an obligation to pay at least 50% of the total bonus as "contingent capital" (to be called upon first if the bank gets into difficulties), shares or other securities linked to the bank's performance;
- a requirement that banks establish caps on bonuses, being linked to a proportion of salary on the basis of EU-wide guidelines; and
- a requirement that bonus-like pensions are paid in shares or contingent capital.

CRD III also adopts tougher capital requirements for bank's trading books and investments in securitisations.

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BELGIUM

Introduction of the Social Criminal Code

The Social Criminal Code was published in the Belgian official journal of laws on 1 July 2010. The Code will enter into force no later than 1 July 2011 (the exact date is yet to be determined by Royal Decree).

The Code aims to harmonise existing criminal and administrative sanctions for infringement of employment, social security and industrial relations law. The main developments include:

- exhaustive classification of the range of violations;
- more active role of social inspectorates;
- introduction of four defined sanction levels, with minor breaches being decriminalised (but still punishable by administrative sanctions) and major breaches being punishable by imprisonment;
- criminal and administrative sanctions to be multiplied by the number of affected employees (up to a maximum number); and
- introduction of new penalties, including powers to shut down a company and to prohibit the execution of an activity.

The Code also provides for specific procedural rules on the investigation process and subsequent prosecution.

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FRANCE

Modification of whistleblowing regulations

The CNIL (*Commission Nationale de l'Informatique et des Libertés*) regulation on whistleblowing dated 14 October 2010 was published in the Official Journal (*Journal Officiel*) on 8 December 2010 and modifies the existing regulation (regulation on unique authorization n°AU-004 dated December 2005).

The modification results from a decision of the French Supreme Court of Judicature on 8 December 2009 in which the Court held that the whistleblowing system, and in particular the code of conduct of business of Dassault Systems, a listed company on the New York exchange, was illegal. This code had been implemented by Dassault Systems in order to comply with the U.S. Sarbanes Oxley Act 2002.

In particular, the code of conduct of business was held illegal because:

- it provided for a compulsory prior authorisation of Dassault Systems for employees to disclose/use confidential and internal information (e.g. notes, organisation chart and information sent to colleagues) which could have come to their knowledge via the employment relationship and that could compromise the vital interests of the company; and
- the scope of the authorisation was too broad as it included information that would compromise the 'vital interests' of Dassault Systems.

CNIL modified its regulations to comply with the decision by:

- ensuring that the whistleblowing system can only relate to accountability, banking, finance and corruption;

- including within the scope of the regulation the systems used to prevent anti-competitive practices; and
- removing the references to the 'vital interests of the company'.

Companies have six months to comply with the new regulation.

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GERMANY

Amendments to Federal Data Protection Act

On 25 August 2010, the Federal Government submitted a draft bill to amend the Federal Data Protection Act. The amendments are scheduled to come into effect in March 2011.

In future:

- An employer's right to ask questions during a job interview will be enshrined in law. The only permissible questions in interviews will be those relevant to the applicant's suitability for the position;
- Employers will not be permitted to collect data from social networks to which only a certain group of people have access (e.g. Facebook). The only exception to this is social networks that are used by people to present themselves to potential employers (e.g. Xing);
- Medical examinations will only be permitted if the employee's state of health at the time employment commences constitutes a significant and decisive occupational requirement;
- Secret video surveillance of employees will not be permitted;
- Tracking systems may generally only be used if they are needed for the company's business operations; and
- The draft bill also contains rules concerning the permissibility of collecting, processing and using data for the purpose of monitoring performance and behaviour, combating corruption and checking compliance with rules applicable to the employment.

Retailers and employers' associations predict that the planned amendments will make it more difficult to combat corruption and crime in companies.

Germany's Bundesrat (a legislative body representing the 16 federal states of Germany) has demanded a number of modifications to the draft bill and the final wording is yet to been published.

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ITALY

Cap on Indemnification for Conversion of Fixed-term Contracts

Law no. 183/2010, so called "Collegato Lavoro", came into force on 24 November 2010. It contains a number of important developments concerning areas of labour law such as arbitration and settlement, terms of forfeitures, self-employment, working time and fixed-term contracts.

A key change is the introduction of a cap on the amount of damages payable to employees where a fixed-term contract is converted into an indefinite-term contract as a result of a court ruling. The cap will range from a minimum of 2.5 months' salary to a maximum of 12 months' salary.

The new provisions are intended to avoid employers having to pay huge damages where the employee is to be reinstated following litigation.

The new provisions are also applicable to pending court proceedings. For this reason, there is a possibility that the provisions conflict with the Constitution and this aspect of Collegato Lavoro could soon be examined by the Italian Constitutional Court.

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NETHERLANDS

Broadening of temporary employment contracts for younger employees

On 9 July 2010, new legislation was passed making it easier to employ younger employees (those under the age of 27 at the date of hire) on successive fixed-term employment contracts.

This is an important change since Dutch law generally only permits an employer to terminate a permanent employment contract unilaterally with prior court or Labour Office approval. Now, however, a fixed-term employment contract for younger workers will automatically end on expiry, without any prior notice being required, unless such prior notice was specifically agreed.

The flexibility in respect of younger employees stems from the following changes:

- Previously, three successive fixed-term employment contracts would automatically result in deemed permanent (indefinite-term) employment. Now, four consecutive fixed-term contracts are allowed before the employment becomes permanent; and
- The maximum total period of the fixed-term contracts, before the employment automatically becomes permanent, has been extended from 36 to 48 months.

It is not entirely clear how these new rules will be interpreted in the case of an employee who reaches the age of 27 during employment. The general opinion is that, if the employee has not reached the age of 27 at the start of the first fixed-term contract, the new, more flexible rules will apply.

This is a temporary measure taken following the economic crisis in order to help keep younger employees at work. The measure will only apply until 1 January 2012.

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RUSSIA

Beneficial immigration law for highly qualified specialists

On 1 July 2010, a Federal Law introduced a beneficial labour migration regime for highly qualified specialists. Highly qualified specialists are defined as foreign citizens who are experienced or skilled in a particular area and whose salary for work in Russia is not less than RUB 2,000,000 a year (approximately USD 65,000 / EUR 49,000).

Highly qualified specialists now enjoy the following benefits:

- Quotas for issuing invitation letters to enter to work in the country and for obtaining work permits are not applicable to them;
- The duration of a work permit can be for the term of the employment contract (up to a maximum of three years) with a right to extend the term on an unlimited number of future occasions (each time for a maximum period of three years);
- If the employment contract stipulates that work will be carried out in several regions of Russia, a single work permit valid in all those regions can be obtained;
- Employment contracts or contracts for services must provide for additional medical insurance;
- Highly qualified specialists who have obtained a work permit are able to receive a residence permit, for themselves and their family members, for the term of the work permit; and
- Highly qualified specialists will be treated as tax residents and will be eligible to use the 13% personal income tax rate from day one, as opposed to other foreign employees who will need to spend at least 183 days in Russia before switching from the 30% non-resident rate.

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SPAIN

Emergency Measures to Reform the Employment Market

New legislation (Act number 35/2010, passed on September 17 2010) modifies the definition of redundancy and includes some changes to the formal redundancy process:

- the definition of each ground for redundancy has been qualified, allowing companies to carry out redundancies not only when the company's viability is endangered but also when there is reasonable evidence that this would improve the future development of the company or the company's competitive position;
- the notice period for a redundancy dismissal has been reduced from 30 days to a minimum of 15 days; and
- non-observance of the formal procedure will now only result in the payment of statutory severance pay and not to reinstatement.

The new Act provides for a new type of permanent contract of employment with the following features:

- in the event of a termination without cause, employees are not entitled to the usual statutory severance (45 days of salary per year of service) but to a reduced statutory severance (33 days of salary per year of service, capped at 24 months' pay);
- a portion of the reduced statutory severance (eight out of the 33 days of salary per year of service) is to be reimbursed to the company by a Special Guarantee Fund; and
- it can be entered into with a person with unemployment status and to certain conversions of fixed-term contracts into new permanent contracts of employment.

Finally, the new Act provides for the following additional measures:

- the future creation of a capitalisation fund which, from 1 January 2012, would allow the funding of a portion of the statutory severance applicable to terminations in Spain by a special new body; and
- the authorisation of the creation of for-profit Employment Agencies, which are now allowed to intermediate in the labour market in Spain.

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UNITED KINGDOM

Agency Workers Regulations 2010

New regulations governing the treatment of temporary agency workers will come into force on 1 October 2011. The Regulations create a right to equal treatment for agency workers who find temporary work through an employment business.

The right to equal treatment will not apply until an agency worker has undertaken the same role with the same hirer for 12 weeks. Agency workers will be entitled to identical basic working and employment conditions as if they had been recruited directly by the hirer. Specific examples include:

- pay (e.g. fees, bonuses linked to performance, commission, holiday pay and certain other emoluments of employment);
- the duration of working time, night work, rest periods, rest breaks and annual leave;
- access to employment (applies from day one of assignment); and
- access to on-site facilities and training (applies from day one of assignment).

Liability for a breach of the Regulations lies with the responsible party, whether that is the employment business, the hirer or a third party intermediary. Agency workers will be entitled to receive compensation for any detriment suffered, which could include a sum for any injury to feelings.

The Equality Act

The Equality Act 2010 came into force on 1 October 2010. It harmonises and updates the UK's anti-discrimination framework. The nine protected characteristics are age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership and pregnancy and maternity. The key changes introduced by the Act include:

- a more standard framework of protection against direct discrimination, indirect discrimination, harassment and victimisation;
- a new concept of "discrimination arising from disability";
- an extension of the law to protect employees from associative and perceptive discrimination;
- employers' liability for harassment by a third party will now extend to age, disability, gender reassignment, race, religion or belief, sex and sexual orientation;
- a prohibition on employers from asking pre-employment health questions except in specified circumstances;
- making pay secrecy clauses unenforceable in certain circumstances; and

- new powers for employment tribunals to make recommendations on the workforce as a whole.

The Equality Act 2010 is supported by Codes of Practice which are still being finalised.

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