Tax&Legal Highlights

Romania

CJEU decision on annual leave. Impact over domestic regulations

Court of Justice of the European Union ("CJEU") ruled that, in certain conditions, the right to annual leave may be lost if the employee refuses without justification to exercise this right.

On 6 November 2018, the Court of Justice of the European Union ("**CJEU**") rendered decision c-684/16, on the interpretation of art. 7 of Directive 2003/88/EC concerning certain aspects of the organisation of working time and of Article 31 Para. (2) of the Charter of Fundamental Rights of the European Union, regarding the annual leave.

The dispute in the main proceedings and the questions referred for a preliminary ruling

The dispute in the main proceeding was triggered by the fact that a German employer, Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV, refused to grant one of its workers, upon termination of employment, a financial compensation for the untaken leave days. The employer's refusal was based on the German legislation pursuant to which the annual leave must be granted in the course of the calendar year when it is accrued – the possibility of carrying forward the annual leave in the following year being

permitted only in the event of compelling operational grounds or for personal reasons pertaining to the employee.

Given the above context, the Federal Labour Court decided to stay the proceedings and refer to the CJEU the following questions for a preliminary ruling:

1. Whether EU law precludes national legislation from providing that the entitlement to an allowance paid in lieu of annual leave upon termination of employment lapses in cases where (i) the worker did not request to benefit from annual leave during a certain reference period and (ii) domestic regulation does not require an employer to specify unilaterally and with binding effect for the employee, when that leave has to be taken by the employee within the reference period.

2. If the first question is answered in the affirmative, is the domestic court required to disapply the national legislation in breach of EU law, even in disputes between private persons.

Grounds and CJEU ruling

a. <u>With respect to the annual leave</u>

CJEU ruled that if:

- The employer is able to prove that it enabled workers to exercise their right to paid annual leave in a concrete and transparent manner and
- The worker refuses to take annual leave voluntarily, being aware of all the consequences arising thereof;

EU law does not preclude national legislation from providing the loss of annual leave or payment of an allowance in lieu of untaken paid annual leave at the end of the employment relationship.

Moreover, CJEU detailed the conditions that need to be met for the right to annual leave/payment of an allowance in lieu of untaken paid annual leave to lapse, namely:

- The employer to enable the worker, in a concrete and transparent manner, to take annual leave;
- To this end, the employer must provide the worker with specific information in good time with regard to his right to benefit from annual leave, to ensure that the purpose of the annual leave is attained (i.e.: enable the worker to rest).

Notwithstanding the above, CJEU reminded that, according to its consistent case law (which remains applicable hereinafter), the right to paid annual leave must be regarded as a particularly important principle of EU social law, the implementation of which by the competent national authorities must be confined within the limits expressly laid down by Directive 2003/88 itself.

Consequently, a practice that would allow the lapse of the right to annual leave without the worker having been provided with the possibility to actually exercise it, would undermine its very substance and, as such, is prohibited.

b. With respect to the domestic court's obligation to disapply the national legislation in breach of EU law

CJEU ruled that in the event that it is impossible to interpret national legislation in a manner consistent with EU law, the national court hearing a dispute between private persons is required to disapply the national legislation.

In this framework, we mention that the above cited CJEU ruling was based on the fact that the right to annual leave is enshrined under the Charter of Fundamental Rights, primary source of law, which contains a clear, unconditional and sufficiently precise provisions and, thus, can have direct effect.

The impact of the CJEU ruling over national legislation

Art. 146 Para (1) of the Labor Code, as amended and supplemented, enshrines the rule pursuant to which the annual leave must be taken every year.

By way of exception, Para (2) of the same article provides that in the event the employee, for justified reasons, cannot take the annual leave during the year in which it was accrued, the employer is under the obligation to grant the employee the untaken leave days, with his consent, in a reference period of 18 months, calculated from the start of the year following the one in which the right to annual leave was accrued.

In light of the above cited CJEU case law, it is necessary to determine whether art. 146 of the Labor Code may be construed in the sense that the right to annual leave lapses at the end of the calendar year during which it was accrued provided the employer guaranteed the employee the right to perform the annual leave (e.g.: specific and timely information, notification with regard to the number of untaken leave days) and the employee refuses to benefit from annual leave without having any objective justification.

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Amendments made to the immigration law concerning the right to stay and work in Romania for non-EU/EEA/Swiss citizens

Law no. 247/2018 for modifying and completing some normative acts regarding the regime of foreigners in Romania was published on November 7, 2018. The changes are in force starting November 2018 and cover the conditions to acquire residency and to work in Romania.

The main purpose of the law is to transpose the EC 2016/801 Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purpose of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, for which Romania had as implementation deadline the year 2018.

Through the implementation of the Directive, new categories of foreigners are defined and regulated:

- Trainee – for the purpose of gaining new knowledge in a professional environment as per the training agreement
- Researcher – for the purpose of research and development in a scientific project approved by the Ministry of Research and Innovation
- Au pairs– for the purpose of carrying out light domestic work and childcare activities for a temporary period for a host family

The minimum salary threshold for foreign citizens working in Romania is reduced from the national average the case of highly skilled workers, the minimum salary threshold is reduced from four to two gross average salaries.

Other changes brought by the Law no. 247/2018:

- The liability of the host entities having legal agreements with foreign citizens to notify the immigration authorities
- The Governmental fees for issuing the work permits for employment/ assignment purposes are reduced by half
- The general conditions regarding the cancellation and revocation of the right to stay in Romania for foreigners admitted to Romania who are exempt from obtaining a visa are being clarified
- New contraventions are introduced, regarding the prevention of employees of the General Inspectorate for Immigration from exercising control at employers' headquarters or not making available requested documents.

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Reauthorization of the temporary storage and customs warehouse require a customs global guarantee

In order to obtain reauthorization, the economic operators holding authorizations for temporary storage or customs warehousing will also have to obtain an authorization for using a global guarantee. The deadline for reauthorization is the 1st of May, 2019.

According to a notification issued by the General Customs Directorate, granting an authorization for operating temporary storage perimeters, as well as a customs warehouse authorization, including their re-evaluation, cannot take place unless an authorization for using a global guarantee is obtained.

The authorization for using the global guarantee is intended to cover the amount of import taxes concerning the customs debt and of other taxes related to the goods import, regarding two/more operations, declarations or customs regimes, except the Union/common transit regime.

The economic operators can obtain this authorization by request, using the Central System of Customs Decisions, developed within the EU level. The time limit for obtaining it is of 120 days starting with the day of the application request.

If you currently hold an authorization for using the temporary storage regime or customs warehouse regime, the time limit for reauthorization is the 1st of May, 2019. In order gross salary to the national minimum gross salary. In

to obtain the reauthorization, you will also have to apply for an authorization for using a global guarantee. We encourage you to consider in advance the implications of these changes on your activity and to make sure that you have obtained the necessary authorizations in time.

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