



**HUMAN RIGHTS DEFENDER
OF THE REPUBLIC OF ARMENIA**



AD-HOC PUBLIC REPORT

Comparative analysis of the Armenian Labour Law and EU standards



Yerevan 2019

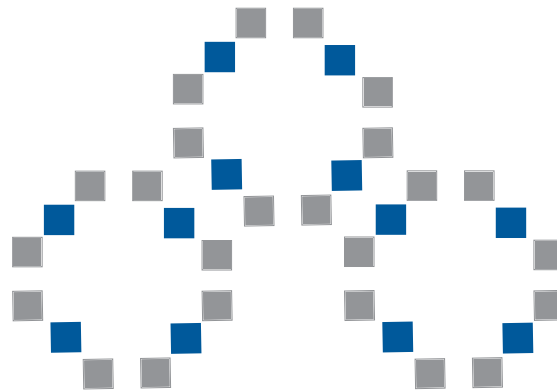


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**FRIEDRICH
EBERT
STIFTUNG**

This report was conducted by the office of the Human Rights Defender of the Republic of Armenia in cooperation with the Friedrich-Ebert-Stiftung. The views and opinions expressed in this report do not necessarily reflect the views and opinions of the Friedrich-Ebert-Stiftung.

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INTRODUCTION

Property or labour is the material basis of a person's life. As a source of income, labour is both meant to provide minimum living standards for an individual and is also a necessary prerequisite for self-fulfilment and self-development, which in turn secures the person's full-fledged existence and normal development in society.

The state plays a crucial role in upholding labour rights, particularly in ensuring the normative regulation of employment relationships, promoting social partnerships, providing mechanisms for the protection of labour rights, and in a number of other areas.

The state's obligations to uphold labour rights gain further importance when it comes to the protection of human rights in employment relationships. These obligations at the same time form part of international commitments undertaken by the state under treaties.

The Comprehensive and Enhanced Partnership Agreement signed between the Republic of Armenia and the European Union in March 2017 (hereinafter, the Agreement) added to the list of treaties ratified by the Republic of Armenia. Its partial implementation commenced on June 1, 2018.

In order to achieve the goals of the Agreement, the two parties have prioritized labour policies, collaboration in trade affairs, and specifically have undertaken, inter alia, to cooperate in introducing effective remedies for upholding labour rights (including labour inspectorates) (Article 284 of the Agreement).

Human rights in the European Union are guaranteed by the EU Charter of Fundamental Rights of 2000, although individual provisions securing key trans-border economic rights and protection from discrimination are envisaged in the founding treaties

According to part 2 of Article 6 of the Treaty on European Union, the Union respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and as they result from the constitutional traditions common to the Member States, as general principles of law.

Firstly, the EU norms of primary and secondary law shall be interpreted in light of EU standards on human rights. Secondly, human rights restrictions at the national level shall not breach the EU standards on human rights. Thirdly, in the process of introduction of EU standards at the national level the member states are bound by the EU's conceptual framework on human rights.

As part of the commitments undertaken under specific provisions of the Agreement, the Republic of Armenia has also committed to approximating its legislation to legal acts and specific provisions adopted by the institutions of the European Union.

In terms of the legal acts of the European Union this refers to the sources of primary and secondary law of the European Union, namely the Charter of Fundamental Rights of the European Union, Founding Treaties, as well as regulations, directives and decisions taken by the Council, the Parliament and the Commission.

The current Labour Code came into force on June 21, 2005. Since constitutional reforms in 2015 no comprehensive law-making activities have been undertaken to bring labour legislation into conformity with the constitution.

A comparative analysis of RoA labour legislation and EU human rights standards can prove useful in the process of bringing RoA labour legislation more closely into line with EU human rights standards. Within the framework of the report the following were carried out:

- A review of the scope and substance of commitments related to upholding and promoting labour rights envisioned by the EU-RoA Agreement;
- A review of the current labour legislation and legal initiatives envisaging amendments thereto;
- An analysis of RoA labour legislation in light of the standards existing in the labour law of the European Union, identifying differences between them, and causes of existing contradictions;
- An analysis of reports prepared by international and domestic rights watchdogs related to labour legislation;
- Development of recommendations on the steps necessary for bringing RoA labour legislation into conformity with the requirements laid down in the Agreement.

The scope of issues covered in the analysis was predetermined based on their priority and systemic nature. In terms of substance, labour rights include a wide range of issues; it was necessary to make a targeted selection of issues in this analysis in order to address them in sufficient detail and depth, and to refrain from an abstract and generalised narrative. Relevant assessments, conclusions and recommendations are provided for the resolution of each issue to bring labour regulations into conformity with EU standards at the legislative level.

The problems identified in this analysis and the findings of legal reviews can serve as important milestones in the process of implementing and assessing legislative approxi-

mation in the area of upholding labour rights.

CHAPTER 1. CONTROL AND SUPERVISION OF ADHERENCE TO LABOUR LEGISLATION

1.1. THE NEED TO HAVE SUPERVISION OF LABOUR LEGISLATION

The constitution of the Republic of Armenia guarantees the free choice of employment for everyone as well as the right to protection in the event of unjustified dismissal (Article 57).

Labour rights are also guaranteed by a number of international and European legal acts ratified by the RoA such as the Universal Declaration of Human Rights, the International Economic, Social and Cultural Covenant of the UN, the Revised European Social Charter and a number of treaties and documents of the International Labour Organization.

The EU Charter of Fundamental Rights dedicates five specific articles to protecting labour rights which guarantee the right of collective bargaining and action (Article 28), the right of access to placement services (Article 29), protection in the event of unjustified dismissal (Article 30), the right to fair and just working conditions (Article 31), and the right of protection of young people and the prohibition of child labour (Article 32).

Based on constitutional provisions, the state has an obligation to create the necessary conditions for free and dignified development of the individual in all spheres of life, including in the field of labour, as well as securing the right of effective remedies against public authorities.

The state's obligation to have a labour inspection system is set forth in supranational legal acts guaranteeing the protection of labour rights.

The Revised European Social Charter also lays down the obligation to have a system of labour inspection, which defines the obligation to have a labour inspection system appropriate to national conditions. The RoA has also undertaken such a commitment under the Agreement, according to which the state is required to cooperate in the area of introducing effective remedies for upholding labour rights (including labour inspectorates) (Article 284 of the Agreement). In the meantime, the RoA has committed to approximating its legislation to the standards of the International Labour Organisation (ILO).

According to ILO Convention No. 81 concerning Labour Inspection in Industry and Commerce, ratified by the RoA on December 17, 2004, member states undertake to maintain a system of labour inspection in industrial workplaces (Article 1) aimed at enforcing the legal provisions relating to conditions of work and the protection of workers, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, and bringing to the notice of the competent authority defects or abuses not specifically covered by existing legal provisions (Articles 1-3). In addition, one of the requirements of this convention is that the competent authority supervising labour relations be placed under the supervision and control of a central authority.

The observations of the ILO Committee of Experts on the Application of Conventions and Recommendations published in the 106th session of the ILO indicated that: "In relation to the ongoing reform of the labour inspectorate, the Committee would like to emphasize that, whatever the form of organization or the mode of operation of the labour inspectorate, it is important that the labour inspection system functions effectively and that the principles of the Convention are respected."¹

In 2009 within the framework of the *Enhancing Labour Inspection Effectiveness*

project, supported by the ILO and the Government of Norway, a review of the RoA's Labour Inspection System was carried out and its findings were published in a report supporting labour inspection system enhancement activities in light of ILO labour standards on labour inspection.²

Having assessed the efficiency of the current State Labour Inspectorate and the organisation of its work, the report stated that Armenia had a labour inspectorate with a considerably well-organised and rationalised structure. However, it needed improvement as a newly-created institution, which could be achieved by streamlining and consolidating certain procedures and institutions.

According to the report, there was a significantly large number of bodies entrusted with supervisory functions and the majority functioned in closely related sectors. Therefore, importance was attached to a systemic approach and the need for creating an integrated supervisory body.

By 2013 the State Labour Inspectorate was controlling and overseeing employer compliance with labour legislation and normative provisions of other legal acts comprising labour law regulations. The State Health Inspectorate under the staff of the RoA's Ministry of Health is its legal successor.

According to the RoA's Law on Public Administration Bodies enacted on March 23, 2018, the Health and Labour Inspection Agency (hereinafter, the Inspection Agency) is a body implementing a specific government policy direction, as well as one of the bodies supporting the government in policy making within its defined sphere of activity.

International standards attach importance not only to the formal existence of the Inspection Agency but also to its endowment with powers that allow it to implement effective remedies for upholding labour rights, and that will ensure that the relevant

1. See Observation (CEACR) - adopted 2016, published 106th ILC session (2017)

www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3298657:NO

2. See Republic of Armenia Labour Inspection Audit Project on 'Enhancing Labour Inspection Effectiveness' (RER/09/50/NOR) www.un.am/up/library/Technical_Memorandum_eng.pdf

legal provisions are effectively applied.

In this regard, it is necessary to take into account a number of requirements set by these conventions concerning the scope of the inspection agency's powers, guarantees for operation, qualifications of labour inspectors, the number of inspectors needed for effectively discharging inspection duties, the technical equipment necessary, etc.

1.2. SCOPE OF OVERSIGHT OF LABOUR LEGISLATION

According to its charter, approved by Decree of the Prime Minister of the RoA No. 755-L of June 11, 2018, the RoA Health and Labour Inspection Agency is a body subordinate to and acting on behalf of the Government of the Republic of Armenia, which carries out supervision and other functions defined by law, and applies sanctions according to the procedure established by law in the areas of healthcare and protecting the health and safety of employees.

ILO Convention No. 81 prescribes the obligation not only to create a labour inspection system but also to define its key functions.

After the establishment of the Inspection Agency, related amendments were also made to the RoA Labour Code, with Article 262 specifying that: *“the supervision of protection of employee **safety and health** shall be carried out by the inspection agency, authorised by the Government of the Republic of Armenia, overseeing that work safety is ensured.”*

According to paragraph 11 (10) of the Charter, the authorities of the Inspection Agency oversee *“the application of norms protecting employee health and ensuring safety in cases and according to the procedure established by law, which includes:*

a. Oversight of mandatory requirements defined by the legislation of the Republic of Armenia for protecting employee

health and ensuring safety at the workplace, including the availability, maintenance and operation of equipment of collective and individual protection;

b. review and analysis of causes of accidents at work and occupational diseases in cases and according to the procedure established by law;

c. organise methodological support for employers and trade unions in ensuring work safety in the area of application of labour legislation and other legal acts i.e. provision of relevant information and advice;

d. carry out oversight over securing the guarantees provided by labour legislation for people below the age of 18, as well as pregnant or breast-feeding women and employees caring for children;

e. stop the activities temporarily in cases and according to the procedure defined by the Labour Code until violations are corrected.”

As a result, the authority of the newly-created Inspection Agency in employment relationships is limited to the function of maintaining employee safety and health. However, the scopes of the subject and object of supervision by the Inspection Agency are much wider, according to international standards.

ILO Convention No. 150 concerning Labour Administration: Role, Functions and Organisation envisions a wider scope of authority in order for the Inspection Agency to meet the needs of a potentially higher number of employees.

The functions of the system of labour inspection are defined in Part 1 of Article 3 of ILO Convention No. 81. They are:

(a) to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged

in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors;

(b) to supply technical information and advice to employers and workers concerning the most effective means of complying with the legal provisions;

(c) to bring to the notice of the competent authority defects or abuses not specifically covered by existing legal provisions.

The scope of the authority of the Inspection Agency in the Republic of Armenia, with some exceptions, is limited to protecting **employee health and safety**.

The general term of 'protecting health and safety' can be understood broadly and narrowly. Narrowly speaking, it is understood as defined by law, i.e. conditions that are proper, safe and harmless to health. Broadly speaking, it is understood as comprising all the conditions laid down in labour legislation that explicitly or implicitly aim to ensure that employee life, health and safety are protected, including working hours, resting periods and remuneration terms.

Protecting life, health and safety is one of the key objectives of labour legislation. This determines one of the fundamental principles of labour law and legislation, the principle of providing fair and just conditions, as well as the form of influence on employment relationship, i.e. the method of regulation. The nature of administrative control and supervision of private employment relationships depends on specific features of regulation of the employment relationship.

An assessment of the Inspection Agency's powers reveals that their narrow scope is due to an application of the narrow conceptual framework for securing health and

safety, whereas the provisions, as laid down in international legal documents, take the broader understanding into account by also incorporating working hours, resting periods and remuneration terms.

For a long time the RoA lacked a government agency empowered with state control and supervisory functions over compliance with labour legislation. This undoubtedly had a negative impact in terms of both the effectiveness of protection of employee rights, and also placed an undue burden on courts. The burden on the courts arose because the scope of the State Labour Inspectorate, the predecessor agency, was limited to containing or reversing violations of labour rights that had already been committed. The absence of more proactive administrative mechanisms left the behaviour of employers relatively unconstrained, and such dispute resolution as was possible had to proceed via onerous lawsuits.

Hence, it is important to note that the mere existence of a body controlling and supervising compliance with labour legislation is not the only important factor for compliance with the requirements of international documents ratified by the RoA; this body must also be able to play a preventive role as well as reacting to violations that have already been committed. Specifically, it is important that the inspectorate be able to intervene in cases where violations by employers result in losses to employees that were not great enough to justify legal action given the costs in time and money of court procedures.

According to the 2012 report of the RoA State Labour Inspectorate, the Inspectorate received 543 applications-complaints, of which 460 were resolved (84.7%). The Inspectorate carried out 395 inspections. The inspections detected unpaid salaries of AMD 144,412,019.³

Furthermore, according to the report, the Inspectorate organised 409 workshops

3. http://www.mlsa.am/?page_id=4405

attended by 8,455 citizens and employer representatives.

These figures again provide evidence of the Inspectorate's important role in preventing violations of labour rights.

The absence of the inspection agency led to an increased annual number of complaints brought to the Human Rights Defender concerning violation of labour rights. This was the reason why the Annual Communique on the Activities of the Human Rights Defender of the Republic of Armenia, and the State of Protection of Human Rights and Freedoms during the Year 2017, published in 2018, made specific recommendations for action in the area of labour rights, described the legal violations most frequently raised in applications and presented recommendations on solving them. The violations mainly concerned failure to make a final settlement, unjustified dismissal, failure to notify employees within the timeline defined by law in advance of employment contract termination, failure to pay remuneration for probation, etc.⁴

Hence, in order to fulfil the international commitments undertaken by the RoA it is recommended to:

1. *Expand the scope of powers of the Health and Labour Inspection Agency to include the power to supervise compliance with work conditions, upholding labour freedoms and rights of employees and ensuring compliance with labour legislation and other legal acts specifying labour law norms;*
2. *Provide for guarantees to ensure the effective functioning of the Health and Labour Inspection Agency, including having the required number of adequately qualified and technically equipped inspectors to carry out the duties of the agency, as is necessary for compliance with the terms of the convention.*

CHAPTER 2. GUARANTEES FOR THE PROTECTION OF LABOUR RIGHTS IN CASE OF CONCLUSION OF FIXED-TERM CONTRACTS

Employment contracts are vitally important for the unhampered exercise, protection and enforcement of labour rights. Contracts are important for both employee and employer because they ensure that relations between them are regulated and the rights and interests of the parties are protected. Contracts are also important for providing appropriate public and government oversight.

According to the RoA Labour Code, relationships between an employee and employer mainly arise, change and cease through employment contracts, which are categorised into contracts of indefinite duration and fixed-term contracts according to the current legislation.

Article 95 (1) of the RoA Labour Code states that unless otherwise provided for by law, a fixed-term contract may be concluded if the nature of the work or the conditions under which it is carried out preclude the conclusion of an indefinite-term contract

The RoA Labour Code therefore defines the fixed-term employment contract as an exception from the general rule, encouraging contracts of indefinite duration. This is an important safeguard for employee rights; however, it does not obviate the need for providing guarantees for protecting employee rights for fixed-term contracts.

EU directive 1999/70/EC is the benchmark for fixed-term contracts in EU law by which the framework agreement on major cross-industry organisations was approved. The agreement defines the general principles and minimum requirements for fixed-term work, the purpose of which is to:

4. Annual Communique on the Activities of the Human Rights Defender of the Republic of Armenia, and the State of Protection of Human Rights and Freedoms during the Year 2017, 2018., pp. 76-88 // Available at <http://www.ombuds.am/resources/ombudsman/uploads/files/publications/b5220dd0b83b420a5ab8bb037a1e02ca.pdf>

- improve the quality of fixed-term work relations by ensuring the application of the principle of non-discrimination;

- establish a framework to prevent abuse in concluding fixed-term employment contracts.

The principle of non-discrimination is one of the fundamental principles in the EU legal system, and labour relationships are no exception. According to this principle, employees working under a fixed-term contract shall not be treated in a less favourable manner than employees working under contracts of indefinite duration, unless these differences are justified on objective grounds.

According to the agreement, the principle of 'pro rata temporis' applies to employment relationships where appropriate. This principle dictates that in those cases where an employee of indefinite duration has the right to receive special remuneration or other income, the fixed-term employee shall also be entitled to a similar remuneration or income, which should be directly proportional to the number of working hours per week.

The agreement also attaches importance to ensuring equal treatment of men and women. Thus, one of the main objectives of the above directive is to improve the quality of fixed-term work using the non-discrimination principle. In this regard, enforcement of the RoA Law on Ensuring Equal Rights and Equal Opportunities for Women and Men in employment relationships is important; the law prohibits implicit and explicit gender-based discrimination in all spheres of public life. One of the explicit forms of discrimination is different pay for the same or equivalent work, or any gender-based change in remuneration (increase or decrease) or deterioration in employment conditions.

Under the agreement it is imperative to have equivalent legal measures to prevent abuse arising from fixed-term employment con-

tracts or relationships. Where they are absent, the agreement recommends introducing the following measures:

1. Objective reasons justifying conclusion or renewal of fixed-term contracts;

Under the RoA Labour Code a fixed-term employment contract is an exception to the general rule, i.e. as a rule employment relationships should be regulated by contracts concluded for an indefinite duration and only in exceptional cases it is permissible to conclude fixed-term employment contracts. Article 95 (3) of the RoA Labour Code provides an exhaustive definition of the conditions under which a fixed-term contract may be concluded with an employee. This means that the employer has an obligation to justify that such grounds exist and will face negative legal consequences for failure to do so.

In fact, it is an established practice among institutions and organizations to assign core functions to fixed-term workers. In order to fight against this practice it is necessary to enshrine in legislation the principle of prohibiting the conclusion of fixed-term employment contracts for core functions. One way to accomplish this would be to introduce an exhaustive list of grounds on which the conclusion and renewal of fixed-term employment contracts is forbidden.

2. A maximum total duration or number of renewals of successive fixed-term employment contracts with one person.

The RoA Labour Code does not stipulate a limit on fixed-term employment relationships between the same employer and employee. In terms of safeguarding employee rights it is also possible to define a maximum duration after the expiry of which it would be forbidden to conclude fixed-term employment contracts. As a result, the employer would have an obligation to conclude an employment contract of indefinite duration with the employee, and in case of not concluding such

a contract, the continuing relationship would qualify as an employment relationship of indefinite duration. This guarantee would ensure that in employment contract resolution the employee is comfortable in making use of the opportunities provided by unilateral termination of employment contracts.

Furthermore, limits on the duration and number of fixed-term contracts should not prevent the employee from appealing to the absence or existence of objective grounds when disputing the type of the employment contract. Hence, the existence of objective grounds for concluding a fixed-term contract as a guarantee is supplemented by safeguard provisions stipulating limits on duration and number.

Stability in employment relationships contributes to increased quality of life for employees. For employers, it stimulates performance, making organisations efficient and competitive. Article 111 of the RoA Labour Code also defines an additional mechanism for limiting the possibility of concluding a fixed-term employment contract. This article guarantees that if the parties do not terminate the fixed-term employment contract once it expires, and the employment relationship continues, the employment contract is regarded as concluded for an indefinite duration.

In individual EU countries (Estonia, Latvia, Lithuania, Bulgaria, Sweden, etc.) the legislation provides that a fixed-term employment contract can become a contract of indefinite duration, when the circumstances under which a fixed term was set cease to apply during the employment relationship. The RoA Labour Code does not provide for such a legal guarantee for fixed-term contracts.

Differentiation of employment contracts based on whether they are fixed-term or of indefinite duration is important both for the employee and the employer, as these two

types of contract have different legal consequences. For instance, whereas for an indefinite-term contract an employer can only terminate employment on grounds provided for in law, an employer can terminate employment based on a fixed-term contract simply by allowing the contract to expire. Because of this and a number of other factors employers are motivated to conclude fixed-term contracts, which warrants a review of regulations on guarantees for fixed-term contracts.

For the purpose of levelling unequal conditions between employees under fixed-term contracts and contracts of indefinite duration, it is also possible to define the employer's obligation to provide or make information on fixed-term or indefinite-duration work opportunities available to employees in a given institution and/or via existing representative bodies.

Thus, in order to prevent abuse in the application of fixed-term employment contracts and to prevent discrimination, it is recommended to introduce the pro rata temporis principle into the Labour Code in order to ensure equal rights and opportunities for employees. It is also recommended to define the grounds on which conclusion of fixed-term employment contracts will be forbidden. Additionally, it is also important to define the maximum term or the maximum number of times that it is possible to conclude successive fixed-term contracts or renew them.

In order to promote social partnership, it is necessary to introduce norms securing mutual support and cooperation between the employer and employee, for example the employer's obligation to provide or make available information on work opportunities to employees.

CHAPTER 3. GUARANTEES FOR THE PROTECTION OF LABOUR RIGHTS IN CASE OF COLLECTIVE REDUNDANCIES

According to Article 23 (1) of the Universal Declaration of Human Rights, everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. The state has a positive obligation to guarantee labour rights, including upholding the right to protection against unemployment.

The Preamble to the ILO Constitution provides for a guarantee of prevention of unemployment.⁵ According to Article 1 of the ILO 1964 Employment Policy Convention, with a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment, each member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.⁶

Availability of clear, specific and effective legal mechanisms regulating collective redundancies is critically important for the protection of employee rights both in international practice and in the Republic of Armenia. Its importance lies not only in protecting the individual employee's right to work but also in terms of its negative implications for stimulation of employment and for economic and social development.

.3.1. THE CONCEPT OF COLLECTIVE REDUNDANCIES AND SCOPE OF USE

The conceptual framework for legal specificity is interconnected with the concept of autonomy of individual will, both of which are important in the process of organising and regulating social life. In 1960 the Court of Justice of the European Union recogni-

sed legal specificity as a fundamental principle of the EU legal system.

The principle of stability of labour relationships is a particular expression of the principle of legal specificity which secures the interests of the parties to labour relationships in contractual relations by guaranteeing their predictability.

Availability of clear legal guarantees for the expression of free bilateral will in establishing and terminating a legal relationship is an important prerequisite for the exercise of an individual's labour rights and for the free and multifaceted development of market relations. Following this logic, employers have been granted powers of independent decision-making on organisational and staff policy at their own risk in order to promote the objectives of effective economic activity and efficient use of property.⁷

The RoA Labour Code lays down different grounds for terminating contractual relationships (mutual agreement of parties, on the initiative of competent authorities that are not a party to the employment contract, the death of the employee, etc.) (Article 113 of RoA Labour Code).

Liquidation of the organisation and reduction in the number of staff and/or staff positions due to changes in production volumes, economic or technological conditions, or organisational changes due to the needs of production are among the grounds for contract termination by the employer.

Referring to the interpretation of Article 113 (1,2) of the RoA Labour Code, the RoA Court of Cassation has noted that a number of preconditions are jointly necessary for employment contract resolution on the employer's initiative. In particular:

1. The contract has to be concluded for an indefinite duration or be fixed-term.

5. https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO

6. <http://www.arlis.am/DocumentView.aspx?DocID=81179>

7. See decision of 07 July 2010 of the Constitutional Court of the Republic of Armenia, No. CCD-902

2. Termination of the contract has to be due to the need to change production volumes and/or economic and/or technological conditions and/or conditions for organising work and/or be due to production necessity;

3. The number and/or positions of staff should have been reduced.

4. The employer should have offered the employee another position appropriate to the professional readiness, qualifications, and condition of health of the employee within the opportunities available to the employer, and the employee should have declined this position, or

5. The employer should have no opportunity to offer another position to the employee appropriate to his/her professional readiness, qualifications, and condition of health.

In the professional literature these grounds for termination of an employment contract on the employer's initiative are referred to under the general term of 'collective redundancies'. In contrast to the termination of an individual contract, the rights of a specific number of employees are involved in the case of 'collective redundancies'.

Relations in the case of 'collective redundancies' are regulated in EU law under Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the member states relating to collective redundancies, which defines the term and scope of collective redundancies, the obligation of the employer to provide specific information on redundancies to workers' representatives and the competent public authority and provides for mechanisms to ensure the active involvement of the competent public authority and workers' representatives in order to identify the causes of collective redundancies and find alternative solutions.⁸

The purpose of the directive is to provide minimum protection in cases of collective re-

dundancies and to provide information and consultation. This does not prevent the states from introducing more favourable conditions for protecting workers' rights. At the same time, it is necessary to provide a fair balance between the rights and legitimate interests of the employer and the employee. Thus, the employer's right to act independently cannot be exercised to the detriment of workers' rights, while the legal mechanisms balancing these rights should prevent abuses of rights to the extent possible.

The RoA Labour Code sets forth the concept of 'collective redundancy', according to which the liquidation of the establishment or reduction in the number and/or positions of staff will be treated as collective redundancy if the dismissal of more than twenty percent of the total number of employees but no fewer than 10 employees is contemplated within a period of two months (Article 116 of RoA Labour Code).

For initiating a process of redundancy and considering it as a case of 'collective redundancy' the conditions listed in the RoA labour code must be met. Furthermore, changes in the volume of production, in economic conditions, in the organisation of work, or in the needs of production are not in themselves sufficient for terminating contracts as part of a 'collective redundancy' and for applying the corresponding legal guarantees; these changes must also be the reason for the proposed reduction in the number of employees.⁹

The law therefore places the burden of proof for the existence of economic, technological and organisational reasons on the employer, as enshrined in Article 9 of ILO Convention No. 158.

Section 1 of Directive No. 98/59/EC defines the concept of 'collective redundancy' as dismissals effected by an employer for one or more reasons not related to the individual workers concerned.

8. According to the Agreement, Directive 98/59/EC is enforceable in the RA within 7 years of entry into force of the Agreement.

9. See Court of Cassation decision of 12 April 2009, Artak Muradyan, Hovhannes Derdzakyan, Srubhi Harutiunyan, Suren Tadevosyan, and Yevgenya Manukyan vs Gafesjian Museum Fund; Case No. YKC/3613/02/09

As defined by the European Court of Justice, the term 'collective redundancy' applies not only to dismissals effected at the desire of the employer, but also any other dismissal against the will of the worker and with the reason for dismissal not related to the individual employee. At the same time the ECJ noted that "redundancies are to be distinguished from terminations of the contract of employment which are assimilated to redundancies for want of the worker's consent."¹⁰ Therefore the ECJ determines that the directive applies to any case in which dismissal is due to external circumstances.

It can therefore be argued that the Directive identifies two different notions of collective redundancy, one which applies to any dismissal against the employee's will where the grounds are not related to that employee, and a narrower notion that applies in the same circumstances but only when the redundancy is initiated exclusively by the employer.

The provisions of the RoA Labour Code do not comply with the requirements of the Directive since they only apply to cases of liquidation of the organisation or reduction in the number of employees and/or positions.

Thus, it can be argued that limiting the concept of collective redundancies to only structural, technological and cyclical reasons rather than making it applicable to any redundancy violates directive 98/59/EC.

Termination of employment relationships will also be treated as collective redundancy according to the provisions of the law regarding the number of workers concerned.

The definition of 'collective redundancy' provided in the RoA Labour Code mentions more than ten percent of the total number of employees but no fewer than ten individuals. However, the standards provided for in the Directive are proportional to the number of people working for the organisation. Thus,

according to the Directive, in order to qualify as a collective redundancy, according to the choice of the state, the number of dismissals should be:

- 1) over a period of 30 days - at least 10 in organisations normally employing at least 20 and less than 100 workers, or 10 % of the number of workers in organisations normally employing between 100 and 300 workers, or 30 in organisations employing more than 300 workers,
- 2) over a period of 90 days, at least 20, whatever the number of workers normally employed in the organisation in question.

In addition, according to the last paragraph of the same Article terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least 5 redundancies.

3.2 GUARANTEES FOR EMPLOYEES IN CASE OF COLLECTIVE REDUNDANCIES

The RoA Labour Code provides for a number of guarantees for protecting employee rights in the process of collective redundancies. The importance given to these guarantees is due to the fact that regardless of the employer's reasons for restructuring, it first has an impact on the stability of relationship with employees.

A change in the name of a structural unit or job title although the functions of the position or structural unit formed remain entirely or mostly the same can disguise violation or abuse of rights on the part of the employer.

Given these considerations, the Constitutional Court of the RoA has clarified that while applying the legal grounds for collective redundancies on a case-by-case basis the

10. See Judgment of 12 October, Commission v Portugal, C-55/02

law-applier is required to examine economic, technological and organizational reasons underlying the redundancy and in particular to determine whether the given reasons were artificially created by the employer.

Because collective redundancies are prompted by objective necessity rather than the employee's professional readiness or qualifications, it is legitimate to oblige the employer to offer another job to the employee appropriate to the employee's professional readiness, qualifications and condition of health.

In the case law of the Court of Cassation, it is not sufficient that the employer offer any employment to the employee; this employment must also be appropriate to the professional readiness, qualifications and condition of health of the employee. According to the RoA Court of Cassation, with a view to extending protection to employees in all possible cases, the concepts of 'professional readiness' and 'qualification' must be interpreted as broadly as possible and also take into account such important facts as the position held previously by the employee and the work performed.¹¹

Therefore, the employer may only terminate the contract in the absence of an appropriate opportunity or if the employee declines the offer (Part 3 of Article 113 of RoA Labour Code).

In the case of collective redundancies there is also a guarantee related to notification deadlines with the main objective of safeguarding employee interests by making the potential contract resolution predictable. Article 115 of the RoA Labour Code also obliges the employer to provide at least 2 months' notice to the employee and to set aside at least 10 percent of working hours for the employee to search for a new job.

Based on the above-mentioned considerations and given the fact that the employment sector is one of the priority areas for ensuring socioeconomic stability in the

country, with state regulation and management being essential, an optimal format should be found to enable state involvement in collective redundancies or other activities which may lead to dismissals of a large number of people. This will allow clear regulation of this sector and prevent potential abuses committed by employers.

The supervision of state agencies with the power to intervene when necessary is an important guarantee of labour rights.

Article 116 of the RoA Labour Code sets out the unconditional obligation of the employer in case of collective redundancies to provide data on the number of employees to be dismissed (separately by occupation, gender and age) as well as information about the collective redundancy to the State Employment Agency under the staff of the RoA Ministry of Labour and Social Issues no later than two months before contracts are terminated (part 17 of Article 11 of RoA Law on Employment).

In accordance with paragraph 13 of part 7 of the Charter of the State Employment Agency under the staff of the RoA Ministry of Labour and Social Issues, the Agency's function is to receive information from employers, as well as from relevant authorities of foreign states, under the procedure established by RoA legislation on collective redundancies and expected restructurings and other activities that may result in dismissals.¹²

However, in cases that are not considered to be collective redundancies, no obligation is provided for in any legal act for employers to provide information to the Agency on restructurings or other changes leading to dismissals, meaning that the Agency is not authorised to request and receive such information, and if it does request it, employers can lawfully refuse to provide it.

According to the Charter, the Agency's objective is to ensure that state employment

11. See Judgement of 4 December 2009 of RoA Court of Cassation, Gayane Danilova vs ArmenTel CJSC, Civil case YAQC/ /2378/02/08

12. <http://www.arlis.am/DocumentView.aspx?docid=90854>

programs are implemented so as to secure sustainable employment for job-seekers, and that the demand for labour is met and available labour supply is effectively realised. These functions stem from the objectives above, and other than receiving information the Agency is in no other way authorised to interfere in collective redundancies or other activities implying dismissals from work.

In contrast to those currently in force, the previous regulations provided for a more multifaceted regulation of procedures for collective redundancy, with a broader scope of powers for the competent public authority. Under former regulations, a collective redundancy was defined as:

a) termination of employment contracts **due to the liquidation of the employer;**

b) termination of employment contracts with at least **3 percent** of the total number of employees, but no fewer than **5 employees** within one calendar year in case of reducing the number of employees or positions.¹³

Regarding the employer's obligation to provide information on collective redundancies to the competent public authority, RoA Law on Employment of the Population effective until 2006 stipulated an obligation to provide both data on the number of employees (Article 116 of the RoA Labour Code), and on the reasons for collective redundancies (Article 18 (b) of the Law).

This is important since provision of information on the reasons for collective redundancies by the employer makes the redundancy process transparent and gives the other party an opportunity to determine whether it is justified.

Moreover, the same law explicitly defines the power of the competent public authority *to regularly request information from employers on expected restructurings and other activities that might lead to dismissals from*

work (regardless of whether the expected dismissals will be ten or more), which, as indicated above, is missing from the current RoA Law on Employment.

In addition, the competent public authority is authorised to suspend employers' decisions in collective redundancies if the employer failed to inform the State Employment Service about collective redundancies within the specified 2-month period, or if there are difficulties finding new jobs for those who are to be dismissed.

In the latter case, the employer's losses may be compensated from the Employment Fund according to the procedure defined by the Government of the RoA.

Thus, under the current legislation the toolkit afforded to the competent public authority in the area of collective redundancies has significantly decreased, leading to many abuses by employers. In particular, the employer is required to provide information only on the number of employees being dismissed without presenting the reasons, and only in cases of collective redundancies, i.e. in case of the dismissal of 10 or more employees). Moreover, neither past nor present legislation allows the competent public authority to intervene in the process of collective redundancies or other activities that may lead to dismissals, even in the form of negotiation.

3.3. DEMOCRATISATION OF THE PROCESS FOR COLLECTIVE REDUNDANCIES

In Council Directive 98/59/EC, as well as in all EU directives pertaining to labour rights, special attention is paid to mechanisms for democratising processes, particularly those of ensuring freedom of information and engaging workers in decision making processes.

The employer has an obligation to consult with the workers' representatives when

13. RoA Government Decree No. 130 of 8.05.1997, available at: <http://www.arlis.am/DocumentView.aspx?DocID=28615>:

14. Article 15 (2, b) of RoA Law on Employment of Population, available at: <http://www.arlis.am/DocumentView.aspx?docid=348>

effecting collective redundancies, with a view to reaching an agreement on collective redundancies. In particular, part 1 of Article 2 of the Directive sets forth the employer's obligation to begin consultations with the workers' representatives in good time with a view to reaching an agreement.

According to the Directive, consultations are convened in order to avoid or reduce the number of collective redundancies and mitigate the consequences by recourse to accompanying social measures aimed, inter alia, at redeploying or retraining workers made redundant.

Meanwhile, to enable workers' representatives to make constructive proposals, Part 3 of Article 2 of the Directive stipulates the employer's obligation to supply the workers' representatives with all relevant information, as well as to provide:

- the reasons for the projected redundancies;
- the number of categories of workers to be made redundant;
- the number and categories of workers normally employed;
- the period over which the projected redundancies are to be effected;
- the criteria proposed for the selection of the workers to be made redundant. in so far as national legislation and/or practice confers this power on the employer;
- the method for calculating any redundancy payments, other than those arising out of national legislation and/or practice.

Trade unions (for instance in Poland and Slovenia) or elected works councils or similar bodies within the enterprise (for instance in Hungary) or both (for instance in Bulgaria, Lithuania, and Romania) are employees'

representatives participating in the process of collective redundancies. In certain new member states the law stipulates that in case there are no employees' representatives within the enterprise, the employer has to inform the employees directly (for instance in Estonia, Lithuania, and the Czech Republic).¹⁵

It is important to emphasize that the employer's obligation to supply such information to employees' representatives not only creates an informative database for the latter to participate in negotiations and come up with constructive proposals, but also provides conditions for effectively organising the subsequent protection of their rights. In particular, the fact that the employer has to provide information about the reasons for dismissal and present criteria for the selection of employees to be made redundant enables the employees to verify the true motive and rule out or reveal the existence of an ulterior motive.

In contrast, the RoA Labour Code only sets out the employer's obligation to provide data on the number of employees to be made redundant (Part 1 of Article 116), which is not sufficient for achieving the tasks assigned to the Agency by the legislator. In order that the Agency be able to fulfil its tasks, the scope of the employer's obligation to supply information to the competent public authority must be expanded.

Section 3 of the Directive sets out the procedure for collective redundancies, according to which employers have to notify the competent public authority in writing. This applies to the information on collective redundancies, and the information sent to employees' representatives concerning the reasons for redundancies, the number of employees made redundant, the number of normally working employees and the period over which the redundancies are to be effected.

The Directive makes it obligatory for employers to forward a copy of the notification sent

15. Dr. Barbara Kresal, Termination of Employment Relationships, Legal situation in the following Member States of the European Union, European Commission, 2007. par. 6.5.3.

to the competent public authority to the workers' representatives, enabling the latter to present their comments to the competent public authority.

Article 4 of the Directive provides for the legal consequences of sending or failing to send the notification in question to the competent public authority. In particular, according to Article 4, projected collective redundancies reported to the competent public authority may take effect no earlier than 30 days after the notification. This period is provided in order for the competent public authority to seek solutions to the problems raised by the projected collective redundancies. In the meantime, if this period is not sufficient for solving these problems, the Directive provides a wider opportunity to member states by giving the competent public authority the power to extend the initial period to 60 days provided that the employer is notified. Moreover, member states may grant the competent public authority wider powers of extension (for instance, in Bulgaria the initial period is 45 days, in Latvia 60 with a possibility of extension up to 75 days, and in Lithuania even 2 months).¹⁶

According to the provisions of the Directive, the public authority has to be actively engaged in the process of collective redundancies, and by receiving the necessary information from the parties to the process and the position of the other party on them, attempt to find and propose solutions.

Although the public authority has no power to prohibit collective redundancies, the procedure outlined above provides the transparency that is necessary for parties to negotiate mutually beneficial solutions, and for the state to identify and punish employers who attempt to conceal the true motivations for collective redundancy.

Although the Directive does not grant the competent public authority any power to ban collective redundancies, the member states

of the European Union are not prohibited from applying other preventive measures against an employer who fails to comply with procedural requirements. In particular, the national legislation of a number of member states provides for administrative penalties in cases when, for instance,

the employer fails to notify employee representatives or the competent public authority about collective redundancies (e.g. Bulgaria, the Czech Republic, Estonia and Slovenia).¹⁷

In summary, given the absence of any public authority to carry out all the functions above in the Republic of Armenia, we consider that RoA legislation needs to be approximated to the requirements set out in the Directive, by empowering the competent public authority to request and receive information about dismissals and to play an active role in the entire procedure of collective redundancies. Increasing the role of the public authority in collective redundancies will first reduce the economic and social risks resulting from collective redundancies and second will help prevent deception regarding the aims of collective redundancies.

We recommend implementing the following reforms:

1. Revise the definition of collective redundancy to include not only cases of liquidation or reduction in the number of employees and/or positions in an organisation but also any other dismissals for reasons not related to the individual worker. Also introduce quantitative criteria into the definition that are proportional to the size of the organisation.

Treat redundancies effected on the initiative of the employer as a type of collective redundancy and reduce the minimum threshold for the number of employees being dismissed to 5.

2. With a view to identifying the true causes of collective redundancies and finding

16. Dr. Barbara Kresal, Termination of Employment Relationships, Legal situation in the following Member States of the European Union, European Commission, 2007 par.6. 5. 8.

17. Dr. Barbara Kresal, Termination of Employment Relationships, Legal situation in the following Member States of the European Union, European Commission, 2007 par. 6. 5. 8

alternative solutions, introduce mechanisms ensuring the active engagement of the competent public authority and employee representatives prior to collective redundancies.

Define the employer's obligation to supply specific information on redundancies to employee representatives and the competent public authority. In particular, provide for the employer's obligation to report:

- the reasons for redundancies;
- the number and categories of workers to be made redundant;
- the number and categories of workers normally employed;
- the period over which the projected redundancies are to be effected;
- the criteria proposed for the selection of the workers to be made redundant, in so far as national legislation and/or practice confers this power on the employer;
- the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

- Expand the powers of the competent public authority for carrying out proper control and supervision in the area of collective redundancies.

Provide for effectiveness periods for notifications of collective redundancies and proportionate penalties for the failure to comply with the notification requirement or failure to comply with it within the specified time period. Provide for a consultation phase prior to effecting redundancies for the purpose of finding mutually beneficial solutions to avoid redundancies, reduce their number or mitigate the socioeconomic consequences of redundancies by upholding the employees' right to be heard.

CHAPTER 4. RIGHTS FOR PROTECTING EMPLOYEE HEALTH

The comprehensive basis for protecting the health and safety of employees in EU law was established in 1986 under the European Single Act with the aim of providing minimum conditions for health and safety and ensuring the equality of these conditions across member countries of the European Community. Prior to this, only the issue of protecting the health of previously marginalised social groups (disabled people, elderly people, etc.) was treated as important in the European Community.

The Treaty of Maastricht introduced social issues into the European Community, followed by the adoption of the Agreement on Social Policy. This agreement expresses the willingness of member states to fulfil the European Community Charter of 1989 on Fundamental Social Rights of Workers. The Charter provides for the adoption of appropriate directives on conditions at work and the protection of health and safety at work.

The Charter on Fundamental Rights of the EU adopted in 2000 guarantees fair and just working conditions. The Charter on Fundamental Rights made the protection of fair and just working conditions equal to fundamental rights and expanded the content of the concept of 'working conditions'.

According to Article 31 of the Charter of Fundamental Rights, every worker has the right to working conditions which respect his or her health, safety and dignity. Under the principles of EU law the following components of fair and just working conditions have been shaped over time:

- Protection of employee's health and safety;
- The right to working conditions ensuring the dignity of the employee;

- Working hours and rest periods.

4.1 HEALTH AND SAFETY OF EMPLOYEES

Protecting the health and safety of employees during their career involves legal, socio-economic, organisational, technical, sanitary, rehabilitative and other measures, which are defined by law.

Matters concerning the health and safety of employees in the Republic of Armenia are regulated by Chapter 23 of the RoA Labour Code, and by a number of directives in the European Union, among them the Framework Directive 89/391/EEC on the health and safety of workers at work (hereinafter, the Framework Directive). The Framework Directive provides for general legal norms, which are of *lex generalis* nature compared to non-framework directives.

An important goal of labour legislation is to ensure the health and safety of employees. In order to reach this goal, the state has an obligation to take measures aimed at improving working conditions. Furthermore, in meeting its obligations the state should not limit itself to setting primary rules and norms aimed at protecting the health and ensuring the safety of employees, as is provided for in RoA Labour legislation, but should also make an effort to ensure that these norms are implemented and should take proactive measures to prevent harm caused by working conditions.

EU Directive 89/391/EEC prescribes a more active approach to attaining the goal. As noted by the EU Court of Justice in its judgement on the case *EU Commission vs the Netherlands*, the aim of the Directive is not solely to improve the protection of workers against accidents at work and the prevention of occupational risks; it is also intended to introduce specific measures to organise that protection and prevention.¹⁸ Thus, the state is required to ensure that both the appropriate technical requirements are met and that

measures aimed at protection and prevention are taken.

The Framework Directive includes general principles regarding prevention of occupational risks, ensuring health and safety, eliminating risks and incident factors, providing information, consultations with employees and their representatives and ensuring balanced participation (part 2 of Article 2 of the Directive).

In addition, the Framework Directive provides for minimum standards for ensuring safety and protecting health, meaning that it cannot be a basis for eliminating more favourable working conditions already envisaged in the legislation of member states or be an impediment to setting higher standards in the future.

Particularly, according to Article 4 of the Directive the states have positive obligations to introduce legal provisions to ensure that the requirements set forth in the Directive are in place for workers and employers, including workers' representatives on the one hand, and mechanisms for adequate controls and supervision on the other.

Hence, in contrast to national law, the scope of measures provided for attaining the goals of the Framework Directive is broad. In addition, the Directive does not only stipulate the minimum acceptable conditions for health and safety, but also encourages improvements to those conditions.

The Framework Directive has a broad scope; it applies to employees in both private and public sectors (manufacturing, agricultural, commercial, services, education, etc.). A few service sectors, such as the armed forces, the police and the civil protection services, are excepted. Furthermore, the exceptions provided are subject to narrow interpretation,¹⁹ particularly reference is made to actions taken by the legislator in those sectors.²⁰

18. Judgement of 22 May 2003, *Commission v. Netherlands*, Case C-441-01, para. 38

19. See Judgment of 3 October 2000, *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, Case-303/98

20. See Judgment of 12 November 1996, *UK v Council*, Case C84/94, ECLI:EU:C:1996:431.

It is difficult to form an understanding of the meaning of the concepts 'health' and 'safety' as used in RoA labour legislation because of the absence of legal cases in this area. The Court of Justice of the European Union is guided by the definition of 'health' in the Constitution of the UN's World Health Organization, according to which health is a state of complete physical, mental and social well-being.²¹

The term 'worker' is used in the Directive to mean "any person employed by an employer, including trainees and apprentices but excluding domestic servants" (Article 3). Over time, the Court of Justice of the European Union has developed the term 'worker' as an autonomous concept in EU law based on the argument that the absence of such a fundamental concept from EU Law would distort the provisions protecting worker rights and would not serve the objectives for which those provisions had been developed.

The Court of Justice of the European Union has indicated that the term 'worker' is not subject to restricted interpretation and must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.²² The Court adds that: "It is for the national court to apply that concept of a 'worker' in any classification, and the national court must base that classification on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved."²³

As a result, the following elements for qualifying the concept of 'worker' have been developed in the case law of the Court of Justice of the European Union:

- the person acts under the direction of the employer, in particular in choosing their timetable, and the place and content of their work;²⁴
- the person does not share commercial risks with the employer;²⁵
- the person, for the duration of the relationship, is incorporated into the employer's enterprise.²⁶

Both under the Directive and under the RoA Labour Code the duty of ensuring that the health and safety of workers are protected at work rests with the employer. There is no disagreement between the EU and RoA legislation with regard to who is the addressee of the described duties, however, there is disagreement regarding the nature of the employer's duty.

Thus, in order to meet the requirements set out in part 1 of Article 243 of the RoA Labour Code which clarifies the duty to create "conditions set forth in the law", the employer is only required to ensure that the conditions set forth in the law exist. This code also sets out the powers of the RoA Health and Labour Inspection Agency in applying health and safety norms, and the limitations of those powers. According to paragraph 10 of the Charter of the Inspection Agency, its responsibility is the supervision of mandatory requirements set forth in the law, including the availability, maintenance and operation of collective and personal protective measures for safety at work.

21. Judgment in Case C84/94, op. cit., para 15.

22. Judgment of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, para. 28.

23. Judgment in case C-428/09, op. cit., para. 29.

24. Judgment of 13 January 2004, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, C-256/01, para. 72.

25. Judgment of 14 December 1989, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd*, C-3/87, para. 36.

26. Judgment of 16 September 1999, *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV*, C-22/98, ECLI:EU:C:1999:419, para. 26.

In EU labour law the employer's obligations are not limited to taking the necessary and sufficient measures to protect health and safety and to providing the required conditions. According to the provisions of the Directive the employer is obliged to ensure the safety and protect the health of workers in the following ways:

- carry out risk assessment, prevention and protection;
- provide for first aid, employee evacuation, and firefighting;
- provide preventive measures and equipment;
- record occupational accidents²⁷ and report them to the competent public authority;
- inform workers of their duties and safety rules;
- ensure that workers are consulted and participate in discussions on issues related to ensuring worker safety and protecting health;
- provide training, etc.

The Directive (Article 6) also places a responsibility on the employer to take into account the following principles:

- avoiding risks;
- evaluating risks which cannot be avoided;
- combating risks at source;
- adapting work to the individual, especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods, in particular with a view to alleviating monotonous work and work under time pressure and to reducing their effect on health;

- adapting to technical progress;
- replacing the dangerous by the non-dangerous or the less dangerous;
- developing a coherent overall prevention policy which covers technology, organization of work, working conditions, social relationships and the influence of factors related to the working environment;
- giving collective protective measures priority over individual protective measures;
- giving appropriate instructions to the workers.

In terms of fulfilling its obligation of protecting employee health and safety, the RoA's domestic legislation imposes an obligation on the employer to either personally carry out the function or enlist qualified service providers for ensuring the safety and protecting the health of workers, taking into account the degree of hazard for the workers.

The provisions of the Directive in principle differ on this issue. It considers the case of an employer personally overseeing health and safety as an exception to the general rule. It is imperative in the Directive for the employer to designate, select or organise selections of one or more persons responsible for ensuring the health and safety of workers, and where this is impossible, to enlist qualified external services to take the necessary actions for protection from and prevention of occupational risk at work on behalf of and to the benefit of the employer.

According to the Directive, the employer may only approach a qualified external service if they lack competent personnel. In addition, if a third party service provider is enlisted, the Directive indicates that the employer, worker and service provider shall cooperate, where necessary, in enforcing safety requirements: the employer has to ensure internal and external communication, coordinate the

27. The employer is required to keep records of occupational accidents resulting in a worker being temporarily unfit for work for more than three working days.

actions of all participants of the system, provide the necessary information to workers and their representatives and provide the necessary information or access to it for service providers.

Depending on the scale and nature of activities, the number of people responsible may vary. The Directive authorises the member states to define the categories of undertakings in which the employer, provided he is competent, may himself take responsibility for ensuring the safety and protecting the health of workers (Part 7 of Article 7 of the Directive).

The Framework Directive clarifies the issues of rights and duties between the employer and the employee that they designate as responsible for health and safety. If such a selection or designation is made, the employer obviously has additional obligations to this employee. According to the Directive the employer has an obligation to ensure that designated responsible persons:

- are not placed at any disadvantage because of their activities (Article 7 (2) of the Directive);
- are allowed adequate time to enable them to fulfil their obligations arising from their activities (Article 7 (2) of the Directive);
- are entitled to proper training for their special role which cannot be at the expense of the worker or his representative.

In order to handle the organisation of protective and preventive measures, it must be ensured that (Article 7 (5) of the Directive):

- the workers designated must have the necessary capabilities and the necessary means, to be defined by the state (Article 7 (8) of the Directive);
- the external services or persons consulted must have the necessary aptitudes and

the necessary personal and professional means;

- the workers designated and the external services or persons consulted must be sufficient in number.

In matters of responsibility, the Directive clearly enshrines the principle of the employer's responsibility in ensuring the safety and protecting the health of workers. Article 5 of the Directive asserts the employer's responsibility regardless of whether he designates an employee or an external service as responsible.

The Directive does not prohibit absolving employers of responsibility or limiting their responsibility where occurrences are due to unusual and unforeseeable circumstances beyond the employer's control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all necessary measures.

Given the absence of a mechanism for designating responsible persons, the RoA Labour Code transfers the major part of health and safety duties from the employer to employees.

Given the need to democratise labour relations, the Directive provides for the employer's duty, and therefore the employees' right, to ensure that employees participate in discussions on matters related to health and safety. The participation of employees must be such that they have a significant say in matters of health and safety, designation of responsible persons, the decision to enlist an external service, risk assessment and handling of occupational accidents.

The consultations must be organised in advance or in a timely manner so as to provide workers with a real opportunity to provide suggestions and to allow a balanced participation of employees in accordance with domestic legislation and/or developed practice.

Under the Framework Directive it is the employer's obligation to ensure that each worker receives adequate health and safety training in the form of information and instructions specific to his workstation or job, at the time of recruitment, in the event of a change of job, and in the event of the introduction of new work equipment or any new technology.

In the RoA Labour Code this obligation is defined negatively; the employer cannot require that the employee assumes performance of job duties if he/she has not undergone training and/or instruction in work safety. The employer has an obligation to ensure that the employee is informed about potential risk factors at the time of assuming their working duties and that they receive safety instruction specific to the workplace, but only for employees that are on a business trip. Although Article 250 of the RoA Labour Code stipulates that work be temporarily stopped if the employee has failed to familiarize himself with the work safety rules, again the legal norm does not specify the consequences of offences by either the employer or the employee.

According to Article 206 of the RoA Labour Code, in the event of a failure by an employer to adhere to the rules for ensuring labour health and safety the employee may refuse to perform his work duties as a protective measure.

This measure of self-protection does not have a sufficiently clear formulation to allow the employee to form an understanding of what grounds are sufficient and necessary for him to exercise his right to refuse to perform his duties, nor does the law specify any negative consequences of abuse of this principle. Providing for such a legal norm in Chapter 20 of the RoA Labour Code instead of Chapter 23, which regulates employee safety and health protection issues, would be problematic. For legal predictability and therefore stability considerations, it is necessary to consolidate the legal norms related to

worker health and safety in one chapter that includes legal provisions both for remedies and for unfavourable legal consequences for failure to adhere to the rules.

Regarding mandatory health surveillance, Article 249 of the RoA Labour Code provides for the employee's obligation to undergo health surveillance at recruitment and during employment. The obligations of employers for health and safety arise from the employee's rights. Thus, the Directive rightly defines this as the worker's right rather than as an obligation.

Nevertheless, the Directive does not place the entire burden of ensuring the safety and protecting the health of employees on the shoulders of the employer. In addition, it introduces an obligation for employees to take care of their own health and safety according to the training and instruction given by the employer. In particular, in Article 13 of the Directive it is stated that employees must:

- make correct use of machinery, apparatus, tools, dangerous substances, transport equipment and other means of production;
- make correct use of the personal protective equipment and, after use, return it to its proper place;
- refrain from disconnecting, changing or removing arbitrarily safety devices fitted, e.g. to machinery, apparatus, tools, plant and buildings, and use such safety devices correctly;
- immediately inform the employer and/ or the workers with specific responsibility for the safety and health of workers of any work situation they have reasonable grounds for considering represents a serious and immediate danger to safety and health and of any shortcomings in the protection arrangements;

- cooperate, in accordance with established practice, with the employer and/ or responsible workers, for as long as may be necessary to enable any tasks or requirements imposed by the competent authority to protect the safety and health of workers at work to be carried out;

- cooperate, in accordance with the established practice, with the employer and/ or workers with responsible workers, for as long as may be necessary to enable the employer to ensure that the working environment and working conditions are safe and pose no risk to safety and health within their field of activity.

With a view to bringing RoA Labour legislation into conformity with the principles and standards of EU law, it is recommended to revise Chapter 23 of the RoA Labour Code. To this end, it is necessary to expand the “conditions defined by law” provided for in Article 243 of the RoA Labour Code by incorporating into them the existence, maintenance and operation of protective means.

In order to ensure that the process of ensuring safety and protecting health of workers is democratised, the RoA Labour Code will need to:

- make legal provisions and mechanisms guaranteeing consultation and balanced participation of workers and workers’ representatives;

- define legal norms for provision of and access to information, awareness-raising, liberalisation and responsibility enhancement.

In order to increase the level of protection of the health and safety of employees it is necessary to define the conditions and procedure for designating, selecting or organising selection of responsible workers in the format provided for in the Framework Directive.

In carrying out legislative and regulatory ac-

tivities it is necessary to pay special attention to defining the rights and obligations of all parties, protection of rights issues, legal consequences of a failure to perform obligations and particularly financial and procedural matters of personal liability.

It is necessary to provide state oversight of the existence, maintenance and operation of collective and individual protective measures for ensuring the safety and protecting the health of workers.

4.2. CONDITIONS SUPPORTING THE RIGHT TO DIGNITY OF A WORKER

Human dignity is a key concept in the system of protection of fundamental human rights. As a supreme, all-encompassing and absolute value, dignity is the ideological basis of all basic human rights, freedoms and justice; the requirement of recognising and protecting it is closely linked to specifying guarantees of socioeconomic rights, including labour rights.²⁸

Being a fundamental right, dignity is part of the essence of rights enshrined in the EU Charter of Fundamental Rights. The Charter implies that limitation of the right to dignity is not allowed; all rights enshrined in the Charter shall be exercised without harming human dignity, and dignity shall not be harmed even when limitations are applied to rights.

Without exception the right to dignity is also protected in labour law. Therefore, the state has positive obligations to prevent impermissible violations of dignity in labour relationships and to fight actively against them.

In EU law the important requirement of fair and just working conditions includes respect for individual dignity. Moral harassment is an offence against this dignity.

Sexual harassment is a form of moral harassment that can occur in the workplace. It consists in continuous deliberate actions

28. See Judgment of 9 October 2001, *Netherlands v European Parliament and Council*, C-377/98, paras 70-77,

against a person which violate their rights or dignity, have an impact on working conditions and create an intimidating, hostile, degrading, humiliating or offensive environment.

The definition of 'sexual harassment' is provided in paragraph 21 of Article 2 of the RoA Law of 2013 on Ensuring Equal Rights and Equal Opportunities for Women and Men, and in Article 6 of the same law 'sexual harassment' is included among the types of gender-based discrimination.

Despite further legislative developments, no distinct sanctions have been introduced for sexual harassment. Particularly, the RoA Criminal Code neither envisages *corpus delicti* for sexual harassment nor sets out criminal law sanctions. Also, there is no general legal provision applicable to such cases.

In the fight against and prevention of cases of sexual harassment criminal liability cannot be the sole and sufficient measure substituting other remedies. A comprehensive approach is required in the fight against sexual harassment, like that taken in countries following the European system of law; parallel to criminal law sanctions for sexual harassment in the workplace, civil law and disciplinary sanctions have been introduced proportionate to the type of act committed and depending on the degree of social danger.

There is no reference to moral harassment and its specific manifestations in RoA labour legislation. Dignity is mentioned only in Article 30 of the RoA Labour Code, according to which no statute of limitation applies to defending lawsuits on the right to honour and dignity. Among other principles, Article 3 of the Labour Code asserts the equal rights of parties to employment relationships, and the equal rights of and opportunities for employees. Nevertheless, no preventive, punitive or restorative legal provisions are envisaged in the fight against violence or harassment.

Under the Treaty on the European Union, gender equality is both a fundamental value (Article 2) and an objective (Article 3). Among the priority areas for EU activities under the Strategic Engagement for Gender Equality 2016-2019 are increasing female labour market participation, economic independence of men and women, and equality between women and men.

To strengthen measures for the fight against sexual harassment the European Union adopted Directive No. 2002/73/C of September 23, 2002 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (currently Directive 76/207/CE).

Directive 76/207/CE defines sexual harassment as a situation where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

From the definition of sexual harassment in Directive 76/207/CE it follows that:

- Both women and men can be victims;
- The harasser can be the victim's manager, agent or other managerial employee at the workplace, a colleague, etc.
- The victim does not have to be intentionally harassed; it is sufficient for such behaviour to have such an effect on her/him;
- Sexual harassment does not necessarily lead to economic consequences;
- The harasser's conduct must be unwanted.

The concept of harassment at the workplace applies only in the presence of the following three conditions:

- Employee harassment has occurred;
- The purpose of harassment is prohibited by law;
- The purpose or result of harassment is degradation or harm to the work environment.

Although the RoA law on Ensuring Equal Rights and Equal Opportunities for Women and Men provides the legislative definition of the term 'sexual harassment', there is no provision for the necessary mechanisms for enforcing the law in employment relationships.

Directive 76/207/CE sets out the obligations of both the state and employers.

In particular the obligations of the state are not limited to developing the necessary legislation but also include providing effective administrative and judicial mechanisms for protecting rights, and adequate sanctions for their infringement, and introducing mechanisms for compensation of losses. In addition, the protection of an individual's dignity is an obligation not only for the state but for everyone. Therefore, the obligations of the employer cannot be limited to the negative obligation of refraining from committing sexual harassment. The obligations of the employer and his representatives are divided into several areas:

- Obligations to take the necessary measures for detecting individual cases and holding the offender liable;
- Obligations to prevent and eliminate cases of sexual harassment and take necessary actions and measures therefor, including awareness raising activities;
- An obligation to inform or report to com-

petent public authorities.

In this regard the French Labour Code is a good example, which defines the employers' obligations to prevent sexual harassment cases and to hold offenders liable where necessary. Moreover, the employer has an obligation to inform all parties to the employment relationship of any criminal liability contemplated for sexual harassment, as well as an obligation to report the sexual harassment case to competent public and local government authorities and where necessary, law enforcement agencies.

The effectiveness with which these obligations are carried out may also be enhanced by strengthening the role played by other participants in the matter, and spelling out their rights and duties. In particular, this refers to those participants, who due to the nature of their activities partake in employment and interpersonal relations. Examples include trade unions, medical assistance or service providers, etc.

It is also important to work continuously on developing and implementing preventive policies as well as raising public awareness of health and safety at work. EU normative legal acts call for legislation that obliges competent public authorities and employers to provide information. The state is responsible for encouraging the prevention of repeated and repulsive or explicitly negative and offensive actions against employees in the workplace or in relation to work and therefore is required to take the necessary measures to protect employees from such conduct.

Raising awareness involves focusing the attention of employers on measures to stop and prevent occurrences of sexual harassment among employees and employers and on the obligations of employers to identify such conduct, forbid it, and to forbid putting pressure on persons complaining about it.

Furthermore, obligations to organise awareness-raising activities shall rest on the shoulders of employers.

A necessary complement to awareness-raising activities is the development of publicly available guidelines on the prevention of sexual harassment and the elimination of its consequences, which express the rights, duties, and authorities of the powers involved in the process of prevention of and protection from cases of sexual harassment.

In summary, legal and practical mechanisms must be introduced for the fight against moral harassment, including sexual harassment, in the workplace.

Firstly, it is necessary to introduce the concept of 'moral harassment' into labour legislation to serve as a starting point for the provision of protective and preventive regulations and mechanisms.

In exercising legal provisions it is necessary to clearly differentiate between the powers of law enforcement authorities, and the nature and scope of employer and employee duties, and to define criminal, disciplinary and property liability by envisaging appropriate and proportionate coercion measures.

In order to ensure and increase the effective use of legal provisions and remedies, including those related to liability, it is necessary to promote awareness and provide information regarding harassment in the workplace or related to work.

4.3. WORKING HOURS AND REST PERIOD

Each worker is entitled to reasonable working hours, limits on working hours, periods of daily rest, weekly rest, and paid annual leave. Regulation of working hours is one of the legal guarantees of the workers constitutional right to rest, and thus legal norms regulating working hours are inseverably linked to norms regulating rest time.

One of the objectives of labour law regulations under changing economic conditions is to strike a balance between flexibility for employers in managing their labour force and the need to ensure the health and safety of workers. This general principle also applies to the issue of working hours; labour law should balance employees right to rest against employers interests.

In EU primary law the main legal basis for regulating working hours and rest periods is the Treaty on the Functioning of the EU and the Charter of Fundamental Rights of the EU. In EU secondary law it is the EU Directive 2003/88/EC on Working Time, which is a foundation stone of the social Europe.

Directive 2003/88/EC regulates laws concerning rest periods and limits to working hours. The primary objective of regulations in this normative act is to improve working conditions, especially from the perspective of meeting health and safety requirements. It defines general provisions for working hours, allowing for the introduction of specific provisions under collective agreements accommodating the characteristics of work in each organisation. These conditions include factors which may have an impact on employee health and safety.²⁹

The scope of areas regulated by Directive 2003/88/EC is very broad. In defining this scope, the Directive refers to Framework Directive 89/391 EEC on improvements in the health and safety of workers at work, linking the two Directives in their effects and areas covered. In this regard, Directive 2003/88/EC is applicable to the armed forces, the police and civil protection services as long as their work is conducted in normal situations.

Despite the broad scope of application of Directive 2003/88/EC, it does not cover situations in which the population is at serious risk and personnel are implementing measures aimed at protecting the population, where those measures must take absolute

29. See Judgment of 12 November 1996, United Kingdom of Great Britain and Northern Ireland v Council of the European Union, C-84/94, paras. 15-49.

priority.³⁰ Examples of such cases include natural or technological disasters, attacks, serious accidents or similar events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large, measures the proper implementation of which would be jeopardised if all the requirements in Directives 89/391 and 93/104 were to be observed.³¹

The concepts of 'working time' and 'rest period' are understood autonomously in EU law and cannot be interpreted in light of domestic law. They have been defined based on objective characteristics with the aim of improving the living and health conditions of individuals. According to the Court of Justice of the European Union, it is only by having such autonomous concepts that it is possible to secure the effectiveness of the Directive and the uniform application of its concepts in all the member states.³²

The concept of working time in EU law is linked with that of the 'worker', the content of which is spelled out in Directive 89/391. Specific Directives provide for special regulations for individual groups of workers: young workers, workers in civil aviation, transport, cross border railways and inland water transport.

Working time is defined according to three criteria, all of which must be fulfilled simultaneously. These are:

- the worker is working or is at the workplace;
- the worker is at the employer's disposal;
- the worker is carrying out his activity or duties.

The worker's presence at the workplace is a spatial criterion related to the need for the worker to be present at the workplace for performing the job. The workplace can be the employer's location, a location defined by him, or the location intended for carrying out duties.³³

For "the worker is at the employer's disposal" criterion the decisive factor is that the worker is available to perform his work duties at any moment. The worker must therefore be in a situation in which he must obey the employer's orders and perform his duties for the employer. Other time that the worker spends for his own benefit may be not regarded as working time. 'On-call time' and 'standby time' regimes are special cases which are often used for physicians, firefighters, people providing care for disabled persons, and in other cases. In the case of the 'stand-by' regime the worker does not necessarily have to be at the workplace but must always be available. In the case of 'on-call' time, the Court of Justice of the EU has included the active 'on-call time' in the working time, but not the 'passive on-call time'.

Regarding the third criterion it should be noted that neither the frequency nor interruption of carrying out activity or functions matters.

Following the logic of the EU Directive on working time, the fact that the employee must be available to provide professional services at the workplace means that at that moment he is considered as performing his work duties regardless of whether an action or function following from work duties is performed, and regardless of the frequency or interruption of carrying them out.³⁴

30. Order of 14 July 2005, *Personalrat der Feuerwehr Hamburg v Leiter der Feuerwehr Hamburg*, C-52/04, ECLI:EU:C:2005:467, para. 53; Judgment 12 January 2006, *Commission v Spain*, C-132/04, para. 26.

31. Order in case C-52/04, p. cit., para. 54; Judgment in case C-132/04, op. cit., para. 27;

32. Judgment of 01 December 2005, *Dellas and others*, C-14/04, para. 44; see also Judgment in case C-151/02, para. 58; Order in case C-437/05, para. 26; Judgment in case C-266/14, para. 27; Order in case C-258/10, para. 44.

33. Judgment of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras v Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA*, Case C-266/14, paras 30, 35, 43.

34. Judgment in case *Simap*, op. cit., para. 48; see also Order in case C-437/05, para. 25; Judgment in case C-14/04, para. 43.

According to the RoA Labour Code, the working time is the period during which the worker is required to carry out the work provided for in the employment contract, as well as other equivalent time periods.

Furthermore, under Article 84 of the RoA Labour Code the list of job functions is not required to be defined exhaustively in the employment contract, job description or other internal legal acts. On the other hand, labour rights and duties between an employer and an employee can be shaped and performed outside contractual employment relationships. Thus, the actual time period that the employee has worked may not coincide with the working time provided in the employment contract.

The concept of the term 'working time' in the Directive is much broader than in RoA labour law, according to which the working time is the period during which the worker is working, at the employer's disposal and carrying out his activity and duties in accordance with domestic laws and/or practice (Article 2).³⁵

In Article 138 of the RoA Labour Code the legislator lists the periods included in the working time. As a result, only the time periods defined by law or made equivalent by law can be regarded as working time according to the RoA Labour Code. Thus, it follows that due to the absence of standards in the Code, the authorities applying the law are practically deprived of the possibility of defining the actual periods that the worker has worked as working time.

The EU law defines maximum working hours only per week. The maximum duration of the working time, including overtime, should not exceed 48 hours per week.

Furthermore, the member states cannot apply existing grounds for limiting labour rights to the case of the right to limited working hours by imposing an obligation on the worker to work for more than 48 hours a week.

The period which does not meet the conditions defined for working time must be classified as rest period.

According to Article 150 of the RoA Labour Code, the rest time is the period during which the worker must be free from work and may use it at his discretion.

Directive 2003/88/EC and RoA labour legislation both guarantee rest rights during the year, the week, the working day and between working days.

The right to paid annual leave is a fundamental social right in EU law, which is aimed at improving living conditions and ensuring the best protection for health and safety.

The member states of the EU have a right to limit this right based on the grounds specified in Directive 93/104/CE.

The legislation of the EU is not the only law code that asserts the right to paid annual leave.

The Universal Declaration of Human Rights (Article 24), the European Social Charter (Article 2 (3)) and Convention 132 of the International Labour Organization also guarantee the right to annual holiday with pay.

According to Article 151 of the RoA Labour Code, annual rest (minimum, extended and additional) is a type of rest period. It is a period calculated based on the working days and is granted to the worker for rest and for recovery of working capacity while retaining their job.

The RoA Labour Code defines the procedure for granting annual leave, according to which it can be granted:

- both in full as well as in part (Article 163 of the RoA Labour Code);

35. There is ambiguity in the English and French versions of Article 2 of the text of the Directive. Namely, the English version reads "the worker is working", while the French version reads "le travailleur est au travail" (the worker is at the workplace).

- within the given year for each work year³⁶ (Article 164 of the RoA Labour Code);

- for the first work year usually after six months of consecutive work in the given organisation (Article 164 (2) of the RoA Labour Code).

In addition to these conditions, Article 167 of the RoA Labour Code allows for annual leave to be carried forward and extended with the employee's consent.

At first glance, domestic RoA law on annual leave has adopted a much more liberal approach than EU law. In EU law the right of annual leave is a critical component of protecting fair and just working conditions. The purpose of annual leave is to ensure that the worker has time off to recover and maintain his health and to be allowed to dispose of his time freely.

Article 7 (1) of the Directive states the State's obligation to take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks without making a distinction between fixed-term workers and those of indefinite duration.

The individual's right to rest is an autonomous right and cannot be made conditional on the performance of work duties. According to the position of the Court of Justice of the European Union, the conditions for the exercise of this right are reserved to the member states through internal regulations that set out the necessary conditions for exercising this right without making access to the right subject to any other conditions.

Directive 93/104 provides the states the discretion to define the conditions and procedure for granting annual leave, including for the first months after recruitment. However, the Directive does not authorise the states to define preconditions for the exercise of the right or to define those conditions in such a way as to undermine the purpose of annual

leave, i.e. that of protecting employee health.

In addition, according to Articles 15 of Directives 2003/88 and 93/104 the Directive should not hamper introduction of conditions in domestic law that are more favourable to the protection of the health and safety of workers than those prescribed by EU Law. On the other hand, Articles 17 of these Directives lay down an exhaustive list of articles and grounds allowing derogations, and Article 7 of the Directive securing annual leave is not indicated among these grounds, and thus the Directive does not afford the state the opportunity to derogate from Article 7.

The RoA labour laws applying preconditions for taking paid annual leave are incompatible with the objectives of the Directive. The Court of Justice of the European Union has expressed a position in its judgement on case C-173/99, stating that the Directive does not allow the state to set a rule by which the person may use his paid annual leave only after having worked consecutively for a specific minimum period of time.

RoA labour laws also stipulate that annual leave be provided in a given year. This means that it should be granted during a given work year, and cannot be carried forward to the next year based on either the employer's or the worker's desire except under objective circumstances and force majeure. The Court of Justice of the European Union considers that granting of paid annual leave after the envisioned time is possible in those cases when it has been impossible to use the right because of illness. Furthermore, a person who has not reported to work cannot be refused annual leave on the grounds that after a long absence there is no need to rest. This would contradict the principle expressed in the case-law of the Court of Justice of the European Union.

Providing payment in lieu of leave is disallowed in RoA labour law except where the employment relationship is terminated.

36. The work year is a period calculated based on calendar days, which starts from the start date of work as provided under the employment agreement or individual legal act on hiring and ends on the same day of the month in the following calendar year.

37. Judgement of 20 January 2009, Gerhard Schultz-Hoff, C-350/06 and C-520/06, paras 28, 46.

A ban on assigning a monetary value to annual leave is an important guarantee in the legislation for exercising the right to annual leave. This provision in the RoA Labour Code in essence conforms to EU standards.

The aim of regulations in the Directive is not to create a trade-off between rest through leave and payment in lieu of it, but rather to ensure health and safety. To achieve this aim, the Directive not only disallows converting the right to rest into any monetary value but also prohibits carrying it forward to the next year.

Concerning weekly rest, the Directive sets forth the state's obligation to ensure that a minimum of 24 hours' rest time is provided in each seven-day period. In case of daily rest this period is 11 hours in each day.

According to Article 5 of the Directive, the worker is entitled to 35 hours of uninterrupted rest for weekly rest. If there are objective grounds the weekly rest period may be reduced to up to 24 hours.³⁸

The Directive does not impose an obligation to grant the worker rest on the same days of each week. However, given the consideration of allowing the worker to organise their rest efficiently and as desired, it is necessary to inform them of their rest days as soon as possible.

In practice there are often cases in which work is organised in three shifts involving twelve or twenty-four-hour work regimes. As a result, each group working on shift works for three shifts for at least one week during the month, i.e. 12 or 24 hours more than 48 hours, respectively. In such situations the Directive, in contrast to domestic legislation, allows calculating the rest period on a two-week basis rather than weekly.

Irrespective of the degree to which national legislation conforms to the standards of EU laws, the state must introduce a compensa-

tion mechanism for potential violations of rights guaranteed by EU law.³⁹

Thus, in order to bring RoA labour legislation into conformity with the EU's legal standards, it is necessary to revise the terms and procedure for providing annual leave, eliminating the preconditions for its use and introducing mechanisms for the protection of rights and compensation of losses in the event of violation of the rights guaranteed by the Directive.

38. The Court of Justice of the European Union has not yet provided a commentary on this provision.

39. See *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, joined cases C-6/90 and C-9/90.