CONSIDERATIONS ON THE MEANING OF THE NOTION OF "WORKING TIME" IN THE LIGHT OF RECENT C.J.E.U. JURISPRUDENCE[1]

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Abstract

In a series of decisions ruled for preliminary questions, the Court of Justice of the European Union interpreted the notion of "working time", as well as that of "resting time", defined by Directive 2003/88/EC of the European Parliament and Council of 4th of November 2003 on certain matters of organizing working time. The objective of the Directive is to guarantee superior protection of workers' security and health, providing in this respect a series of minimum rules. In terms of these European rules, CJEU had to rule again on certain submitted preliminary questions. This study aims to highlight a part of these decisions and their incidence in the employment relations practice. The national court, in settling a conflict concerning the calculation of the working time of an employee, shall be bound to verify the incidence of absolutions made by the European court in the matter and, subsequently, to apply them for the factual case it settles. Indirectly, the employers are bound to take into account the solutions of the European court.

Keywords: *working time, resting time, employee, employer, European jurisprudence.*

JEL Classification: K31

1. Introductory considerations

In a series of decisions ruled for preliminary questions, the Court of Justice of the European Union (CJEU) interpreted the notion of "working time", as well as that of "resting time", defined by Directive 2003/88/EC of the European Parliament and Council of 4th of November 2003 on certain matters of organizing working time[3]. In the light of art. 2 point 1 of the Directive, working time is any time period in which the worker is at the working place, available to the employer and performing his activity or functions, according to the national laws and practices, the resting times being deemed as the time periods that are not working time.

The objective of the Directive is to guarantee superior protection of workers' security and health, providing in this respect a series of minimum rules. Among these rules, the following provisions imposing obligations to member states are registered:

- to take "required measures so that, depending on the needs of protection of workers' health and security: … (b) the average working time for each seven days period, including overtime, does not exceed 48 hours" - art. 6;

- "all workers benefit from a minimum resting time of 11 consecutive hours during a 24 hours period" - art. 3;

- "all workers benefit, during a seven days period, of a minimum uninterrupted resting time of 24 hours, plus the 11 daily resting hours provided by Article 3" - art. 5.

According to art. 16 let. (b), in order to establish the maximum weekly working time, member states may provide "a reference time not exceeding four months. The annual paid rest leaves, granted according to article 7, and the medical leaves are not included or are neutral in the calculation of the average".

Article 19 of this Directive, entitled "Limitations of Derogations to Reference Periods", provides in the first and second paragraphs: "*The possibility to derogate from the provisions of article 16 letter (b), provided in article 17 paragraph (3) and article 18, cannot lead to establishing a reference period longer than six months. However, member states may, subject to observing the general principles for protecting workers' health and security, allow, for objective or technical reasons or concerning work organization, collective agreements or agreements concluded between*

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[3] Published in the Official Journal L 299/9 of 18th of November 2003.

social partners that establish reference periods which may not, in any case, exceed 12 months."

According to art. 22 par. (1) of the same Directive: "*A member state may opt to not apply article 6, observing, at the same time, the general principles for protecting workers' health and security and on the condition it takes the necessary measures to make sure that:*

a) No employer requests a worker to work more than 48 hours in a seven days period, calculated as average for the reference period provided by article 16 letter (b), unless they obtained the previous agreement of the worker to perform such a work; …

b) The employer keeps updated records of all workers performing such work;

c) The records are made available to competent authorities that may, for reasons related to workers' security and health, forbid or limit the possibility to exceed the maximum weekly working time…".

2. Recent solutions of C.J.E.U.

A. In terms of these European rules, CJEU had to rule again on certain submitted preliminary questions.

a. In case C-254/18[4], having as subject a preliminary decision application, the Court was requested to establish if the provisions of Directive 2008/33/EC oppose the French regulation on working and resting time applicable to national police staff which provides, for the calculation of average weekly working time, reference periods that begin and end on fixed calendar dates, and not reference periods defined on variable basis.

A dispute occurred between "Syndicat des cadres de la sécurité intérieure", on one side, and the French authorities, on the other side, related to the reference period used for the calculation of average weekly working time of active officers of national police services. The French law applicable to this staff category provides that the weekly working time, for a period of seven days, including overtime, cannot exceed 48 hours on average during one semester of the calendar year. The union submitted an application to the State Council in France requesting the cancellation of this provision. In supporting the application, it showed that for the calculation of the average weekly working time, retaining a reference period expressed in semesters of the calendar year, that is a fixed period, and not a period of six months whose start and end would change depending on the passing of time, that is a variable reference period, breaches the rules set by the above-specified Directive, especially the derogation based on which the member states may extend the reference period to six months. Thus, the Court was asked if the corroborated provisions of art. 6 and 16 of Directive 2003/88/EC must be interpreted in the meaning that they require a reference period defined on a variable basis or in the sense that it allows the member states to choose whether to confer this period a variable or fixed character.

In the Decision delivered on 11th of April 2019, the Court found that the member states are free to establish reference periods according to the method they choose, on the condition that the objectives pursued by this Directive are met. The Court believed that art. 6 let. (b), art. 16 let. (b) and art. 19 first paragraph of Directive 2003/88/EC *do not oppose a national rule providing for the calculation of the average weekly working time, reference periods starting and ending on fixed calendar dates, on the condition that this rule includes mechanisms that allow the assurance that the average maximum weekly working time of 48 hours is observed in each six months period overlapping two fixed successive reference periods.*

b. In case C-55/18[5], having as subject a preliminary decision application, the Court was requested to establish whether the national law provisions, such as articles 34 and 35 of the Workers

[4] Decision of the Court of 11th of April 2019, *Syndicat des cadres de la sécurité intérieure vs. Premier ministre, Ministre de l`Intérieur, Ministre de l`Action et des Comptes public*; http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-254/18 [Accessed on April 6, 2020].

[5] Court Decision of 14th of May 2019, *Federación de Servicios de Comisiones Obreras (CCOO) vs. Deutsche Bank SAE,* http://curia.europa.eu/juris/liste.jsf?num=C-55/18 [Accessed on November 1, 2020].

Status of Spain[6], as interpreted by Tribunal Supremo (Supreme Court), allow an actual protection of workers in terms of the working day and working week duration and the daily and weekly resting times, as provided in the transposition of Union law, although they do not impose the organization of a daily working time records system. In the dispute, the Spanish Union "Federación de Servicios Comisiones Obreras" intimated "Audiencia Nacional" (National Court of Spain) in order to obtain a decision finding the obligation of "Deutsche Bank SAE" to implement a recording system for the daily working time of its staff members. The Union believed that this system would allow verifying whether the provided working schedules and the obligation, provided by the national law, to transmit to the union's representatives information referring to monthly overtime, are observed. "Deutsche Bank" claimed that the jurisprudence of the Supreme Tribunal of Spain shows that Spanish law does not provide such an obligation with general applicability and the Spanish law requires the keeping of a record of overtime performed by workers, as well as the communication, at the end of each month, to workers and their representatives, of the overtime performed, except for the case in which it is otherwise agreed. The Supreme Court said that the interpretation of the Spanish law by the Supreme Tribunal deprive, in practice, on one side, the workers of an essential evidence means to prove that their working time exceeded the maximum working times and, on the other side, their representatives of the necessary means to verify the observance of applicable rules in the matter. Therefore, the Spanish law cannot guarantee the actual observance of the obligations provided by the Directive on working time and by the Directive on workers' security and health at the workplace.

In the Decision delivered on 14th of May 2019, the Court stated that articles 3, 5 and 6 of Directive 2003/88/EC understood in the light of article 31 paragraph (2) of the Charter of Fundamental Rights of the European Union, as well as article 4 paragraph (1), article 11 paragraph (3) and article 16 paragraph (3) of Directive 89/391/EEC of the Council of 12th of June 1989 on the application of measures for promoting the improvement of workers' security and health at the workplace, *must be interpreted as precluding a law of a Member State that, according to the interpretation given to it in national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured.*

B. From the motivations formulated by the Court on the preliminary questions submitted in the two cases, as well as from the Court jurisprudence on Directive 2003/88/EC, the following specifications must be made:

a. The minimum requirements of Directive 2003/88/EC pursuing the provision of the protection of workers' security and health, require member states clear and precise result obligations in terms of observing the rights granted to them by the directive, the workers must effectively benefit from such rights, the member states being bound to guarantee the observance of each of the instituted minimum requirements[7].

b. *The reference period* established for limiting the maximum duration of working time is an autonomous law notion of the Union that must be uniformly interpreted, irrespective of the qualifications used by the member states, depending on objective features, considering the terms of the provisions that use it, as well as the context and objectives pursued by the rule of which this notion is part; such an interpretation may guarantee the full efficiency of the Directive[8].

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[6] Art. 35 of the Spanish Workers Status, called "Overtime", provides: „*1. Overtime is working time performed in addition to the maximum duration of normal working time established according to the previous article. […] 2. Overtime cannot exceed 80 hours per year […] 4. Performing overtime is voluntary, on the condition that it had been provided in a collective convention or in an individual employment contract, within the limits specified by paragraph 2. 5. For the calculation of overtime, the working time of each worker is recorded daily and totalized on the date set for the payment of remuneration, and the worker is handed a copy of its summary on the proper payment proof*." According to Royal Decree 1561/1995 on special working schedules, it is provided in the section called "Competences of workers representatives concerning working time": "*Notwithstanding the competences of the workers representatives concerning working time provided by the Workers Status and in this Royal Decree, such representatives are entitled: […] b) to be notified each month by the employer about the overtime performed by workers, irrespective of the adopted compensation method; for this purpose, they receive a copy of the summary specified in article 35 paragraph 5 of the Workers Status*."

[7] In this respect, the Decision of 7th of September 2006, the Commission/United Kingdom, case C-484/04; Decision of 5th of October 2004, Pfeiffer and others, cases C-397/01, C-403/01.

[8] Decision of 9th of November 2017, Maio Marques da Rosa C-306/16, point 38; Decision of 1st of December 2005, Dellas C-14/04, point 44.

The notion of "reference period" is used in the Directive for many purposes. On the one side, art. 16 letter (a) establishes the reference period that may be provided by member states for the application of art. 5 referring to the minimum weekly rest, on the other side, letter (b) for the application of art. 6 on maximum weekly working time, while letter (c) uses the same notion for the application of art. 8 on night working time.

Referring to the calculation of the weekly resting time, the Court said that "a reference period cannot be defined, in this context, as a fixed period during which a certain number of consecutive resting time must be granted, irrespective of the time when those resting hours are granted"[9]. In this case, the Court aimed to show that the reference period is a fixed period meaning that it has a determined duration (of 7 days), interpretation which applies in the context of the provisions of art. 5 in the matter of weekly rest, and it does not have to correspond to a specific date of the calendar week.

In the absence of a precise specification concerning the "variable" or "fixed" nature of the notion of "reference period", used to establish the average of maximum working time, this notion must be interpreted from the perspective of the essential objective of the Directive and obligations of the member states to guarantee the full efficiency of Directive requirements.

Choosing a reference period calculated on variable basis optimally corresponds to the essential objective of the Directive, as it guarantees that the average weekly working time is ensured at any time. In this case, the start of the reference period varies depending on the passing of time, fact which has as a result the constant recalculation of the average weekly working time, eliminating the risk that the worker exceeds, on average, the weekly limit of forty-eight hours of work per week for long periods of time.

In case the use of a fixed reference period is chosen for the calculation of the average maximum weekly working time, whose start corresponds to a rigid date, the member state must guarantee that the implemented organizational, procedural and jurisdictional mechanisms can assure, *in concreto*, the *actual* observance of the needs to protect the security and health of workers in the organization of working time and that situations of breaching these needs are avoided or, if they occur, that they can be efficiently removed without delay[10].

In order to guarantee that the temporal limits are effectively observed and, therefore, the rights the Directive confers to workers can be unrestrictedly exercised, the Court said that it is necessary for the member states to establish a system for measuring the duration and distribution in time of the work provided by the worker. The obligation to provide a mechanism for recording working time is not expressly provided by Directive 2003/88, but it is an instrumental obligation arising from the one of achieving the objectives provided by the Directive and for the benefit of the subjective rights acknowledged by it. The obligation to measure daily working time meets an essential function supporting the observance of all other obligations provided by Directive 2003/88, as well as the limitation of work day duration, daily rest, limitation of work week duration, weekly rest and possible overtime. Such obligations are connected not only to the workers and their representatives' rights to be able to periodically check the number of worked hours for remuneration, but especially for the purpose of protecting health and security at the workplace[11].

Member states must impose the employers' obligation to implement an objective, reliable and accessible system allowing the measuring of daily working time of each worker and to establish concrete means of applying such a system.

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[9] Decision of 9th of November 2017, Maio Marques da Rosa C-306/16, point 38. In this case, the Court was summoned to establish whether the minimum uninterrupted weekly resting time of twenty-four hours, to which a worker is entitled in the sense of art. 5 par. 1 of Directive 2003/88, must or must not be granted, the latest, on the seventh day following a consecutive working time of six days. The Court stated that "Article 5 of Directive 93/104/EC of the Council of 23rd of November 1993 on certain matters of working time organization, as amended by Directive 2000/34/EC of the European Parliament and Council of 22nd of June 2000, as well as article 5 of the first paragraph of Directive 2003/88/EC of the European Parliament and Council of 4th of November 2003 on certain matters of working time organization must be interpreted in the sense that they do not impose the minimum uninterrupted rest time of 24 hours to which a worker is entitled to be granted the latest on the day following a consecutive six days working period, but they require it to be granted during each seven days period".

[10] Please see point 74 of the Conclusions of the General Attorney in case C-254/18.

[11] Points 70 and 72 of the Conclusions of the General Attorney in case C-55/18.

3. Means of interpretation of the Labor Code texts in the light of the C.J.E.U. solutions presented above

As known, CJEU decisions are mandatory for all member states and courts of law, but not for the other law subjects, including employers.

a. Art. 114 of the Labor Code provides: *"(1) Maximum legal duration of working time cannot exceed 48 hours per week, including overtime. (2) By exception, the working time including overtime can be extended beyond 48 hours per week, on the condition that the average working hours, calculated for a reference period of 4 calendar months, do not exceed 48 hours per week. (3) For certain activities or professions established in the applicable collective employment contracts, reference period longer than 4 months may be negotiated, through that collective employment contract, but not exceeding 6 months. (4) Subject to the observance of the rules on occupational health and security protection of employees, for objective, technical or work organization reasons, the collective employment contracts may provide derogations from the duration of the reference period established by par. (3), but for reference periods which do not, in any case, exceed 12 months. (5) On establishing the reference periods provided by par. (2) - (4), the duration of annual rest leave and the cases of suspending the individual employment contract are not taken into consideration. (6) The provisions of par. (1) - (4) do not apply to young people who have not reached the age of 18 years".*

The Romanian legislator did not concretely regulate the method of calculation of the reference period. The interpretation of the legal text grants flexibility, in the meaning that the employer is free to choose how to define the reference period for the calculation of the average maximum weekly working time on a "fixed" or "variable" basis. This matter might be included in the collective employment contract on unit level or in the internal regulations [based on art. 242 letter h) of the Labor Code[12]].

In the case of establishing a reference period on variable basis, the average of worked hours must not exceed the maximum legal term of 48 hours per week in any consecutive period of 4 months or, as applicable, 6 months or 12 months, including the period during which overtime was performed beyond the normal working time. Concretely, in the case of the 4 months reference period, in order to make sure that it observes the maximum legal working time of 48 hours per week, the employer must calculate the number of weeks in the interval of the 4 months and the number of working days during them and, then, the number of worked hours. Finally, the total worked hours are divided by the number of working days of the 4 months and the average of worked hours results (which must not exceed 48 hours). The calculation must be made for any 4 consecutive months including the months in which the employee performed overtime. This method of calculation must also be applied in case the reference period is extended to 6 months, in the applicable collective employment contract.

In case a reference period is chosen corresponding to a calendar interval, the employer must make sure it also observes the provisions referring to weekly and daily rest.

Regardless of the method of establishing a "reference period", on calculating the average of working time, rest leave days and the days during which the contract was suspended are not taken into consideration, irrespective of the suspension reason[13].

Obviously, the method for calculating the maximum weekly working time that uses a reference period on variable basis (any 4 months, respectively 6 months that include the interval during which the working time duration was extended beyond 48 hours per week) provides a better protection of the security and health, representing the first option for interpreting the notion of

[12] Art. 242 of the Labor Code provides: "The internal regulation includes at least the following categories of provisions: […] h) methods of applying other legal or contractual specific provisions…".

[13] The legal doctrine emphasized that the provisions of the Labor Code are not in accordance with art. 6 let. (b) of Directive 2003/88/EC which provides that in the calculation of the average of weekly working time, the rest leave days and medical leave days are not included. Please see O. Cazan, comment to art. 112 of the Labor Code in Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole. Vol. II. Articolele 108-298 (Labor Code. Comment on articles. Vol. II. Articles 108-298)*, C.H. Beck Publishing House, Bucharest, 2011, p. 7.

"reference period"[14]. Such a solution should be expressly included in the regulation of the Labor Code in art. 114.

b. For the purpose of guaranteeing the observance of the employee's rights to daily rest, weekly rest, limitation of maximum duration of working time, but also for the elimination of dissimulated labor, the Romanian legislator provided in art. 119: *"(1) The employer is bound to keep at the workplace defined according to art. 16[1] the records of daily worked hours for each employee, highlighting the start and end hours of the working schedule, and to submit these records to the check of labor inspectors whenever requested. (2) For mobile employees and employees working from home, the employer keeps the records of daily worked hours for each employee according to the conditions established with the employees by written agreement, depending on the specific activity performed by them".*

The legislator did not establish the way the employer must keep these records, having, according to art. 40 par. (1) letter a) of the Labor Code, the attribute of establishing the unit organization and operation.

The employer may opt for a written record (collective attendance sheet, staff clocking, attendance register) or electronic one, organized on the unit level or the level of the compartment/department/business sector or working point where the employee performs work (access card, electronic platform login).

The worked hours records must be made daily, for each workplace - section/workshop/ office/service/compartment etc. of the registered office/working point/other workplace organized by the employer with the express specification of the start and end time of the working schedule of each employee[15].

At the end of the month, the employer draws up a monthly centralizing record based on these primary records documents of the real worked time of the employee at their workplace, regardless of whether they are fixed or mobile.

According to the jurisprudence of the European court, in order to measure the duration of the worked time of a worker and to establish the extent to which the temporal limits are observed, the use of means such as emails, consulting phone conversations or computers, as well as testimonials of other workers do not allow the objective and reliable establishment of the observance of the legal maximum daily and weekly duration of the worked time of a worker, considering their vulnerability in the employment relations[16].

Therefore, the employer should also establish in the internal regulation, an objective, reliable and accessible system that would allow the measurement of the duration of daily worked time of each employee.

4. Conclusion

In conclusion, the national court, in settling a conflict that regards the calculation of the duration of the worked time of an employee, shall be bound to check the incidence of the solutions passed by the European court in the matter and, subsequently, to apply them to the factual situation in question.

As shown on other occasions, the interpretations given by CJEU should be incorporated as

[14] It is also true that in the debate of case C-254/18, it was shown that there is the possibility that establishing a fixed reference period can provide a better protection of the worker than the variable reference period. It was exemplified in this sense, being shown that a worker subject to a rule in the national laws which establish a maximum weekly working time below the limit of forty-eight hours provided by article 6 letter (b) of Directive 2003/88 and which must be calculated for a fixed reference period of three weeks would be better protected than a worker subject to the weekly limit of forty-eight hours calculated based on a variable reference period of six months. Please see point 68 of the Conclusions of the General Attorney in case C-254/18.

[15] I. T. Ștefănescu (coordinator), *Codul muncii și Legea dialogului social. Comentarii și explicații (Labor Code and Social Dialogue Law. Comments and Explanations)*, Universul Juridic Publishing, Bucharest, 2017, p. 219-220.

[16] Such evidence means may be used to establish the employee's right to remuneration. In this context, we specify that, in relation to the jurisprudence of the European court, the employer may establish different remuneration methods for the time periods during which the worker actually performs the activity and for the periods in which they are available to the employer.

such in the labor laws.

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6. Law no. 53/2003 on the Labor Code, republished in the Official Gazette, Part I no. 345 of May 18, 2011, with subsequent amendments.