DO EMPLOYERS NOW NEED TO MEASURE DAILY WORKING HOURS OF ALL WORKERS?

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European Labor, Employment, and Workplace Safety Alert

By: Paul Callegari, Christine Artus, Roberto Podda, Nils Neumann, LL.M.

In *Federacion de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE (C-55/18)*, the European Court of Justice (ECJ) decided that, in order to comply with the provisions of the EU Working Time Directive (the Directive) on maximum weekly working time and daily and weekly rest, EU Member States must require employers to set up an objective, reliable and accessible system for measuring actual daily working time for individual workers. In this article we consider the implications of the decision in the UK, Germany, France and Italy.

UNITED KINGDOM

The Working Time Directive was incorporated into UK law by the Working Time Regulations 1998 (WTR). Regulation 9 of the WTR requires employers to keep 'adequate records' to show whether weekly working time limits and night work limits are being complied with. However, it does not cover daily or weekly rest and it does not specifically require all hours of work to be recorded. Guidance published by the Health and Safety Executive (HSE) - the regulator which is responsible for enforcing certain parts of the WTR - states that specific records are not required and that employers may be able to rely on existing records maintained for other purposes, such as pay, in order to meet their Regulation 9 obligations.

However, the ECJ's judgment raises serious doubt as to whether the WTR complies with the Directive's requirements. This could mean that the Government will voluntarily change the WTR to comply with the ECJ's judgment, or will be forced to do so as a result of court action by an interested party (e.g. a trade union). Otherwise, we could see the HSE and UK courts taking a more purposive interpretation of the requirements of Regulation 9 in the future, requiring employers to comply with the Directive's provisions. So for employers in the UK, the message is: no immediate action is needed, but keep an eye out for developments.

It remains to be seen what effect Brexit will have in this area. Much depends, as ever, on the terms on which the UK leaves the EU. In the absence of any agreement to voluntarily observe ECJ jurisprudence in the future, the WTR will be “delinked” from the underlying Directive from the date of exit, meaning that, in the future, the WTR can be amended as the UK Government considers appropriate. While the current Conservative government is very unlikely to extend the WTR to impose onerous record-keeping obligations on UK employers, a future Labour government may well do so.

GERMANY

Generally, the ECJ judgment does not directly impact working time documentation in Germany. It imposes an obligation on EU Member States to ensure that legislation is put in place which ensures that working time is documented, but also highlights that EU Member States will have some discretion concerning the scope and details of such legislation. Thus, it remains to be seen if/what legislation Germany puts in place and, in any event, it is likely to take some time before any such legislation is actually introduced.

The ECJ judgment is subject to controversial debates within the German coalition government and amongst other stakeholders with different views being taken as to if/what legislation should be introduced. At the moment, there seems to be no majority regarding the implementation of stricter or more comprehensive working time recording obligations in Germany. Currently, the German Working Time Act only requires employers in Germany to document daily working time which exceeds 8 hours and this documentation needs to be retained for two years.

Some commentators argue that employers in Germany are directly obligated by the ECJ judgment to document every hour worked by employees in Germany (i.e. even before new legislation has been passed) based on an EU-friendly interpretation of German law (*effet utile*). However, we consider that legislation will need to be put in place in Germany first before such an extensive obligation would apply. Future case law may clarify this question.

It is worth bearing in mind that this area of the law can be the subject of administrative fines of up to EUR 15,000, which can be imposed if working time documentation obligations are not complied with. Currently, administrative fines with regard to working time documentation (i.e. concerning documentation of hours worked beyond 8 hours per day) are very rare. German authorities almost never verify compliance of employers with these obligations. In addition, the competent authority supervising compliance with the German Working Time Act could potentially impose measures prior to the introduction of new legislation. However, we consider the likelihood of this happening soon very low.

Clearly, an employer wishing to take a cautious approach would maintain working time records for its employees in Germany with regard to all hours worked (i.e. not only hours going beyond 8 hours per day). Such record keeping could likely be delegated to the employees if the employer verifies from time to time that employees actually comply with this. We do not believe that the majority of employers in Germany will follow such a cautious approach given the significant impact it may have on the daily working routine - however, this will remain to be seen. A more pragmatic approach would be to monitor the situation for now (especially potential further legislation and corresponding case law) and only introduce daily working time recording if: (a) new legislation or measures by authorities with such an obligation are introduced; or (b) either German case law or a significant portion of legal expert opinion confirms that the record keeping obligation already exists without the need for such new legislation.

FRANCE

Under French law, there is no general obligation on employers to monitor all employees' working time. The French Labour Code (the *Code*) expressly requires the daily recording of each employee's working time only in the following cases:

- Where there are individualised working hours or differentiated collective working hours within the same department or establishment (Article D.3171-8 of the Code); or
- Employees with a fixed amount of working hours (Article D.3171-9 of the Code).

French law aims to force the employer to control the maximum daily and weekly working time and the minimum rest periods. However, there is no legal requirement to record the working hours of employees working under collectively agreed working hours (Article D.3171-1 of the Code).

That said, from a practical standpoint, given the very large number of claims relating to the duration of working time and payment of overtime hours (also triggering criminal offences), most companies have become accustomed to setting up a badge or time sheet system, recording the entry and exit times of all employees. Indeed, French case law requires the employer to provide proof of hours worked by the employee, whatever the working time arrangement in place. In court, an employer who cannot provide written evidence of hours worked by employees will be considered to be not complying with French law on working time.

While in the situations described above French legislation already seems to apply the requirements of the ECJ, there is nevertheless an important question concerning employees who are paid an annual salary in respect of a certain number of days worked per year, as provided in the relevant collective bargaining agreement. This arrangement tends to apply to executives. The working time of these employees is based on a record of days worked, rather than hours.

It has been decided that the guarantees provided by French labour law (i.e. the employer's obligation to regularly ensure that the employee's workload is reasonable) are sufficient under European Union law. In this sense, the French Supreme Court has validated the annual salary/annual days system on the basis of the Directive and Article 31 of the EU Charter of Fundamental Rights. Notwithstanding the above, employees working under this arrangement have been known to challenge the validity of this arrangement before the French courts, claiming payment of overtime hours worked over the previous three years. Consequently, employers do also put in place a system for monitoring the working hours of these employees.

In summary, the ECJ's decision does not make any major changes to French practice at first sight. Nevertheless, the open question is whether the French system for monitoring employees' working time on the basis of an annual salary/annual hours arrangement is sufficient in view of the ECJ's legal analysis. Attention should be paid to future case law.

ITALY

In Italy, the ECJ's judgment does not have an immediate and direct impact on the working time documentation to be kept by the employer. The current status of Italian legislation on the topic shows that employers are not required to keep working time documentation. Rather, the employer may opt, at its discretion, whether to register the daily working time of its employees.

Nonetheless, it is recommended to trace employees' working time (and, usually, this is a standard practice for prudent employers) in order to correctly monitor overtime worked in excess of the 8 hour limit on maximum daily working time and even for health and safety purposes. Should an employee work more than 250 hours of

overtime in a year, the employer will be subject to administrative fines and the employee may claim compensation for professional work-related stress.

In light of the above, we consider it highly likely that the Italian Legislator could, sooner or later, adopt provisions implementing the ECJ Judgment in order to convert the current optional practice of recording employees' working time into a statutory obligation.

KEY CONTACTS

PAUL CALLEGARI
PARTNER

LONDON
+44.20.7360.8194
PAUL.CALLEGARI@KLGATES.COM

CHRISTINE ARTUS
PARTNER

PARIS
+33.1.58.44.15.38
CHRISTINE.ARTUS@KLGATES.COM

ROBERTO PODDA
PARTNER

MILAN
+39.02.3030.2923
ROBERTO.PODDA@KLGATES.COM

NILS NEUMANN, LL.M.
PARTNER

BERLIN
+49.30.220.029.309
NILS.NEUMANN@KLGATES.COM

