Trust, but Verify

The roar of thunder: Timekeeping according to the ECJ

By Dr. Thilo Mahnhold and Janine Weber

It has been suspiciously quiet at the European Court of Justice (ECJ). As a Result, the roar of thunder from the ECJ's decision of March 14, 2019 (File: C-55/18) on timekeeping has caused rare excitement among HR and compliance managers in Germany. Although it is easy enough to understand the core statement of the court, namely that EU member states must obligate employers to *"introduce an objective, reliable and accessible system to measure the daily working time of employees,"* it nevertheless raises big questions regarding the practical impact on working time compliance in daily business.

The ECJ judgment – Objective, reliable and accessible working time records

How it all began: A Spanish trade union sought a judgment by lodging a class action suit against Deutsche Bank SAE, obligating the latter to introduce a system for registering daily working time and not merely overtime. Previously, the Spanish case law had been assuming that, as in the German statutory law, →

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only overtime had to be recorded. The Spanish National Court *(Audiencia Nacional)*, who was handling the litigation, then turned to the ECJ by requesting a reference for a preliminary ruling.

The ECJ first consulted article 31 section 2 of the Charter of Fundamental Rights of the European Union, according to which, each employee has a right to a limitation of his or her maximum working time. This fundamental right is defined more closely in the Directive 2003/88, also known as the European Working Time Directive. In light of that directive as well as of articles 4 and 11 of the Framework Directive of the European Union, which are intended to encourage improvements in the safety and health of workers at work (89/391/EEC), it follows from articles 3, 5 and 6 of the Working Time Directive that in the interest of protecting the health of employees, member states and employers have a duty to create an objective, reliable and accessible system for measuring daily working time. This concerns the entire span of daily working time, and thus not only overtime.

The considerations of the ECJ are laden with statements that give rise to speculations about the future of the timekeeping system: The ECJ states that the Member States will still have leeway in defining the specific terms for implementing such a system, particularly its form, and *"if necessary, [they may take] into account the peculiarities of the specific area of work"* and the *"singularities of certain businesses, namely their size."* However, in another context, the ECJ then emphasizes that witness testimony alone is not an effective form of evidence, therefore a system resulting in objective and reliable data sets accessible to the supervisory agencies would be required.

Where do we come from?

But would the currently applicable German law meet the requirements of the ECJ? Hardly! Although the obligation to record working time is already part of German law, the extent of such obligations still falls short of the requirements set by the ECJ:

- Section 16 paragraph 2 of the Working Time Act merely obligates the employer to record working time hat goes beyond the regular working day (overtime). Despite the clear wording, and long before the ECJ issued its decision, a dispute arose as to exactly which times should be recorded. The prevailing opinion adheres to the wording of the act and only demands a record of overtime hours. Unnecessary administrative efforts were to be bypassed in Germany, a country already fraught with bureaucracy. However, a complete record of working time is obligatory on Sundays and public holidays, as in these cases work is considered to go beyond the regular daily working time. The minority opinion, which will see itself strengthened by the ECJ ruling, demanded a complete record of working time even prior to the ECJ's decision, as this was the only way to determine when the overtime limit had been reached and whether appropriate adjustment periods were observed.

- In order to guarantee and monitor compliance with the minimum wage restriction that has been in force in Germany since 2015, section 17 of the Minimum Wage Act obligates employers to record the start, end and duration of daily working hours and to keep these records for at least two years. The scope of the record is thus moving in the direction of the ECJ requirements. The catch: Section 17 of the Minimum Wage Act only applies to certain employee groups and branches of industry so as to prevent a burden of bureaucracy on all employment relationships. The law covers marginally employed persons as well as employees who are active in one of the sectors mentioned in section 2a of the Act to Combat Clandestine Employment. But section 1 of the Minimum Wage Documentation Duty Ordinance also provides exceptions for these employees, such that, the obligation to record working time does not apply to employees with a sustained gross pay exceeding €2,958, nor does it apply to those who earn a sustained gross monthly pay exceeding €2,000 if the employer can prove he or she has paid this monthly sum for the last full 12 months.

- Finally, according to currently applicable law, the works council is also entitled to information on the basis of section 80 paragraph 2 of the Works Constitution Act, which refers to notification regarding working time that exceeds the regular working time specified under section 3 of the Working Time Act, as well as the beginning and end of the regular working time, and any instances that exceed or fall short of the regular weekly working time *(BAG,* resolution of May 6, 2003: 1 ABR 13/02). This entitlement to information was established because according to section 80 paragraphs 1 and 2 of the Works –>

Constitution Act, one of the works council's tasks is to supervise the implementation of valid laws benefitting employees. This also includes monitoring the implementation of the Working Time Act. The right to information is also enforced when the employer does not record the actual working hours of employees. The German Federal Labor Court has not expressly clarified whether this goes hand-in-hand with the works council's right of initiative to introduce control systems. In an earlier decision (1 ABR 97/88), it was assumed that such a right of initiative did not exist, since the employer only had to provide the works council with the information he or she had at his or her disposal. However, the works council could not demand that the employer prepare the relevant documents and purchase the necessary equipment. On the other hand, the current decision of the Federal Labor Court of May 6, 2018 points in a different direction. Accordingly, the employer must now provide the relevant information, even if he or she does not wish to record the employee's working hours. This could lead to the employer being forced to set up control systems. How the ECJ ruling will affect this remains to be seen.

Altogether, this shows that in some areas the current regulations do not meet the requirements of the ECJ and to some extent require adjustment.

What now?

As already mentioned, the decision contains an unequivocal mandate for German lawmakers to obligate employers to record the start and end of the working time of employees. This means

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section 16 paragraph 2 of the Working Time Act must be revised. Considering the ECJ requirement of creating objective, reliable and accessible systems, this will essentially boil down to IT-based solutions. However, the ECJ leaves the member states leeway concerning the mode of transposition. In the end, only patience will reveal the outcome of the legislative process. It will be interesting to observe whether employers will be given control opportunities in compliance with the GDPR and the amended *BDSG*; after all, a "reliable" system requires reliable data capable of being monitored. The discussion surrounding mobile work and working time on the honor system, as envisioned with Work 4.0, will most likely gain a new facet. It also remains to be seen whether other types of work aside from those engaged in by executive employees should be exempt from the obligation to keep records due to the special nature of the work. The Working Time Directive offers a basis for such exceptions in article 17.

Irrespective of this, employers are unlikely to be obligated to begin introducing comprehensive, blanket timekeeping systems in anticipation of the law. Such an obligation would only apply in the event that section 16 paragraph 2 of the Working Time Act is deemed capable of interpretation. In contrast to Spanish law, the wording of section 16 paragraph 2 of the Working Time Act, according to which only overtime must be recorded, hardly offers scope for such an interpretation in conformity with European law, even if isolated voices in the literature are now demanding a complete record of working time.

What remains is the question of whether the all-encompassing obligation to record working time acquires direct validity on the basis of article 31 section 2 of the EU Charter of Fundamental Rights. The question referred to by the Spanish court did not seem to provide the ECJ any impetus to clarify this aspect of the matter. But the decision of the ECJ on vacation entitlement (C-684/16) could point the way forward here. In this decision, the ECJ derived from article 31 section 2 of the EU Charter of Fundamental Rights employees' entitlement to paid annual vacation. Does this ultimately mean German employers have an obligation to record all working hours? Non-compliance should not carry any consequences. A fine pursuant to section 22 of the Working Time Act is only imposed for breach of recording obligations within the meaning of section 16 paragraph 2 of the Working Time Act. In cases of violations of record-keeping obligation going beyond this stipulation, there is no legal basis for the imposition of a fine. However, a legal basis for the imposition of a fine would be necessary pursuant to article 103 section 2 of the European Constitutional Law and section 3 of the Administrative Offences Act.

Ultimately, it cannot be ruled out that the courts may make adjustments in →

other, much less evident areas. One example is the court rulings on the burden of substantiation and proof in litigation regarding overtime pay. Although the German Federal Labor Court has balanced out the burden of substantiation to the benefit of employees in more recent decisions, the ruling by the ECJ may provide further reason to accommodate employees if working time is not systematically recorded. The decision of the Federal Labor Court of December 21, 2016 (5 AZR 262/16) already points in this direction. A dispute concerning overtime pay can become an unexpectedly significant problem if there are weak points in how overtime is handled.

What is to be done?

One thing is certain: It gets serious for employers when the issue is working time. Ultimately, this working time is sticky not only in the realm of law, but also in the realm of compensation. Employers are well-advised to:

- take even greater care that overtime is at least recorded pursuant to section 16 paragraph 2 of the Working Time Act. In this respect, it cannot be ruled out that audits in frequency, supervisory agencies could increase even if lawmakers have not yet taken action. This is also a precautionary measure to steer clear ofovertime litigation;
- draft clauses in employment contracts concerning normal weekly working time and overtime compensation as well as exclusionary periods, precluding any unnecessary motivation for overtime litigation; and
- review internal rules and practices, works agreements, etc. to see if action needs to be taken.

The last point in particular will likely lead to intense discussions with either employees or works councils. If working time must be comprehensively recorded, there is no way around the question of whether a “creative break” to go surf the Internet, the classic smoker’s break, sports talk on Monday morning, business travel or simply a passing thought about a work-related problem while sitting on the couch at night has to be counted and recorded. All in all, it is recommended to establish clear rules regarding what is and is not to be recorded and when work may not be performed in such a way as to warrant resting periods.The more mobile and flexible work becomes, the greater the need for regulation will be. If employers want to protect themselves against unsupervised working time violations forced on them by employees, working time policies will likely be the instrument of choice.

Finally, the decision of the ECJ is further evidence in practice, often it is not enough to rely, on mere compliance with the rules, at least in the case of employment law rules based on European law. By demanding reliable systems to monitor working time, the ECJ adds a new piece to the puzzle that is employment law compliance. Until now, the road map was section 12 of the General Equal Treatment Act, which obligates employers to execute preventive measures to protect employees against the disadvantages outlined in the act. This is a logical application of that principle. The decision to ensure compliance should also be an incentive

- to review how employment law risks are handled, including those on the General Equal Treatment Act, and to launch preventive measures, such as training, etc. <–

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