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WHITE PAPER

June 2019

European Court of Justice: Employers Must Implement a Daily Working Hours Registry

The European Court of Justice (“ECJ”) recently ruled that all employers in EU Member States must implement a daily registry of employee working hours. This *White Paper* chronicles the judicial history that led to this landmark decision, identifies the ECJ’s main conclusions, discusses the applicable legal framework in various EU Member States today, and analyzes the potential impact the ECJ decision may have in those EU Member States going forward.

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On May 14, 2019, the Grand Chamber of the European Court of Justice (“ECJ”) issued a Judgment declaring that all EU Member States must require employers to register the daily working time of their employees (ECJ Judgment, Case C-55/18—*Deutsche Bank S.A.E.*). The ECJ Judgment results from a controversial legal debate initiated in Spain five years ago.

BACKGROUND

A former Spanish law required employers to keep a registry of all overtime worked by their employees. In 2015, unions of a major Spanish financial institution filed a claim asking Spanish courts to declare that the financial institution was required to keep a registry of all employee working time, not just overtime, because otherwise the union could not determine if overtime had been worked. The Spanish National Court (*Audiencia Nacional*) issued a first Judgment¹ that obligated the financial institution to establish a daily registry of all daily working hours performed by employees.

The bank appealed to the Spanish Supreme Court, which accepted the appeal and overruled² the National Court’s decision. It held that Spanish law did not require employers to implement a daily registry of working hours, except in very specific cases such as part-time employees and employees working overtime. However, the Supreme Court also noted it would be convenient to have a registry of daily working hours for various other purposes, such as controlling the resting time and maximum working hours from a health and safety perspective.

THE SECOND SPANISH LEGAL PROCEEDING, THE REQUEST FOR A PRELIMINARY RULING, AND THE ECJ’S JUDGMENT (CASE C-55/18—*DEUTSCHE BANK S.A.E.*)

A few months after the Spanish Supreme Court’s judgment, the unions of a different financial institution filed a similar claim premised not on the overtime law but upon the arguments suggested by the Supreme Court in its earlier decision (i.e., controlling maximum working time regulations, rest, and health and safety). In January 2018, the *Audiencia Nacional* submitted a Request for Preliminary Ruling to the ECJ³ asking it to

rule whether the Spanish labor legislation on working hours matters was compliant with the European regulations and, more specifically, with the Charter of Fundamental Rights of the European Union,⁴ the Directive 2003/88/EC (Working Time Directive⁵), and the Council Directive 89/391/EEC (Directive on Health and Safety matters in the workplace⁶).

On May 14, 2019, the ECJ issued its judgment, which offered the following principal conclusions:

- Without a daily registry of working hours, it is impossible to determine objectively and reliably either the number of hours worked by the worker or when work finished for the day. It is equally difficult, if not impossible, in practice for a worker to ensure compliance with a maximum duration of weekly working time.
- In the absence of such a registry, it is not possible to determine the number of overtime hours worked beyond normal working hours.
- The objective and reliable determination of the number of hours worked each day and each week is essential in order to establish, first, compliance with the maximum weekly working time during the reference period and, second, compliance with the minimum daily and weekly rest periods.
- A national law that provides no means by which to make an objective and reliable determination of the number of hours worked each day and each week deprives both employers and workers of the ability to verify compliance with the rights of minimum rest and undermines the law’s objective to protect the health and safety of workers.
- By contrast, a registry of the time worked by employees each day provides employees an effective way to access objective and reliable data on the duration of their time worked. Thus, a registry of time worked will facilitate both the proof of a breach of workers’ rights and the verification, by the competent authorities and national courts, of the observance of those rights.

Consequently, the Grand Chamber of the ECJ declared:

The Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured.

THE APPLICABLE LEGAL FRAMEWORK AND THE IMPACT OF THE ECJ'S JUDGMENT IN VARIOUS EU MEMBER STATES

The current legal framework and primary impact of the ECJ Judgment in various EU Members States is as follows.

Spain

Spain has already passed legislation requiring all employers to establish a daily registry of working hours, in the recently approved *Real Decreto-ley 8/2019*,⁷ which became effective May 12, 2019 (before the ECJ Judgment was released). The new regulation is not very clear, however, and a more detailed regulation is pending. Nevertheless, the Spanish government has already confirmed that employers' obligation to register working hours applies to all employees, regardless of their seniority (with some exceptions for top executive roles), and to all business sectors and companies, irrespective of their size and business organization scheme. The labor authorities are already arranging regular checks on companies' implementation of working time controls.

Germany

In Germany, the current legal framework is likely not compliant with the ECJ Judgment. The German Working Time Act also is considered by many to be outdated in view of modern working environments, so legislative changes are expected. As one example: If checking emails in the evening is recordable working time, the statutory requirement of an 11-hour "uninterrupted" rest period would prevent work from beginning at a normal time the following morning. It remains to be seen how German regulators will address this and similar issues.

Italy

Italian laws already require employers to record employees' working time, so the ECJ judgment has little impact in Italy when it comes to recording working hours. The main challenge in implementing the ECJ decision probably will concern the different regimes of working time set by the multitude of existing national collective bargaining agreements. These various regimes also may impede an exhaustive new law governing this matter. Moreover, the restriction on monitoring employees' working activities may also prevent Italian employers from using certain tools to track the working time of employees working off the company's premises, including home-based employees.

France

The ECJ Judgment would not require, at least for now, any legislative changes in France. Indeed, French law has mandated a daily working time monitoring obligation for employers since 2008: The working time of employees who are not subject to a fixed collective working time organization ("*horaire collectif*") must be monitored daily, as well as the compensatory rest ("*repos compensateur*") they have acquired and taken when performing overtime hours. More flexible working time organization, such as computation of working time in hours or days over the year, also requires employers to monitor working time. The great challenge for French employers is the implementation in practice of such monitoring and its control by French courts. Litigation over working time has increased, as dismissed employees systematically challenge their working time organization when challenging their dismissal before the courts.

Belgium

As in France, the ECJ Judgment would not require immediate legislative changes in Belgium. Several acts in place already obligate employers to register employees' working time, especially if flexible work schedules and/or shift work is occurring. Employers must register the way that working time is monitored and controlled as well as all the applicable working schedules in the so-called "work rules" ("*arbeidsreglement/ reglement de travail*"). Any company established in Belgium must have such work rules in place, which must provide for a number of mandatory provisions, including monitoring of working time and applicable working schedules. Furthermore, specific mechanisms are in place with respect to the performance and the monitoring of overtime and payment for it. Consequently, the ECJ Judgment will not lead to legislative changes in the near future, but Belgian labor courts will have to take the ECJ Judgment into consideration in their interpretation of the applicable rules on working time.

The Netherlands

As in France and Belgium, the ECJ Judgment will likely not require immediate legislative changes in the Netherlands. The Dutch Working Hours Act already obligates employers to register working hours and work breaks in writing (Section 4:3). Companies that violate the Act are subject to penalties. Case law is also in line with Section 4:3 of the Working Hours Act, as courts generally rule that the employer has the burden of proving a diligent registration of employee working hours. The ECJ Judgment

also emphasizes the requirement to have a diligent working time recording system in place, so the ECJ Judgment will aggravate the burden of proof on employers. Some believe registration using employee fingerprints is a practical solution, especially for professionals or employees with a flexible workplace. However, in 2018, the Dutch Ministry of Social Affairs concluded that such biometric registration conflicts with privacy regulations if it is not done for authentication or security purposes.

United Kingdom

The Working Time Regulations 1998 (“WTR”) requires employers to keep records to demonstrate compliance with a 48-hour average working week (for those that have not “opted out”) and night work limits. There is currently no specific obligation to keep a daily registry of working hours. The ECJ Judgment suggests, therefore, that the WTR does not go far enough in protecting an employee’s right to minimum rest breaks. Going forward, it will be interesting to see how UK tribunals interpret the ECJ Judgment in the context of the WTR and, ultimately, whether the WTR will have to be amended (assuming the United Kingdom does not leave the European Union).

LAWYER CONTACTS

For further information, please contact your principal Firm representative or the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com/contactus.

Vidal Galindo

Madrid
+34.91.520.3939
vgalindo@jonesday.com

Friederike Steininger

Munich
+49.89.20.60.42.200
fsteininger@jonesday.com

Markus Kappenhagen

Düsseldorf
+49.211.5406.5500
mkappenhagen@jonesday.com

Paul de Beauregard

Düsseldorf
+49.211.5406.5500
pbeauregard@jonesday.com

Emmanuelle A. Rivez-Domont

Paris
+33.1.56.59.39.39
earivez@jonesday.com

Jean-Michel Bobillo

Paris
+33.1.56.59.46.50
jmbobillo@jonesday.com

Chantal Biernaux

Brussels
+32.2.645.15.32
cbiernaux@jonesday.com

Irene H. Vermeeren-Keijzers

Amsterdam
+31.20.305.4251
ivermeeren@jonesday.com

Luca Allevi

Milan
+39.02.7645.4001
lallevi@jonesday.com

Mark Taylor

London
+44.20.7039.5243
marktaylor@jonesday.com

Michael J. Gray

Chicago
+1.312.269.4096
mjgray@jonesday.com

Matthew W. Lampe

New York
+1.212.326.8338
mwlampe@jonesday.com

Elizabeth B. McRee

Chicago
+1.312.269.4374
emcree@jonesday.com

Georg Mikes

Frankfurt
+49.69.9726.3914
gmikes@jonesday.com

Javier Gutierrez, an associate in the Madrid Office, and Florence Coussau, counsel in the Paris Office, assisted in the preparation of this White Paper.

ENDNOTES

- 1 Spanish *Audiencia Nacional* Judgment num. 207/2105, December 4, 2015.
- 2 Spanish Supreme Court Judgment num. 246/2017, March 23, 2017.
- 3 Request for Preliminary Ruling of Spanish *Audiencia Nacional* to the European Court of Justice (Case C-55/18), January 19, 2018.
- 4 Article 31(2) of the Charter of Fundamental Rights of the European Union.
- 5 Articles 3, 5, 6, 16 and 22 of Directive 2003/88/EC of the European Parliament and of the Council of November 4, 2003, concerning certain aspects of the organization of working time.
- 6 Articles 4(1), 11(3) and 16(3) of the Council Directive 89/391/EEC of June 12, 1989, on the introduction of measures to encourage improvements in the safety and health of workers at work.
- 7 *Real Decreto-ley 8/2019, de 8 de marzo, de medidas urgentes de protección social y de lucha contra la precariedad laboral en la jornada de trabajo.*

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