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EU enlargement and acquis adoption burden: state of art and proposals for a correct adoption of the acquis for Albania

INTERNATIONAL SCIENTIFIC CONFERENCE

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JEAN MONNET CHAIR
EEAABAC
EU ENLARGEMENT and ACQUIS ADOPTION BURDEN: ALBANIAN CHALLENGES

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Edited by
ARBER GJETA

January, 2024
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DIRECTIVE 2003/88/EC CONCERNING CERTAIN ASPECTS OF THE ORGANIZATION OF WORKING TIME: RATIONALE OF THE DISCIPLINE, ROLE OF THE COURT OF JUSTICE AND DEROGATIONS BY COLLECTIVE AGREEMENTS.

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Abstract

The organization of working time stands as a pivotal domain within European Directives on social policy, with Directive 2003/88/EC serving as the cornerstone of current regulations. This directive, while consolidating the provisions of its predecessors, notably Directive 1993/104/EC, modified the structure without altering the core content, thus underscoring the significance of working time regulation within the European Union. Such recognition is further reinforced by its integration into the Charter of Fundamental Rights of the European Union, as articulated in Article 6(1) of the Treaty on European Union. Central to this framework is Article 31(2) of the Charter, which enshrines workers' rights to limitation of maximum working hours, daily and weekly rest periods, and annual paid leave. This paper aims to offer a comprehensive understanding of Directive 2003/88, elucidating its coverage of various aspects such as weekly working time, minimum rest periods, breaks, annual leave, and specialized work schedules like night, shift, and pattern work. Additionally, it examines the pivotal role played by the Court of Justice in interpreting the provisions of this directive, highlighting its significance in shaping the application and enforcement of working time regulations across member states. Furthermore, the paper explores derogations permitted to member states, including those facilitated through collective agreements, offering insights into the flexibility *inherent within the regulatory framework. Through this analysis, the paper seeks to contribute to a nuanced understanding of the complexities surrounding the regulation of working time within the European Union.*

Keywords: Organization, Working time, Social policy, Workers' rights, Charter of Fundamental Rights, European Union.

1. Introduction

The organization of working time represents one of the most significant areas of intervention in European Directives on social policy. The current regulations are outlined in Directive 2003/88/EC, which addresses certain aspects of working time organization and consolidates the provisions of Directive 1993/104/EC, as amended by Directive 2000/34/EC. It's worth noting that Directive 2003/88 not only repeals these earlier Directives but also modifies the numbering of some Articles and paragraphs, thereby partly altering the structure without significantly changing the content. Consequently, the importance of working time regulation has been acknowledged at the highest level of Union regulation, namely within the Charter of Fundamental Rights of the European Union. As per Article 6(1) of the Treaty on European Union (TEU), "recognizing the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

Article 31(2) of the Charter expressly provides that "2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods, and to an annual period of paid leave." The aim of this contribution is to provide essential information on issues covered by Directive 2003/88 (weekly working time, minimum rest periods, particularly daily and weekly, adequate breaks, annual leave, night, shift, and pattern work), as well as its purpose[1]. Furthermore, specific attention will be paid to the role played by the Court of Justice in interpreting the provisions of the mentioned Directive. Finally, some considerations will be provided regarding derogations that can be made by Member States, including through collective agreements.

1 More details in V. Leccese, *Directive 2003/88/EC concerning certain aspects of the organisation of working time*, in E. Ales, M. Bell, O. Deinert, S. Robin-Olivier (editors), *International and European Labour Law. Article-by-Article Commentary*, Nomos Verlagsgesellshaft, 2018, p. 1285 ff. and in V. Leccese, *Monitoring working time and Working Time Directive 2003/88/EC: A purposive approach,* in *European Labour Law Journal*, 14(1), 2023, p. 21 ff.

2. Purpose and discipline (main issues) of the European rules on working time

We can first observe that the explicit purpose of the initial Directive (Directive 1993/104) was to establish 'minimum safety and health requirements for the organization of working time' (Article 1(1)), aligned with a broader objective outlined in its preamble. This broader objective aims to foster improvements, particularly in the working environment, to ensure a higher level of protection for the safety and health of workers. This objective was underscored, as is well known, in Article 118A of the Treaty, in the text in force at the time, which served as the foundation for the adoption of the 1993 Directive. It is important to note that this objective forms the basis for the adoption of several European directives, commencing with the European Framework Directive 89/391 on the safety and health of workers, which has constituted a fundamental milestone in European regulation on the subject.

Returning to the working time directives, it is worth noting that the purpose of Directive 1993/104 and the broader objective mentioned earlier are largely reaffirmed in Directive 2003/88/EC. However, this affirmation no longer refers to Article 118A but rather to Article 137 TEC, which was in force when Directive 2003/88 was approved (now Article 153(1)(a) TFEU). Emphasizing this aspect is important because the Court of Justice, in its rulings, has meticulously examined the protective objectives pursued by European legislation since the judgment of November 12, 1996, concerning the action brought by the United Kingdom for the annulment of the first Directive 93/104[2].

Within the constraints of this brief synthesis, it is important to highlight that the overarching argument advanced by the Court unequivocally affirms that the Directive's intervention does not necessarily serve as a tool for influencing the labor market or the economic allocation of a company's resources. [3] Instead, the primary objective of the Directive, in terms of its purpose and content, is the protection of the health and safety of workers, a stance for which the European judges offer a broad interpretation. The Court explicitly confirms this stance by referencing the preamble to the Constitution of the World Health Organization, which defines health as a state of complete physical, mental, and social well-being, not merely the absence of illness or infirmity.

Primarily, the underlying principle of the initial Directive 93/104 (and also of Directive 88) has subsequently influenced the Court's approach in interpreting various provisions within the Directive. This influence is evident in the consolidation of its

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2 ECJ C-84/94, 12.11.1996, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, ECR I-5755.

3 Brian Bercusson, *Les temps communautaires,* in *Droit social*, 2000, n. 3, p. 248 ff.

protective function and in establishing an effective balance between the competing interests at stake. We will soon revisit this theme and explore the interaction between the Court and national judges. As mentioned earlier, let us briefly touch upon some key issues addressed by the Directive.

Without delving into the detailed regulations of the Directive and the extensive interpretations provided by the Court of Justice, it is worth mentioning that the Directive stipulates that Member States must take the necessary measures to ensure:

- that every worker is entitled to a minimum daily rest period of 11 consecutive hours within each 24-hour period (Art. 3);
- that every worker is entitled to a rest break if the working day exceeds six hours. The specifics of this break and the conditions under which it is granted shall be determined by collective agreements, agreements between employers and workers' representatives, or, in the absence of such agreements, by national legislation (Art. 4);
- that, within each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours, in addition to the 11 hours of daily rest stipulated in Article 3. If justified by objective, technical, or organizational reasons, a minimum rest period of 24 hours may be applied (Art. 5)[4];
- that the average working time for each seven-day period, including overtime, does not exceed 48 hours. A reference period not exceeding four months may be utilized for the application of this provision (Art. 6 and 16);
- that every worker is entitled to a minimum of four weeks of paid annual leave. This period cannot be substituted with financial compensation, except in cases of termination of the employment relationship (Art. 7);
- Other provisions pertain to night work, shift work, and work patterns (Art. 8-13);

3. The role of the Court of Justice

Turning to the analysis of the role of the Court of Justice, it is crucial to acknowledge that, as previously mentioned, the underlying principles of the Working Time Directives have consistently guided the Court's proceedings. Indeed, the Court employs a teleological approach in its interpretations, bolstered in recent judgments by referencing the content of Article 31(2) of the Charter of Fundamental Rights, as previously analyzed.

4 See also Art. 16: Member States may lay down for the application of Art. 5 a reference period not exceeding 14 days.

One of the most significant areas where the Court has applied this approach is in defining working hours and rest periods, as outlined in Article 2 of the directive:

- "working time" is defined as any period during which the worker is engaged in work, at the disposal of the employer, and performing their duties or activities, in accordance with national laws and/or practices;
- "rest period" is defined as any period that is not considered working time.

In many Member States, these definitions have been at the center of substantial disputes, leading to the submission of numerous interpretative questions before the Court. The Court's decisions in these matters have had profound effects on the regulatory frameworks of numerous states.

Therefore, while it may not be feasible to discuss every ruling here, it is imperative to at least examine some essential passages of the Jäger[5] case.

The teleological approach is most evident in the assertion that the concepts of 'working time' and 'rest periods' are integral components of Community law, which must be defined in alignment with the objectives of the Directive. These concepts should not be interpreted based on the criteria of individual national legislations.

Therefore, to guarantee the respect of the objective of the Directive (harmonising the protection of the safety and health of workers by means of minimum requirements), Member States may not unilaterally determine the scope of those concepts and may not make subject to any condition the right of employees to have working periods and corresponding rest periods duly taken into account[6]. It's important to note that, in providing its reading of these provisions the Court does not observe the literal wording of the directive, also in view of the diversity of versions found in the different official languages.

As observed by Advocate General Ruíz-Jarabo Colomer in *Jäger* case, a 'comparative exercise' on the different versions 'leads nowhere': 'for example, whereas in Spanish, French, and Italian, the worker is required to be at work, in English, German, and Dutch, the worker must be working' (so, the Advocate concludes that the teleological approach is to be preferred).

The Court, observing the time when doctors are on call, and presence in the hospital is required, concludes that it is essential to establish whether they have two obligations: to be present at the place determined by the employer and to be available to the employer in order to be able to provide their services immediately in case of need. In fact, those obligations, which make it impossible for the doctors to

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5 ECJ C-151/02, 9.9.2003, *Landeshauptstadt Kiel v Norbert Jäger*, ECR I-8389, which takes up and develops the reasoning in ECJ C-303/98, 3.10.2000, *Simap*, and ECJ C-241/99, 3.7.2001, *CIG*.

6 ECJ C-151/02, cited, paras 58-59.

choose the place where they stay during waiting periods, must be regarded as falling within the ambit of the performance of their duties.

This is also the case in the intervals when the employees can rest or even sleep. In fact, on one hand the need for their interventions depends on variable circumstances and cannot be planned in advance.

On the other hand, in these periods the employees are obliged to be separated from their families and social environment, and their freedom to manage their time is impeded or severely restricted.

At the end, they cannot be regarded as being at rest, even during the periods when they are on call and ‘not actually carrying on any professional activity’.

This interpretation is the only one ‘which accords with the objective of the Directive, which is to secure effective protection of the safety and health of employees by allowing them to enjoy minimum periods of rest’; this cannot be called into question by objections based on negative economic and organisational consequences which might result (see recital 5 in the Preamble to Directive).

As we can see the aim to ensure a real rest is the basis of the interpretation. A rest period in which, not in the words of the directive, but in the idea of the Court, the worker must be able to carry out other activities.

In *Jäger* case, the Court says also that different conclusions can be drawn in the case of a stand-by service, in which the employee is reachable at any time (so that he may be called upon at short notice to perform his professional tasks), but is not obliged to be present in a specific place designated by the employer: in this case, the worker can, in fact, choose both where to stay and the activities during the waiting period[7].

In many subsequent decisions the court has addressed the question of definitions, with reference to various jobs and activities[8]. Here we would like to briefly recall only the decision in which the Court modified (or clarified) its interpretation with reference to periods of stand-by duty.

In the case *Ville de Nivelles*, the Court, moving again from a pragmatic and teleological approach, observes that “the obligation to […] reach his place of work within 8 minutes are such as to objectively limit the opportunities which a worker […] has to devote himself to his personal and social interests”.

For this reason, the Court states that “Article 2 of Directive 2003/88 must be interpreted as meaning that stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes, very significantly restricting the opportunities for other activities, must be regarded as ‘working

7 ECJ C-151/02, cited, paras 60 ff.

8 Among others, see ECJ C 397/01-403/01, 5.10.2024, *Pfeiffer*; C-258/10, 4.3.2011, *Grigore*; C-437/05, 11.1.2007, *Vorel*; C-14/04, 1.12.2005.

time'"[9].

In other cases, the Court entrusts the national judge with the task of verifying if the period constitutes 'working time'".

The national judge, in fact, must verify "if it follows from an overall assessment of all the circumstances of the case, in particular the consequences of such a response time and, where appropriate, the average frequency of interventions during that period, that the constraints imposed on that worker during that period are of such a nature as to constrain objectively and very significantly the ability that he or she has to freely manage, during the same period, the time during which his or her professional services are not required and to devote that time to his or her own interests"[10].

4. The principle of primacy of EU law (in some pronounces on working time)

Naturally, the problem of the notion is only one of the problems faced by the Court in its work of interpretation. Working time European regulation, indeed, is one of the fields in which is more intensive the dialogue between national Courts and Court of Justice.

What is more important to note is that this work must be considered by any lawyers intending to interpret and apply the Directive itself.

And, given some conditions, national Court must also disapply the national legislation in the conflicts with the directive, as interpreted by the Court.

We can't here to enter in this issue, in which it is also involved the use made by the Court of the EU Charter of Fundamental rights (art. 31(2), seen above).

It is only possible remember, in general, the relevant impact that the judgements of the Court of Justice have on the national cases.

And it is sufficient to recall two statements, among the many that the Court has produced on the matter of primacy of EU law.

Interpreting the notion of breaks and, again, the definition of working time the Court states, inter alia, that "The principle of primacy of EU law must be interpreted as precluding a national court, ruling following the setting aside of its judgment by a higher court, from being bound, in accordance with national procedural law, by the legal rulings of that higher court, where those assessments are not compatible with EU law"[11].

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9 ECJ C-518/15, 21.2.2018, *Ville de Nivelles c. R.M.*

10 ECJ case C-580/19, 9.3.2021, RJ c. Stadt Offenbach am Main. On this topic see also ECJ case C-344/19, 9.3.2021, DJ c. Radiotelevizija Slovenija.

11 ECJ C-107/19, 9.9.2021, XR v Dopravní podnik hl. m. Prahy, akciová společnost.

In another pronunciation (regarding annual leave) the Courts states that "EU law must be interpreted as precluding national courts from protecting, on the basis of national law, the legitimate expectation of employers that the case-law of the highest national courts, which confirmed the lawfulness" of national provisions rules later revealed to be in conflict with Union law, "will continue to apply"[12].

5. Derogations and exceptions

Some final comments could be made on the derogations permitted by the Directive. Directive regulations, indeed, have been completed with the provisions of important exceptions and derogations and by an *opt-out* clause (now contained in Arts. 17-22 Dir. 2003/88), which, in the interests of the employer and in many cases in a significant way, give greater flexibility in determining minimum rest periods and maximum working time limits.

And Member State may directly introduce derogations or may allow derogations by way of collective agreements or agreements concluded between the two sides of industry at the appropriate collective level.

This has led some academic writers to question the intrinsic consistency of the overall regulation, which has seemed 'schizoid', in that it represents a 'legislative recantation', in which the regulations established in the first part (arts. 1-16) are then deprived of any imperative effect in the second[13].

Many years, we can affirm a much less pessimistic assessment. We think that, despite the derogations introduced in the second part, many provisions of the Directive certainly represent a significant instrument for the protective purposes and objectives described above: so much so that during the procedures for amending the Directive[14], many Member States have suggested reducing the protective elements, especially in view of the strict interpretations which, in the course of time, have been provided by the ECJ.

In second place, the significant volume of judgments by the Court demonstrates that working time flexibility in the interests of the employer cannot be considered to be part of the purposes of the Directive. These interests are, in fact, considered, but only as a (relative and external) commitment with respect to the content of the Directive, as can be seen, again from the Preamble: we note, in particular the part where, after clarifying that the objective of improving workers' safety, hygiene and health at

12 ECJ 13.12.2018, C-385/17, Torsten Hein v Albert Holzkamm GmbH & Co. KG.

13 In that sense, for all, Alain Supiot, *Temps de travail: pour une concordance des temps,* in *Droit Social*, 1995, n. 12, p. 947 ff.

14 We limit ourselves here to noting that on 29 April 2009 an initial procedure for amending Dir. 2003/88 was concluded without success: for the first proposal of the Commission, see COM(2004) 607 Final. The same end had a new procedure, activated by the Commission in 2010.

work should not be subordinated to purely economic considerations (recital 4), the Preamble nevertheless emphasizes the desirability, "in view of the question likely to be raised by the organisation of working time within an undertaking", of allowing a measure of flexibility in the application of certain provisions of the Directive, "whilst ensuring compliance with the principles of protecting the safety and health of workers" (recital 15). There is, therefore, a clear connection with that question when the Preamble closes with the observation that "it is necessary to provide that certain provisions may be subject to derogations implemented, according to the case, by the Member States or the two sides of industry".

As stated by the Court, indeed, as exceptions to the European Union system for the organisation of working time put in place by the Directive, derogations must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which they are designed to protect[15].

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COM(2004) 607 Final. The same end had a new procedure, activated by the Commission in 2010.

15 ECJ C-151/02, cited, para 89; Case C-428/09, cited, para 40.

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