Case C-585/19

Request for a preliminary ruling

Date lodged:

2 August 2019

Referring court:

Tribunalul București (Regional Court, Bucharest, Romania)

Date of the decision to refer:

24 July 2019

Applicant:

Academia de Studii Economice din București

Defendant:

Organismul Intermediar pentru Programul Operațional Capital Uman — Ministerul Educației Naționale

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REPORT ON THE REQUEST FOR A PRELIMINARY RULING

TRIBUNALUL BUCUREȘTI — SECȚIA A II-A CONTENCIOS ADMINISTRATIV ȘI FISCAL (Regional Court, Bucharest, Second Chamber for Administrative and Tax Matters), at the request of the applicant, the **ACADEMIA DE STUDII ECONOMICE DIN BUCUREȘTI (Academy of Economic Studies, Bucharest)**, in view of the ruling given at the conclusion of the hearing on 13 June 2019, on the basis of Article 267 of the Treaty on the Functioning of the European Union (TFEU), requests:

THE COURT OF JUSTICE OF THE EUROPEAN UNION

to answer the following questions referred for a preliminary ruling concerning the interpretation of Article 2(1), Article 3, and Article 6(b) of Directive 2003/88/EC of the European Parliament and of the Council [of 4 November 2003 concerning certain aspects of the organisation of working time], a decision to that effect being useful for resolving the national case brought before the Regional Court, Bucharest, Second Chamber for Administrative and Tax Matters […]:

‘**(1)** Should ‘working time’, as defined in Article 2(1) of Directive 2003/88/EC, be understood as meaning ‘any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties’ under a single (full-time) contract or under all (employment) contracts concluded by that worker?

(2) Should the requirements imposed on Member States by Article 3 of Directive 2003/88/EC (obligation to take the measures necessary to ensure that each worker enjoys at least 11 consecutive hours’ rest per 24-hour period) and by Article 6(b) of that directive (establishing a maximum weekly working time limit of 48 hours, on average, including overtime) be interpreted as introducing limits with regard to one single contract or with regard to all the contracts concluded with the same employer or with different employers?

(3) In the event that the answers to Questions 1 and 2 involve an interpretation which is such as to exclude the possibility of the Member States being able to regulate, at national level, the application per contract of Article 3 and Article 6(b) of Directive 2003/88/EC, where there are no provisions of national legislation governing the fact that the minimum daily rest and the maximum weekly working time are to relate to the worker (regardless of how many employment contracts are concluded with the same employer or with different employers), is a public institution of a Member State, which acts on behalf of the State, in a position to rely on the direct application of Article 3 and Article 6(b) of Directive 2003/88/EC and to penalise the employer for failure to observe the limits laid down by that directive as regards daily rest and/or the maximum weekly working time?’

Subject matter of the dispute. Relevant facts:

1. By *application* lodged with the Regional Court, Bucharest, Second Chamber for Administrative and Tax Matters, the applicant, the **ACADEMIA DE STUDII ECONOMICE DIN BUCUREȘTI (Academy of Economic Studies, Bucharest) (*‘the ASE’*),** in proceedings between itself and the defendant, the **Organismul Intermediar pentru Programul Operațional Capital Uman — Ministerul Educației Naționale) (Intermediate Body for the Human Capital Operational Programme — Ministry of National Education *(‘the OI POCU MEN’)***, has requested annulment of Decision No 1035 [of] […] 2 August 2018 resolving the complaint brought by the ASE against the Report establishing irregularities and **[OR 2]** determining credit entries [of] […] 4 June 2018 and annulment of the Report establishing irregularities and determining credit entries [of] […] 4 June 2018 issued by the *OI POCU MEN*.

2. In its application, the applicant stated that, by the Report establishing irregularities and determining financial corrections [of] […] 4 June 2018, the *OI POCU MEN* established for the ASE, as a beneficiary of the project *POSDRU/89/1.5/S/59184* entitled ‘*Performance and excellence in postdoctoral research in the field of economic science in Romania*’, reference SMIS 21574, [a]

credit entry in the amount of [RON] 13 490.42, corresponding to expenditure regarded as ineligible, amounting to a total of [RON] 13 808, representing salarial expenditure (net salary, tax, employee and employer contributions) in relation to certain employees in the project implementation team, expenditure declared ineligible by the *OI POCU MEN* in view of the finding that the maximum number of 13 hours per day, a limit considered by the *OI POCU MEN* as being established in accordance with the provisions of *Directive 2003/88/EC*, had been exceeded.

3. The applicant brought an *administrative complaint* [of] […] 10 July 2018 against the report of irregularities outlined above, which was rejected as unfounded by decision [of] […] 2 August 2018 by the OI POCU MEN, which considered that: ***(a)*** the legislation (*Article 3* of *Directive 2003/88/EC* is cited) governs the maximum number of hours' work that may be provided per person per day, not for a single contract; ***(b)*** the differences between the contractual hour (40 minutes) and the calendar hour (60 minutes) are irrelevant, since employment contracts concerning the basic function of experts are concluded on the basis of the Labour Code, with a total working time of 40 hours per week, with no derogating provisions; ***(c)*** the request for conciliation has not been made to the correct forum, as the *OI POCU MEN* is not involved with the making of requests for conciliation, the provisions of Instrucțiunea *AM POSDRU nr. 95 (Instruction No 95 of the Management Authority of the Sectoral Operational Programme for Human Resources Development) of 17 April 2014* being repeated; the beneficiary's rights of defence are deemed to be respected inasmuch as that beneficiary is permitted to express its views, in writing, prior to the issuing of the [Report establishing irregularities and determining credit entries], and the expression of those views is not a genuine form of appeal; ***(d)*** on the date of lodging the request for reimbursement, namely 1 April 2013, the applicant should have been aware of the provisions of *Directive 2003/88/EC* and, even in the absence of ***Instrucțiunea AM POSDRU nr. 64 (Instruction No 64 of the Management Authority of the Sectoral Operational Programme for Human Resources Development) of 1 February 2013***, should have been aware of the limit referred to in *Article 3* of *Directive 2003/88/EC* and should not have requested reimbursement of expenses relating to salaries which exceed the limit of 13 hours per day.

4. In its *defence*, included in the case file, [the OI POCU MEN] maintained [that] […] it applied the provisions of Directive 2003/88/EC (the Working Time Directive) in accordance with the European Commission's reports to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of that directive by the Member States.

5. It can be seen from the rules on labour legislation, which are to be interpreted strictly, that working time may be extended beyond 48 hours per week, on the condition that average working hours, calculated over a reference period of 4 calendar months, do not exceed 48 hours per week, and that every employee has the right to work for different employers or for the same employer under

individual employment contracts, receiving the corresponding salary for each of those contracts, with the exception of situations in which, by law, the cumulation of functions is said to be incompatible. **[OR 3]**

6. As the financing agreement [which is to be considered law between the parties], the requests for funding, including all subsequent amendments and additions thereto, and the individual employment contracts, together with their addenda, do not introduce any derogation from the provisions of the Labour Code concerning the calculation of hours worked, [and] make no reference to the hours corresponding to teaching time, reference has correctly and legally been made to a 60-minute hour.

7. Thus, regarding the temporary application of the rules governing the working time allocated to the project pending the entry into force of Instrucțiunea nr. 64 (Instruction No 64) of 2013, the provisions of legislation most favourable to the beneficiary of the funding were considered, namely the maximum limit of 13 hours per day pursuant to Article 3 of [Directive] 2003/88/EC, in accordance with the rationale of Article 1(3) of that directive, pursuant to which '*this Directive shall apply to all sectors of activity, both public and private*'.

8. Consequently, the contractual hours transposed into hours worked which are the subject of the timesheets managed by the beneficiary of the funding and by the experts who have drawn up those timesheets, validated by those experts via signature, in conjunction with the salarial payment documents, come to the maximum limit of 13 hours per day established in the debt instrument (otherwise, the result would be more than 24 hours per day), evidence which led to the finding that the provisions of Article 56 [of] Regulation (EC) [No] 1083/2008, Article 2(1) [of Hotărârea Guvernului nr. 759 din 11 iulie 2007 privind regulile de eligibilitate a cheltuielilor efectuate în cadrul operaţiunilor finanţate prin programele operaţionale (Government Decision No 759 of 11 July 2007 concerning the rules on the eligibility of expenditure incurred in the context of transactions financed by operational programmes), and Article 172a(1)(c) and (f) of Regulation (EC) No 2342/2002, together with the rules cited above, had been infringed, a fact which, in the defendant's view, entails the ineligibility of the sum in question.

Request for a reference to be made to the Court of Justice of the European Union:

9. The applicant has requested that questions intended to clarify Article 2(1), Article 3, and Article 6(b) of Directive 2003/88/EC of the European Parliament and of the Council be referred for a preliminary ruling.

The factual situation:

10. It is considered that, in essence, it is alleged in the contested administrative measure — [the Report establishing irregularities and determining credit entries of 4 June 2018] — that the applicant made 'unlawful' payment to the experts employed on the project of the equivalent of the hours of work carried out by those experts on the basis of legally concluded employment contracts, the reason being that those hours exceed the maximum number of hours provided for by [EU] legislation, namely *Article 3 of Directive 2003/88/EC* concerning certain aspects of the organisation of working time. On a secondary level, the provisions of Instrucțiunea AM POSDRU nr. 62 (Instruction No 62 of the Management Authority of the Sectoral Operational Programme for Human Resources Development) of 30 August 2012 (which established the format for reporting on the experts' activities, namely Annex 3 — individual timesheet, setting out the daily hours worked on each project, including the basic rate), Instrucțiunea AM POSDRU nr. 64 (Instruction No 64 of the Management Authority of the Sectoral Operational Programme for Human Resources Development) of 1 February 2013 (which established, as of 1 February 2013, the settlement limit of 13 hours per day), and *Article 114(1)* and *Article 135(1)* of *Legea nr. 53/2003* privind *Codul muncii* (Law No 53/2003 establishing the Labour Code) are also mentioned.

Provisions of national legislation applicable in the present case:

11. Legea nr. 53/24.01.2003 privind Codul muncii (Law No 53 of 24 January 2003 establishing the Labour Code), in force since 5 February 2003, provides:

'***Article 111***: *"Working time" is any period during which the employee carries out his work, is at the employer's disposal and fulfils his tasks and duties, in accordance with the provisions of the individual employment contract, applicable collective employment contract and/or legislation in force'*.

'***Article 112****(1): For full-time employees, the normal working time shall be 8 hours per day and 40 hours per week.*' **[OR 4]**

'***Article 114****(1): The maximum legal working time may not exceed 48 hours per week, including overtime.*'

'***Article 135****(1): Employees shall have the right between two working days to rest which may not be less than 12 consecutive hours.*'

Provisions of EU law applicable/relevant in the present case:

12. *Directive 2003/88/EC [of the European Parliament and of the Council of 4 November 2003] concerning certain aspects of the organisation of working time* provides:

'***Article 2*** *— Definitions*

For the purposes of this Directive, the following definitions shall apply:

1. *"working time" means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;*

2. *"rest period" means any period which is not working time;*

Article 3 *— Daily rest*

Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.

Article 6 *— Maximum weekly working time*

Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

(a) *the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;*

(b) *the average working time for each seven-day period, including overtime, does not exceed 48 hours.*'

The reasons why the referring court is submitting the request for a preliminary ruling:

13. The ineligible expenditure alleged by the debt instrument [of] *[...] 4 June 2018* is, in fact, expenditure on experts' salaries, considered by the *OI POCU MEN* to be ineligible because those experts, during the period from October 2012 to January 2013, on certain days, by cumulating the hours worked corresponding to the basic rate (8 hours per day) with the hours worked in the context of the project, where appropriate, and with the hours worked on other projects or other activities, reported a total number of hours worked per day greater than the limit of 13 hours per day provided for by *Instrucțiunea AM POSDRU nr. 64 (Instruction No 64 of the Management Authority of the Sectoral Operational Programme for Human Resources Development) of 1 February 2013*, a limit which, the *OI POCU MEN* contends, even in the absence of that Instruction (which was issued on 1 February 2013 and thus after the period from October 2012 to January 2013 for which, under the contested debt instrument, the ineligible expenditure was recorded), derives from the interpretation and direct application of *Article 3* and Article 6 of *Directive 2003/88/EC*.

14. At the same time, Article 3 of Directive *2003/88/EC*, which constitutes one of the legal bases for the action, obliges *Member States to 'take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period', and Article 6 of that directive obliges the Member States to 'take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers: (b) the average working time for each seven-day period, including overtime, does not exceed 48 hours'*. **[OR 5]**

15. Consequently, the questions referred for a preliminary ruling intended to clarify the compatibility of the interpretation of *Directive 2003/88/EC concerning certain aspects of the organisation of working time* given by the OI POCU MEN are decisive for the outcome of the case.

16. To date, the Court of Justice of the European Union ('the Court') has not analysed the application of Directive 2003/88/EC as regards minimum daily rest periods and […] as regards the maximum weekly working time per worker or per contract.

17. According to the second paragraph of Article 267 TFEU, if a question requiring a preliminary ruling is raised in a case pending before a court or tribunal, that court or tribunal may, if it considers that a decision is necessary to enable it to give judgment, request the Court to give a ruling on that question.

18. However, for the uniform application of European Union law in the Member States, it is necessary, where there is a doubt as to the compatibility with the Treaties of a given practice or of national legislation, for the court hearing the case to refer a question to the Court for a preliminary ruling.

19. Nevertheless, there is an exception, which must be interpreted strictly, to that rule. If a particular interpretation is certain, beyond any reasonable doubt, the national court may consider that the question is not necessary and directly apply European Union law.

20. Such a situation was referred to, in *Cilfit*, as the '*acte clair*' *doctrine*. The objective of that doctrine is to avoid congesting the Court with purely theoretical questions or questions unrelated to the settlement of a dispute.

21. However, national courts may not state that a provision of the Treaty is clear unless it has been clarified in the case-law of the Court. If a national court refuses to refer a question to the Court, invoking the 'acte clair' doctrine, without there being any basis in the case-law for doing so, there is a possibility that the right to a fair trial enshrined in Article 6(1) of the European Convention on the Protection of Human Rights [and Fundamental Freedoms] may be infringed. To that end, in the case *Ullens de Schooten v. Belgium*, the European Court of Human Rights established that the refusal by a national court to use the preliminary ruling mechanism may raise issues as to whether the proceedings are compatible with the right to a fair trial, even if the court hearing the case is not a review court.

22. Notwithstanding, in so far as it has any doubts as to the interpretation of the EU Treaty and the compatibility of national law with the provisions of that Treaty, the court must refer a question to the Court of Justice of the European Union for a preliminary ruling. In other words, while the application may be upheld even without a question being referred for a preliminary ruling, it may not be dismissed without clarification beforehand, by way of the questions referred for a preliminary ruling, of the compatibility of the OI POCU MEN's interpretation with [EU] law. Otherwise, the right of the ACADEMIA DE STUDII ECONOMICE DIN BUCUREȘTI to a fair trial would be infringed.

[…]

[…]

Bucharest, 24 July 2019