Bundesverwaltungsgericht

Judgment of 19 April 2018 - BVerwG 2 C 40.17

ECLI:DE:BVerwG:2018:190418U2C40.17.0

Fire fighter's claim for compensation for excessive work in breach of EU law

Headnotes

1. Regular working time cannot concurrently be overtime; this is the case even if regular working time is unlawfully set too high.

2. A detriment within the meaning of article 22 (1) of the Working Time Directive (Directive 2003/88/EC) exists if an employer responds with a reprisal measure to an employee's refusal to work more than 48 hours per week, or if the factual and legal consequences of this refusal prove to be negative when viewed objectively in an overall assessment. Adverse circumstances for which the employer compensates otherwise - for example, with monetary compensation or compensatory time off - must be left out of consideration in this regard.

3. The duty to assert claims against the employer, which do not arise directly by operation of law (principle of prompt assertion), in writing, is met by the civil servant in any text form, including, for example, via email. The requirement of form under section 126 (1) BGB does not apply.

Sources of law

Directive 2003/88/EC		articles 6, 16, 22
Act on Civil Servants of the Federal State of Saxony	SächsBG, *Sächsisches Beamtengesetz*	section 95
Act on Civil Servants of the Federal State of Saxony, old version	SächsBG a.F., *Sächsisches Beamtengesetz, alte Fassung*	section 91

Working Time Ordinance of the Federal State of Saxony	SächsAZVO, *Sächsische Arbeitszeitverordnung*	sections 1, 9, 11
German Civil Code	BGB, *Bürgerliches Gesetzbuch*	section 126 (1)

Summary of the facts

The claimant is a fire fighter in the service of the defendant city. He seeks compensatory time off, or alternatively, monetary compensation, for a total of some 3,000 hours of service provided in excess of 40 hours per week in the years from 2010 to 2015.

In 2008 the claimant declared to the defendant in writing that he consented to an increase in the average maximum weekly working time to not more than 52 hours. The declaration states that he had been informed that making the declaration was voluntary, and that he would suffer no detriment from a revocation of the declaration. The claimant subsequently provided 52 hours of work per week, or 50 hours per week from January 2015 onwards, and 48 hours per week as from January 2016. The claimant first objected to his weekly working time in November 2013, including the manner of its calculation and compensation, insofar as the working time exceeded the limit of 48 hours per week. He later additionally objected to the amount of his working time insofar as it exceeded 40 hours per week.

The Administrative Court (*Verwaltungsgericht*) dismissed the action the claimant brought after unsuccessful preliminary administrative proceedings. The claimant's appeal on points of fact and law to the Higher Administrative Court (*Oberverwaltungsgericht*) met with partial success, in that the defendant city was ordered to provide the claimant with 285 hours of compensatory time off for the period from 1 December 2013 to 31 December 2015.

Both parties lodged an appeal on points of law. The Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*) has reversed the appellate judgment on points of fact and law insofar as it pertained to the period from 1 December 2013 to 31 December 2015, and referred the matter back to the Higher Administrative Court for a further hearing and decision in this regard. Apart from that, it dismissed the appeals on points of law of both the claimant and the defendant city.

Reasons (abridged)

12 1. The court hearing the appeal on points of fact and law (hereinafter court of appeal) correctly held that the claimant has no claim for overtime. The relevant provision for the period from 1 January 2010 to 31 March 2014 is section 91 (2) of the Act on Civil Servants of the Federal State of Saxony (SächsBG, *Sächsisches Beamtengesetz*) in the version of 12 May 2009 (Law and Ordinance Gazette of the Federal State of Saxony (SächsGVBl., *Sächsisches Gesetz- und Verordnungsblatt*) p. 194) SächsBG, old version and the relevant provision for the period from 1 April 2014 to 31 December 2015 is section 95 (2) of the Act on Civil Servants of the Federal State of Saxony in the version of 18 December 2013 (SächsGVBl. p. 970) SächsBG, new version . The first sentence of each of these provisions specifies, in identical wording, that a civil servant must provide service beyond regular working time without compensation if compelling service circumstances so require. Pursuant to the second sentence, a civil servant is to be granted equivalent time off within one year for the overtime worked above and beyond the regular working time if the civil servant must serve more than five hours a month beyond regular working time because of overtime ordered or approved by the employer.

13 According to the jurisprudence of the Senate, overtime is the service that a civil servant subject to a working time regulation must provide beyond regular working time - i.e., not within the bounds of the normal scope of work - under an official order or approval, for the purpose of performing the duties of the civil servant's primary office or, if no office is assigned to the civil servant, of fulfilling the tasks equivalent to a primary office. The order or approval of overtime is not subject to a requirement for written form, but it must refer to specific, time-limited overtime circumstances; there is no requirement that the number of hours of overtime to be worked or that have already been worked must be known at the time when the work is ordered or

approved. The employer decides whether to order or approve overtime in its discretion. In this regard, it must in particular examine whether overtime is necessary at all, in view of the service needs, and which civil servant is to take on that overtime (established jurisprudence, see BVerwG, judgment of 17 November 2016 - 2 C 23.15 - Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 156, 262 para. 13 et seq., on section 88 second sentence of the Act on Federal Civil Servants (BBG, *Bundesbeamtengesetz*), which differs only editorially, not in substance, from the provisions relevant here).

14 Lawful overtime may be ordered or approved only if compelling service circumstances so require, and the overtime is limited to exceptional cases (BVerwG, judgment of 20 July 2017 - 2 C 31.16 - BVerwGE 159, 245 (...) para. 61). Therefore - in addition to the need, which the court of appeal emphasised, for a (necessarily) individual discretionary decision whether overtime must be worked at all, and if so, by whom - overtime is primarily characterised by the fact that it is limited to exceptional cases, and exceeds regular working time. The latter point is established by the very wording of section 91 (2) first sentence SächsBG, old version, and section 95 (2) first sentence SächsBG, new version ("above and beyond regular working time"). It follows that regular working time cannot concurrently be overtime. Even regular working time that is unlawfully set too high is not overtime within the meaning of the above provisions. To that extent, any claims for compensation can at most result from the aspect of unlawfully performed excessive work, through the liability claim under EU law or the claim for compensation under the law on civil servants (on this point, see 3. below).

15 The service performed by the claimant does not constitute overtime within the meaning of the above provisions either from the 41st to the 48th hour worked in a week (a) or from the 49th to the 52nd such hour (b).

16 a) Pursuant to section 1 (1) first sentence of the Working Time Ordinance of the Federal State of Saxony in the version of 28 January 2008 (SächsGVBl. p. 199) - SächsAZVO, *Sächsische Arbeitszeitverordnung* - regular working time averages 40 hours. In conformity with article 6 (b) and article 16 (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 (hereinafter Directive 2003/88/EC), section 1 (1) second sentence SächsAZVO provides that the maximum weekly working time over a reference period of four months must not exceed 48 hours on average. For the fire service, among others, section 9 (2) second sentence SächsAZVO provides that working time, depending on service needs, and subject to the established protective provisions, may be extended to as much as 48 hours per week on average during a reference period of four months.

17 With effect as from 1 January 2008, the defendant set the weekly working time for civil servants in the fire service at 48 hours. This specification took place in implementation of the requirements of Directive 2003/88/EC in the form of a limitation of the formerly (even) longer weekly working time. With this specification, the defendant exercised the option, narrowly defined by the issuer of the ordinance in section 9 (2) second sentence SächsAZVO, to expand regular weekly working time for specific occupational groups characterised by on-call duty and shift work. This constitutes regular working time, because it normally pertained to the entire group of the fire service civil servants in an on-call duty roster. Individualisation, exceptional nature and the exercise of discretion in individual cases (all three of these being characteristics that constitute qualification as overtime) are entirely absent from this specification. Therefore, there is no room here for a presumption of overtime.

18 The claimant's appeal on points of law wrongly proceeds from the assumption that any extension beyond the basic rule of section 1 (1) SächsAZVO, which provides for an average weekly working time of 40 hours for civil servants, constitutes overtime in the sense described above. Rather, the Working Time Ordinance of the Federal State of Saxony makes it possible to establish regular working times that differ in length. By linking to shift work and on-call duty, as well as the need to ensure continuity of service in certain occupational groups (including the fire service), section 9 (2) SächsAZVO also makes reference to a sufficient objective reason that is capable of justifying such a differentiation.

19 With this regulation, the provision remains within the bounds of what is permissible under EU law. First of

all, article 6 (b) of Directive 2003/88/EC permits an average weekly working time of up to 48 hours. Second - while it is true that according to the case-law of the Court of Justice of the European Union, on-call duty is to be deemed in its entirety as working time (Court of Justice of the European Union (CJEU), judgments of 3 October 2000 - C-303/98, SIMAP - and of 9 September 2003 - C-151/02, Jaeger - all the same, this does not mean that weekly working time is to be defined uniformly for every occupational activity. Rather, with express reference to civil servants in the fire service, the Court of Justice has emphasised the maximum weekly working time of 48 hours, including on-call duty (CJEU, decision of 14 July 2005 C 52/04, Personalrat Feuerwehr Hamburg - para. 61). Accordingly, within the bounds of the maximum working time specified by article 6 (b) of Directive 2003/88/EC, appropriately structured differentiations are permissible. The Working Time Ordinance of the Federal State of Saxony makes use of this option in that it permits different regular working times for different groups of civil servants.

20 b) Even though the claimant's average weekly working time was longer than 48 hours, namely as much as 52 hours, this was not a case of overtime. Even this expanded working time - irrespective of its lawfulness (on this point, see 3. below) - is regular working time, and therefore not overtime.

21 article 22 (1) of Directive 2003/88/EC allows regular working time to be set higher than is provided in article 6 of the Directive, on a voluntary basis, if (among other factors) the general principles of the protection of the safety and health of workers are respected, and no worker is subjected to any detriment because he is not willing to give his agreement to perform such work.

22 The Saxon issuer of the ordinance properly transposed the requirements of this provision into federal state law in section 11 SächsAZVO (see already, BVerwG, judgment of 20 July 2017 - 2 C 31.16 - BVerwGE 159, 245 (...) para. 25). Accordingly, allowing for the general principles of the protection of the safety and health, the average maximum weekly working time under section 1 (1) second sentence may be exceeded if - among other requirements - the civil servant declares a willingness to accept this overrun (no. 1) and the civil servant is not subjected to any detriment if he is not willing to exceed the maximum weekly working time, or revokes the declaration under number 1 (no. 2).

23 As has already been explained, the referenced maximum working time under section 1 (1) second sentence SächsAZVO is specifically a matter of regular working time. It does not forfeit this nature in virtue of having been expanded. As is evident from the service agreement titled "Organisation of working time in the fire service and mixed service of fire departments" ("Arbeitszeitgestaltung im feuerwehrtechnischen Dienst und Mischdienst der Branddirektion") of 4 August 2008, the average weekly working time of 52 hours was to be the generally applicable working time for those civil servants who agreed to a corresponding expansion of working time. There is nothing in the extensive provisions of the service agreement to indicate an individualised, exceptional extension of working time, which would be a prerequisite for a lawful ordering of overtime (see above). On the contrary, inasmuch as no. 3.4 of the service agreement conceives that overtime is to be ordered for all hours that exceed the planned annual working time, it is clear that the planned working time is meant to be understood as the regular working time. According to no. 3.2 of the service agreement, however, the planned annual working time is calculated on the basis of a (regular) weekly working time of 52 hours.

24 2. The court of appeal was likewise correct in holding that in accordance with the principle of prompt assertion, the liability claim under EU law and the claim for compensation under the law on civil servants are valid only as from the month following the written assertion of such a claim to the employer.

25 According to the established jurisprudence of the Senate, unless a claim is established - and where applicable, must be paid - by direct operation of law, it must first be asserted; this is because a prior administrative decision on the grounds and scope of the claim is necessary. For the civil servant, this duty proceeds directly from the civil servant status with its relationship of mutual loyalty. Unlike an objection to inadequate financial maintenance, which generally refers to a budget year and for which, consequently, the assertion of such claims must necessarily refer to the entire current budget year, the assertion of other claims is of significance only for the period as from the following month (established jurisprudence, see BVerwG, judgments of 6 April 2017 - 2 C 11.16 - BVerwGE 158, 344 para. 50 et seqq. and of 20 July 2017 - 2 C 31.16 - BVerwGE 159, 245 (...) para. 43 et seqq., each with further references).

26 If such claims result from a breach of EU law, the procedural modalities for their assertion are nevertheless to be derived from the laws of the Member State if, as in the present case, there are no applicable provisions of EU law, and as long as these modalities comply with the principles of equivalence and effectiveness under EU law. This also includes the possibility of making the exercise of such rights conditional on compliance with time-limits (CJEU, judgments of 25 November 2010 - C-429/09, Fuß II - para. 72 and of 19 June 2014 - C-501/12 et al., Specht - (...)). With reference to the liability claim under EU law for unlawful excessive work which is in question here, the Senate has already decided that the two aforementioned principles of EU law are not contrary to the requirement of prompt assertion.

27 The principle of equivalence says that the modalities for asserting a claim under EU law must not be less favourable than those that govern similar purely domestic situations. The requirement of prompt assertion applies equally for claims that result from a breach of national law. Namely, the claim for compensation under the law on civil servants, which is likewise in question here, is subject to the same requirements and restrictions as the liability claim under EU law (BVerwG, judgment of 20 July 2017 - 2 C 31.16 - BVerwGE 159, 245 (...) para. 49 with further references).

28 The principle of effectiveness requires that the assertion of the rights conferred by EU law must not be rendered impossible in practice or excessively difficult. It is compatible with these requirements of EU law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the entitled individual and the administration concerned (CJEU, judgments of 30 June 2011 - C-262/09, Meilicke et al. - para. 56 with further references; of 19 June 2014 - C-501/12 et al. - (...); of 9 September 2015 - C- 20/13, Unland - (...); BVerwG, judgments of 17 September 2015 - 2 C 26.14 - (...) para. 31 and of 20 July 2017 - 2 C 31.16 - BVerwGE 159, 245 (...) para. 49).

29 The requirement for assertion in writing also does not constitute a disproportionate burden on the civil servant in his or her relationship to the employer. On the one hand, the civil servant is not expected to have legal knowledge of any kind as to the existence or nonexistence of any claims. It suffices that he should express an unwillingness to consent to a given situation - in this case, the amount of working time. In that sense, the objective of making the assertion is merely to prompt the employer to review the obligations under the law on civil servants, and, as appropriate, to provide compensation if a breach of the law is found. On the other hand, the civil servant can meet the requirement for a written assertion in any desired text form. As this is not a statutory requirement of written form, but merely a duty that derives from the relationship of mutual loyalty under the law on civil servants, the requirement of form under section 126 (1) of the German Civil Code (BGB, *Bürgerliches Gesetzbuch*) need not be observed. Instead, the civil servant can also fulfil this duty with other forms of text, such as email.

30 3. The factual findings by the court of appeal do not offer an adequate basis for arriving at a final decision on the existence of the liability claim under EU law, or of the claim for compensation under the law on civil servants. According to the case-law of the Court of Justice of the European Union, in the event of breaches of EU law individuals harmed have a right to reparation if (a), the rule of EU law infringed is intended to confer rights on them (b), the breach of that rule is sufficiently serious (c), and if there is a direct causal link between the breach and the loss or damage sustained by the individuals (CJEU, judgments of 26 January 2010 - C-118/08, Transportes Urbanos y Servicios Generales - para. 30 and of 25 November 2010 - C-429/09 - para. 47).

31 a) In order to assess whether the maximum working time permissible under Directive 2003/88/EC was exceeded in the claimant's case, insofar as he performed more than 48 and up to 52 hours of work per week, the Higher Administrative Court must determine additional facts.

32 For a lawful extension of working time beyond 48 hours, article 22 (1) of Directive 2003/88/EC requires, *inter alia*, that no worker may be subjected to any detriment by his employer because he is not willing to give his agreement to perform such work (see para. 21 above). Directive 2003/88/EC pursues the objective of ensuring employees' safety and health by ensuring that they observe adequate rest periods.

33 Accordingly, a detriment within the meaning of article 22 (1) of Directive 2003/88/EC must be presumed, first and foremost, if the worker is deprived of the prescribed rest periods. Additionally, it is also possible to show that the worker suffered some other specific detriment that does not lie solely in being deprived of the

prescribed rest periods (CJEU, judgment of 14 October 2010 - C-243/09, Fuß I - para. 54 et seq.). According to the case-law of the Court of Justice of the European Union, such other detriment may also consist of a reprisal measure, i.e., a counter measure such as a transfer contrary to the civil servant's will. Fear of such a negative sanction might deter workers who would not be willing to consent voluntarily to an increase in working time, or who would like to revoke their previous consent, from pursuing their claims (CJEU, judgment of 14 October 2010 - C-243/09 - para. 65 et seq.).

34 However, the concept of detriment also includes other circumstances that constitute a consequence of the decision not to declare one's consent to work voluntarily beyond 48 hours a week, or the desire to revoke that consent. Here it is immaterial, on the one hand, whether the employer attributes to these circumstances a kind of punitive nature for the civil servant's choice not to work for more than the maximum permissible 48 hours a week. On the other hand, the assessment of whether such circumstances are detrimental does not depend on the civil servant's subjective opinion. If that were the case, the civil servant would have the power to assert that virtually any measure falling within the employer's organisational authority was detrimental. This would unduly limit the employer's scope for action to provide meaningful organisational support for the possibility of working more than 48 hours a week, which does at least exist by way of exception. In addition to the reprisal measure described initially here, a detriment within the meaning of article 22 (1) of Directive 2003/88/EC particularly comes under consideration if the factual and legal consequences of refusing an extension of working time prove to be negative when viewed objectively in an overall consideration. The overall consideration must include both the advantageous circumstances and the detrimental ones. However, adverse circumstances for which the employer compensates otherwise - for example with monetary compensation or compensatory time off - must be left out of consideration. In such a context, an adverse shift pattern may also constitute a detriment (BVerwG, judgment of 20 July 2017 - 2 C 31.16 - BVerwGE 159, 245 (...) para. 22, 24).

35 In this specific case, the Higher Administrative Court's factual findings do not offer a sufficient basis for performing the required overall consideration. For example, there is no adequate information about whether, and which, consequences of 12-hour shift work, which from the defendant's viewpoint constitutes a neutral, organisationally necessary *aliud*, are objectively negative in comparison to 24-hour shift work.

36 To that extent, the Higher Administrative Court's finding that civil servants who do not take part in the working time extension did not obtain an equal amount of additional leave seems unclear. Pursuant to section 10 (5) of the Ordinance for Leave, Protection of Working Mothers and Parental Leave of the Federal State of Saxony (SächsUrlMuEltVO, *Sächsische Urlaubs-, Mutterschutz- und Elternzeitverordnung*) of 16 December 2013 (SächsGVBl. p. 901), civil servants in the fire service, if assigned under a shift schedule that provides 24-hour shifts as a standard case, are excepted from the benefits (among others) under subsection 1 of the provision, which prescribes additional leave for hours of night work. In this connection, at any rate, 12-hour shift work might represent more of an advantage than a detriment.

37 It must also be determined whether the scope of the additional travel to the work place, which is inevitably occasioned by 12-hour shift work - depending on the distance from the place of residence to the place of work, and allowing for the fact that such costs are tax-deductible - achieves a certain degree of substantiality that qualifies it to be included in the overall consideration in the first place.

38 Furthermore, it will be necessary to determine the extent to which there are in fact differences between the additional allowances in the two shift models. Here it must be taken into account in each case whether these additional allowances constitute a genuine advantage, or whether they are merely provided to compensate for a detriment that would likewise have to be put in the balance in an overall consideration that included all circumstances. In this regard, it is conceivable that a financial advantage of a civil servant employed in 24-hour service is already compensated by a *de facto* detriment that the civil servant must suffer, and that represents the reason for the additional allowance concerned.

39 Finally, findings must be made as to whether, when viewed objectively, a "long weekend" is more advantageous to the civil servant than a number of shorter recovery periods that are provided in 12-hour shift work.

40 b) The Court of Justice of the European Union has already decided that the working time provisions of

Directive 2003/88/EC are particularly important provisions of EU social law that confer rights on the individual (CJEU, judgment of 25 November 2010 - C-429/09 - para. 33, 35).

41 c) If, in its new decision on the matter, the Higher Administrative Court affirms that there was a breach of EU law, it would likewise have to pursue the question of whether this breach is sufficiently serious. According to the case-law of the Court of Justice of the European Union, a breach of EU law is sufficiently serious if the Member State manifestly and gravely disregards the limits set on its discretion. This is in any event the case where the decision concerned was made in manifest breach of the case-law of the Court of Justice in the matter (CJEU, judgment of 25 November 2010 - C-429/09 - para. 51 et seq.). In that regard, the Senate is of the opinion that the differences in scheduling the shift pattern cannot automatically be viewed as equivalent to a transfer of a civil servant, and thus the seriousness of the breach cannot be founded on the case-law of the Court of Justice of the European Union concerning a transfer (CJEU, judgment of 14 October 2010 - C-243/09 - para. 65 et seq.). Whereas in a transfer, a different specific field of duty is assigned, the assignment to a shift model relates primarily to specific working times.

42 A sufficiently serious breach must also be assumed if the obliged party would have only considerably reduced, or even no, discretion in applying EU law (see CJEU, judgment of 23 May 1996 - C-5/94, Hedley Lomas - para. 28). Depending on the content and result of the overall consideration to be carried out (see para. 34 above), the Higher Administrative Court must therefore also address the question of whether such a reduced scope for action existed for the defendant, or whether other circumstances qualify the breach of EU law as serious.

43 4. The factual findings by the court of appeal also do not offer an adequate basis for determining the scope of a possible liability claim under EU law, and of a claim for compensation under the law on civil servants. In this regard, the Senate has already decided as follows in its judgment of 20 July 2017 - 2 C 31.16 - (BVerwGE 145, 245 (...) para. 57 et seqq.), which could not have been known to the court of appeal at the time of its decision:

"The amount of the excessive work performed in a particular case by the claimant in breach of EU law for the time after the month following the first assertion - here: assertion in January 2012 - is to be calculated specifically and not as a lump sum, as the Higher Administrative Court assumed. The specific calculation of the excessive work actually performed by the claimant in the period from February 2012 to December 2012 is a further task for the new appeal proceedings on points of fact and law. In this regard, it follows from EU law under article 16 (b) second sentence of Directive 2003/88/EC, that the periods of paid annual leave, granted in accordance with article 7 of Directive 2003/88/EC, and the periods of sick leave shall not be included or shall be neutral in the calculation of the average maximum weekly working time. This requirement of EU law demands that, irrespective of the question of transposition into national law by a provision of law, the days concerned must be applied in the calculation using the respective planned working time.

It is true that the Working Time Directive refers only to the minimum leave of four weeks guaranteed under EU law (article 7 of Directive 2003/88/EC). However, the additional leave beyond that amount as established under national law is to be applied with the planned working time. This is because article 15 of Directive 2003/88/EC does not affect the Member States' right to apply or introduce laws, regulations and administrative provisions more favourable to the protection of the safety and health of workers. This also includes granting a leave entitlement that exceeds the minimum leave under EU law. As the claimant is relieved of the obligation to perform work on the day of leave, and as additional leave also serves for the claimant's recovery, these days cannot be treated as compensation for an overrun of the maximum working time of 48 hours per seven-day period (see likewise BVerwG, judgment of 17 September 2015 - 2 C 26.14 - (...) para. 66).

Holidays that fall on weekdays are also to be applied with the planned working time, and are thus generally to be treated as neutral. If the claimant was not required to provide service on these days, such days cannot be treated as compensation for a possible overrunning of maximum working time. By contrast, periods during which the claimant was granted compensatory time off on the basis of the working time compensation order are not working time within the meaning of article 2 no. 1 of Directive 2003/88/EC.

Under EU law, working time includes all time served by the fire fighter in question in the context of being available for work and during on-call duty, in the form of personal presence at the workplace, irrespective of

what work he actually performed during this service (CJEU, judgment of 3 October 2000 - C-303/98, SIMAP - para. 52). For that reason, the exact determination of the number of hours to be compensated will also be a task for the new appeal proceedings on points of fact and law. According to the principle of effectiveness under EU law, here each hour that the claimant worked in excess of 48 hours during a seven-day period must therefore be compensated, because - as has been shown - the requirements for the "opt out" alleged by the defendant under article 22 (1) of Directive 2003/88/EC were not present. This too argues only for a compensation for excessive work actually and specifically performed.

The monetary compensation for the excessive work performed by the claimant in breach of EU law is to be oriented to the hourly rates in the Ordinance on the Granting of Overtime Remuneration for Civil Servants (MVergV, *Verordnung über die Gewährung von Mehrarbeitsvergütung für Beamte*) in the version promulgated on 3 December 1998 (Federal Law Gazette (BGBl., *Bundesgesetzblatt*) I p. 3494). This too makes it clear that what is concerned here is the specific, hourly-based calculation of the excessive work, and not a lump-sum basis. It is true that lawful overtime and excessive work in breach of EU law differ in their constituent elements. Lawful overtime, under section 76 (2) of the Act on Civil Servants of the Federal State of Brandenburg (LBG BB, *Beamtengesetz für das Land Brandenburg*) of 3 April 2009 (Law and Ordinance Gazette (GVBl., *Gesetz- und Verordnungsblatt*) I p. 26) is subject to an order or approval that can be issued or given only if compelling service circumstances so require, and the overtime is limited to exceptional cases. Furthermore, ordered or approved overtime must not exceed the maximum working time of 48 hours per seven-day period as prescribed under EU law (article 6 (b) of Directive 2003/88/EC) - other than in the procedures provided under EU law by article 16 through article 19 of Directive 2003/88/EC and article 22 of Directive 2003/88/EC (BVerwG, judgment of 29 September 2011 - 2 C 32.10 - BVerwGE 140, 351 para. 14). Overtime in terms of service law that is capable of being compensated with time off or remuneration exists only under these constituent elements. By contrast, unlawful excessive work in public service law means working time served by a civil servant in excess of the maximum weekly working time permitted by EU law under the Working Time Directive and its exceptional provisions. The civil servant must always be compensated for such time in full, primarily with compensatory time off, or if this is not possible, secondarily by monetary compensation. Nevertheless, both cases concern compensation for calling upon a civil servant beyond the obligated scope (BVerwG, judgments of 26 July 2012 - 2 C 29.11 - BVerwGE 143, 381 para. 35 and of 17 September 2015 - 2 C 26.14 - (...) para. 67), so that as a legal consequence, the hourly rates of the Ordinance on the Granting of Overtime Remuneration may also be applied for monetary compensation in cases of excessive work in breach of EU law.

By contrast, the provisions concerning regular remuneration cannot be applied (BVerwG, judgment of 26 July 2012 - 2 C 29.11 - BVerwGE 143, 381 para. 39). Regular remuneration is not a compensation in the sense of a reward for specific services (established jurisprudence, see Federal Constitutional Court (BVerfG, *Bundesverfassungsgericht*), decisions of 30 March 1977 - 2 BvR 1039/75 et al. - Rulings of the Federal Constitutional Court (BVerfGE, *Entscheidungen des Bundesverfassungsgerichts*) 44, 249 <264>, of 15 October 1985 - 2 BvL 4/83 - BVerfGE 71, 39 <63>, and of 20 March 2007 - 2 BvL 11/04 - BVerfGE 117, 372 <380>), but rather is the counterperformance provided by the employer for the fact that the civil servant takes on fulfilling his or her service duties with full personal commitment (established jurisprudence, see BVerfG, decisions of 11 April 1967 2 BvL 3/62 - BVerfGE 21, 329 <345>, of 15 October 1985 - 2 BvL 4/83 - BVerfGE 71, 39 <63>, and of 20 March 2007 - 2 BvL 11/04 - BVerfGE 117, 372 <380>). It is not directed to providing a reward for hours worked, but to ensuring a lifestyle consistent with the civil servant's position."

44 The Senate adheres to this jurisprudence. Here as well, the court of appeal may, if necessary, have to determine specifically to what extent the claimant has performed excessive work during the period in question.

45 5. The claim for compensation under the law on civil servants that is likewise a matter for consideration is covered by the same requirements and legal consequences as the liability claim under EU law (BVerwG, judgment of 20 July 2017 - 2 C 31.16 - BVerwGE 159, 245 (...) para. 49 with further references). The determinations to be conducted by the court of appeal likewise relate to this claim.

46 6. In accordance with all the foregoing, for the reasons set forth above (see para. 20 and 26 et seqq.) - and contrary to the claimant's suggestion - the Senate has not seen any reason to suspend the proceedings in

order to seek a preliminary ruling from the Court of Justice of the European Union under article 267 of the Treaty on the Functioning of the European Union (TFEU). Insofar as issues of EU law are concerned, it is established with the certainty required under the "acte clair" or "acte éclairé doctrine" (see, e.g., CJEU, judgment of 15 September 2005 - C-495/03, Intermodal Transports - para. 33) that the Senate's considerations concerning EU law are correct. They are based on the standards established in the cited case-law of the Court of Justice of the European Union. To the satisfaction of the Senate, it is obvious that the provisions of the laws on federal state civil servants of the federal state of Saxony remain within the regulatory scope allowed to the respective national legislature, and that there are no further questions of EU law that are in need of clarification with regard to the legal principles developed in the Senate's jurisprudence, especially because the considerations already undertaken in this regard are predominantly also founded on the case-law of the Court of Justice of the European Union. Moreover, the court of appeal must as the next step reach further factual findings concerning the matter of detriment.