Court of Justice of the European Union
PRESS RELEASE No 8/19
Luxembourg, 31 January 2019

Press and Information

Advocate General's Opinion in Case C- 55/18
CCOO v Deutsche Bank SAE

Advocate General Pitruzzella proposes that the Court find that undertakings are under an obligation to introduce a system for measuring the actual number of hours worked each day

Member States are free to determine the ways and means of implementing that obligation

The Spanish trade union Federación de Servicios de Comisiones Obreras (CCOO), supported by four other trade union organisations, brought a group action before the Audiencia Nacional (National High Court) against Deutsche Bank SAE seeking a declaration that the bank was under an obligation to set up a system to record the actual number of hours worked each day by its employees. According to that trade union, such a system would make it possible to check that stipulated working times were adhered to and that the obligation to disclose to union representatives information on monthly overtime worked was complied with, in accordance with national legislation. The trade unions take the view that the obligation to introduce such a system derives not only from national law but also from the Charter of Fundamental Rights of the European Union ('the Charter') and Directive 2003/88. [1] On the other hand, Deutsche Bank maintains that it is clear from the judgments of the Tribunal Supremo (Supreme Court, Spain) that no such general obligation exists under Spanish law.

In its judgment of 23 March 2017, the Tribunal Supremo found there was no general obligation to record normal hours worked, stating that Spanish law merely imposes an obligation to keep a record of overtime worked and, at the end of every month, to communicate the number of hours overtime worked by employees, if any, to their union representatives. In particular, the Tribunal Supremo observed that the keeping of a record of normal hours worked would entail a risk of unjustified interference on the part of undertakings in the private lives of workers and that, when the Spanish legislature decided to impose the requirement for such a record to be kept, it did so in specific cases, as with part-time workers, mobile workers, workers in the merchant navy and rail transport workers.

The Audiencia Nacional is uncertain whether Spanish law, as interpreted by the Tribunal Supremo, is consistent with EU law. According to the information provided to the Court, in Spain 53.7% of overtime worked has not been recorded. Moreover, the Spanish Ministry of Employment and Social Security considers that, in order to determine whether overtime has been worked, it is necessary to know the precise number of ordinary hours worked. The Tribunal Supremo's interpretation would in practice deprive workers of an essential means of proving that the hours they have worked are in excess of ordinary working time and their representatives would not have the means necessary to check whether the rules have been complied with. According to the Audienca Nacional, in such a situation national law would be incapable of ensuring effective compliance with the obligations laid down by Directives 2003/88 and 89/391. [2]

In his Opinion today, **Advocate General Pitruzzella proposes that the Court rule that the Charter and Directive 2003/88 imposes on undertakings an obligation to set up a system for**

[1] Directive 2003/88/ EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organistion of working time (OJ 2003 L 299, p. 9).
[2] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

recording the actual number of hours worked each day for full-time workers who have not expressly agreed, individually or collectively, to work overtime and who are not mobile workers or persons working in the merchant navy or railway transport workers **and precludes national provisions which do not impose such an obligation. He also states that Member States are none the less free to determine what method of recording of the number of hours actually worked each day is best suited for ensuring the effectiveness of EU law.**

The Advocate General states that it necessary to ensure that workers may fully and effectively enjoy the rights conferred on them by the Charter and Directive 2003/88 regarding the maximum number of hours that may be worked and daily and weekly rest periods. Full and effective protection entails identifying specific obligations for the persons involved in order to ensure that the imbalance in the economic relationship between employer and employee – the latter being the weaker party – does not undermine the effective enjoyment of the rights conferred on the employee by the Charter and that directive.

According to the Advocate General, while Member States remain free to choose the ways and means of implementing Directive 2003/88, they are, in any event, bound by a precise obligation as to the result to be achieved that is not coupled with any condition regarding the application of the rules laid down by Directive 2003/88. They must adopt national rules that are suitable for securing the result of protecting the safety and health of workers (the protection of whom is one of the fundamental objectives of the directive) by ensuring that limits on working hours are adhered to and that any obstacle which in fact undermines or limits enjoyment of the rights conferred by the directive is removed. One of the obligations of the Member States takes the form of imposing a special responsibility on the employer, who, in turn, is under an obligation to adopt appropriate measures to enable workers to exercise unimpeded the rights guaranteed by Directive 2003/88.

The Advocate General takes the view, first, that **in the absence of any system for measuring the number of hours worked, there can be no guarantee that the time limitations laid down by Directive 2003/88 will actually be observed or, consequently, that the rights which the directive itself confers on workers may be exercised without hindrance.** Without such a system, there can be no way of establishing objectively and with certainty how much work has actually been done or precisely when it was done or of differentiating between ordinary hours worked and overtime. Even the public authorities responsible for monitoring compliance with the rules on safety at work will be denied any real possibility of establishing and pursuing breaches.

Second, the Advocate General states that **the absence of such a system makes it much more difficult for workers to obtain protection from the courts of the rights conferred on them by Directive 2003/88, depriving them of an essential first line of evidence.** Indeed, in the event that an employer requires workers to exceed the limits on working hours laid down in the directive, it will be extremely difficult, in the absence of such a system, to implement effective remedies against such unlawful conduct. As a consequence, that absence will significantly reduce the effectiveness of the rights which Directive 2003/88 confers on workers, who will essentially be dependent on their employer's discretion.

In summary, it is the Advocate General's view that **the obligation to measure the number of hours worked each day plays an essential role in ensuring compliance, on the part of the employer, with all the other obligations laid down by Directive 2003/88, such as those concerning the limits on the duration of the working day, daily rest periods, the limits on the duration of the working week, weekly rest periods, and the possible working of overtime. Those obligations relate not only to the right of workers and their representatives to be able to review periodically the amount of work done for remuneration purposes, but also, and above all, to the protection of health and safety in the workplace.**

The national court is required to determine, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, whether it can arrive at an interpretation of domestic law that is capable of ensuring the full effectiveness of EU law. **In the event that it is impossible to interpret national provisions, such as the Spanish provision at issue, in a manner consistent with Directive 2003/88 and the Charter, the**

national court must disapply such provisions and satisfy itself that the obligation on undertakings to equip themselves with an adequate system for recording the number of hours actually worked each day is met. The Advocate General notes that **that obligation to interpret national law in a manner consistent with EU law entails an obligation for national courts to change established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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