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EUROPEAN COURT OF JUSTICE (ECJ) LAYS DOWN SUBSTANTIAL DUTIES OF EMPLOYERS FOR THE RECORDING OF WORKING TIME BASED ON THE WORKING TIME DIRECTIVE

In its judgment of 14 May 2019 (case C-55/18) the ECJ ruled that the working time directive (Directive 2003/88/EC) required every employer to record the working time of employees and obliged each member state to ensure that each employer would set up an objective, reliable and accessible system measuring the duration of time worked each day by each employee.

I. Legal basis

The working time directive contains content requirements for maximum working time and night work as well as minimum rest periods and breaks of employees for their protection. In Germany, these material requirements are fully implemented by the Law on Working Time [ArbZG].

Articles 3, 5 and 6 lit. b of the working time directive each state that member states have to take the “measures necessary” to ensure that the required provisions on maximum working time and rest periods are met. However, the working time directive does not contain any express provision regarding a record keeping obligation of employers. Section 16 subsection 2 sentence 1 ArbZG only included the employer’s obligation to keep record of working time which exceeds eight hours of time worked each day.

II. ECJ judgment of 14 May 2019

The Spanish trade union CCOO had brought an action against the Spanish subsidiary of Deutsche Bank before the National High Court to set up a system for recording the time worked each day by its members of staff in order to verify compliance with the working times stipulated. Previously, Deutsche Bank was requested by the competent employment inspectorate to set up such a system. However, the Supreme Court seized by Deutsche Bank rejected this obligation, because according to Spanish provisions, the employer was merely required to record overtime hours worked by employees and to communicate, at the end of each month, to employees the number of hours of overtime worked. The National Court had doubts as to whether this interpretation was consistent with EU law and therefore referred this question to the ECJ.

The ECJ explained in its judgment that only a system that carried out an extensive record of working time could grant the specific rights from the working time directive. Otherwise it would not be possible to objectively and reliably determine neither the employee’s number of hours worked nor the working time exceeding the normal working time. The ECJ therefore considers that the “measures necessary” include such a determination of working time within the meaning of Article 3, 5 and 6 lit. b of the working time directive. According to the ECJ, this is also based on the worker protection directive (Council Directive 89/397/EEC) and on Article 31 (2) of the EU Charter of Fundamental Rights from which the particular importance of safety and health protection for employees arises. The implementation of these important rights of employees would only be possible if the member states obliged employers to provide corresponding systems enabling working time to be measured.

III. Consequences for the practice

1. New legal regulation?

It is not clear whether the German legislator has to react to the ECJ judgment. It could be conceivable to interpret section 16 subsection 2 sentence 1 ArbZG in conformity with European law in such way that the employer is obliged to keep record of not only any working time exceeding the daily working time, but also the working time per working day. The wording of the provision could be quoted against this interpretation.

Obviously, the right answer to this question is seen differently even within the Federal Government. While the Minister of Labor considers a revision of the Law on Working Time necessary and has announced such a revision, the Minister of Economic Affairs expressed that the current Law on Working Time could suffice for meeting the requirements of the ECJ, according to his assessment. He wanted to obtain a legal opinion on this matter. For the practice, however, a clear regulation in the law could be useful, especially since the ECJ expressly pointed out in its judgment that the member states would enjoy relatively wide discretion regarding the organization of the record keeping obligation. A German provision could, at best, thus stipulate easy implementable and pragmatic solutions. It remains to be seen whether new provisions actually will be introduced.

2. Record keeping obligations

Regardless of a new legal regulation, all employers will have to provide a system enabling working time to be measured – as described by the ECJ – for all employees in the future. Insofar as there is no basis for this yet, this will lead to not insignificant additional costs as well as not insignificant additional administrative burdens. The ECJ expressly mentioned them, however, it did not consider them being obstacles to its interpretation.

Insofar as employees have so far exceeded the prescribed maximum working time or have fallen short of the required rest periods and/or breaks and this has not been noticed or could not be proven due to a lack of recording, this will not be possible in the future anymore. Such a practice, however, was also inadmissible under previous law on working time.

A trust-based working time, meaning that the employee independently determined the working time without any supervision by the employer, will not be possible anymore in the future. Of course, it remains possible for employees to determine their working time independently and flexibly. But the extensive recording of all working hours will make it transparent not only for the employee but also for the employer as to whether the working time legally prescribed and contractually agreed is actually adhered to. It is therefore to be expected that the implementation of the ECJ judgment will restrict the flexibility and freedom of control that has been practiced to date in many cases.

3. Immediate need for action

It seems reasonable to wait and see which legislative changes might take place before introducing new systems enabling working time to be measured in companies. Otherwise, there would be a risk that the new systems introduced might later prove to be either unnecessary or inadequate.