Timekeeping according to the ECJ - Trust, but Verify

INTRODUCTION

Things at the European Court of Justice (ECJ) had been suspiciously quiet so that the roar of thunder from the decision by the ECJ of March 14, 2019 (File: C-55/18) on timekeeping has caused consternation with both HR and Compliance people. As easy to understand as the core statement of the court may be, that the Member States of the E.U. must oblige employers to *„introduce an objective, reliable and accessible system with which the daily working time of every employee can be measured“*, it raises big question marks regarding what the decision means for HR and Compliance in Germany at the present time.

But let us return to how this began: A Spanish trade union sought a judgment by way of a class action against Deutsche Bank to establish that a system to register daily work hours, and not merely overtime, was to be introduced. The Spanish case law had been assuming until then that, as in German law, only overtime had to be recorded. The Spanish National Court of Law (*„Audiencia Nacional“*) handling the litigation then turned to the ECJ by way of a referral for a preliminarily ruling.

The ECJ first consulted Art. 31 (2) of the Charter of Fundamental Rights of the E.U., according to which each employee has a right to a limitation of his maximum working time. This fundamental right is defined more closely in Directive 2003/88, the Working Time Directive. Thereunder and in light of Articles 4 and 11 of the Framework Directive to encourage improvements in the safety and health of workers at work (89/391/EEC) it follows from Articles 3, 5 and 6 of the Working Time Directive that, in the interests of protecting the health of employees, Member States and employers have the duty to create an objective, reliable and accessible system to measure daily working time. This concerns the entire daily working time and thus not only overtime.

The considerations of the ECJ are studded with statements that rightly give reason to speculate about the future of the timekeeping system: The ECJ states that the Member States will still have leeway to define the specific terms for implementing such a system, particularly its form, and “*if necessary, upon taking into account the peculiarities of the specific area of work“* and the *„singularities of certain businesses, namely their size“.* In another context, the ECJ then emphasizes, however, that witness testimony alone is not an effective form of evidence and that one thus requires a system that results in object and reliable data sets that are accessible to the supervisory agencies.

WHAT NOW?

First of all, the decision contains an unequivocal mandate for German lawmakers to oblige employers to record working time from start to finish. This means that Sec. 16 (2) Working Time Act must be revised. If one considers the ECJ requirement of creating objective, reliable and accessible systems, this will regularly boil down to IT-based solutions. In the end, one must wait to see what the legislative process will bring. It will be interesting to see whether employers will be given control opportunities in compliance with the GDPR and the BDSG (amended), for a “reliable” system requires that the data is reliable and thus capable of being monitored. The discussion surrounding mobile work and working time on the honor system - Work 4.0 - will most likely gain a new facet. This also applies with a view to whether other types of work aside from that of executive employees should be exempted from a recording duty because of the special nature of the work. The Working Time Directive offers a basis for such exceptions in Art. 17.

Irrespective of this, there will likely not be any duty for employers to already introduce comprehensive, blanket timekeeping systems in anticipation of the law. As opposed to Spanish law, Sec. 16 (2) Working Time Act, under which it is explicitly stated that only the work hours in excess of the daily working time must be recorded, hardly offers any leeway for an interpretation, including further development of the law, that will conform with European law. The wording as such is clear even if isolated voices in the literature had already sought to read a duty in Sec. 16 (2) Working Time Act to record all of the working time prior to the ECJ decision, and these voices have certainly gotten a push forward from the ECJ. Overall, however, one will more likely not expect that an employer will already be acting against the law in Sec. 22 Working Time Act if he waits for lawmakers and does not yet introduce a comprehensive timekeeping system.

On the other hand, it cannot be ruled out that the courts will make adjustments in other, much less evident places. One example is the court rulings on the burden of substantiation and proof in litigation regarding overtime pay. Although the Federal Labor Court has newly balanced out the burden of substantiation to the benefit of employees in more recent decisions, the ruling by the ECJ may offer a further reason to accommodate employees if working time is not systematically recorded. The decision of the Federal Labor Court of December 21, 2016 (5 AZR 262/16) already points in this direction. A dispute over overtime pay

can become an unexpectedly large problem if the handling of overtime has weak points.

WHAT IS TO BE DONE?

One thing is certain: It gets serious for employers when the issue is working time. Ultimately, this not only affects working time in the sense of the laws surrounding timekeeping, but also compensation. Employers are well advised to already

- take even greater care that at least overtime pursuant to Sec. 16 (2) Working Time Act is recorded. It cannot be ruled out here that the audits of the supervisory agencies will increase even if lawmakers have not yet acted. In addition, this is a precautionary measure prior to overtime litigation;
- draft clauses in employment contracts concerning normal weekly working time and overtime compensation, as well as exclusionary periods, so that there is no unnecessary motivation for overtime litigation;
- review internal rules/practices, shop agreements, etc. to see if action needs to be taken.

Particularly the last point will likely lead to intensive discussions, be this with employees or works councils, for if working time must be fully recorded, there is no way around the question of whether a “creative break“ to go surfing on the Internet, the classic smoker’s break, sports talk on Monday morning, business travel or just the passing thought about “problem X” while sitting on the couch at night has to be counted and recorded. Overall, clear rules on what is and what is not to be recorded and when work may not be performed in order to warrant resting periods are to be recommended. The more mobile and flexible work becomes, the greater the need for regulation will be. If employers want to protect themselves against uncontrolled working time violations that are forced on them by employees, working time policies will likely be the instrument of choice.

Finally, the decision of the ECJ is further evidence that it is often not enough to rely, in practice, on compliance with the rules, at least in the case of employment law rules based on European law. By demanding reliable systems to monitor working time, the ECJ is adding a new piece to the puzzle of employment law compliance. Until now, the road map was Sec. 12 General Equal Treatment Act, which obliges employers to execute preventive measures to protect employees against the disadvantages covered by the General Equal Treatment Act. This is a logical application of that principle. The decision for compliance should also be an incentive

- to review how employment law risks are handled, such as those of the General Equal Treatment Act, and to launch preventive measures such as training, etc.

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