Provisional text

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 31 January 2019 (1)

Case C-55/18

Federación de Servicios de Comisiones Obreras (CCOO)
v
Deutsche Bank SAE
Interveners:
Federación Estatal de Servicios de la Unión General de Trabajadores (FES-UGT),
Confederación General del Trabajo (CGT),
Confederación Solidaridad de Trabajadores Vascos (ELA),
Confederación Intersindical Galega (CIG)

(Request for a preliminary ruling from the Audiencia Nacional (National High Court, Spain))

(Reference for a preliminary ruling — Social policy — Protection of the health and safety of workers — Organisation of working time — Directive 2003/88/EC — Daily rest — Weekly rest — Maximum weekly working time — Article 31(2) of the Charter of Fundamental Rights of the European Union — Directive 89/391/EEC — Health and safety of workers in the workplace — Obligation for undertakings to set up a system to measure daily working time)

1. Is it necessary for the Member States, in order to ensure that the health and safety of workers in the workplace is fully and effectively protected — which is an objective pursued by Directive 2003/88/EC (2) by means, inter alia, of the setting of limits on working time — to make it compulsory for employers to introduce systems to measure the actual duration of the working day and working week?

2. That is, in substance, the issue raised by the request for a preliminary ruling, put to the Court of Justice by the Audiencia Nacional (National High Court, Spain), which is the subject of this case. That request arose in the context of a group action brought by a number of trade unions with the aim of establishing, and obtaining a declaration of the existence of an obligation upon the defendant, Deutsche Bank SAE, to set up a system which records the actual number of hours worked daily and makes it possible to check that the working times laid down in legislation and collective agreements are properly adhered to.

3. In this Opinion I shall explain the reasons for which I believe that European Union law does impose an obligation on the Member States to introduce rules governing working time which, subject to the

discretion which remains with the Member States as a result of the minimum harmonisation effected by Directive 2003/88, ensure effective compliance with the rules on limits on working time, by way of the introduction of systems that measure work actually done. Indeed, in my view, the absence of such mechanisms from the legal system of a Member State will undermine the effectiveness of that directive.

4. I therefore consider that Directive 2003/88 precludes national legislation which fails expressly to require employers to measure in some way or other or to monitor the ordinary working time of workers in general.

I. Legal framework

A. European Union law

5. Recital 4 of Directive 2003/88 states as follows:

'The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.'

6. Article 3 of Directive 2003/88, headed 'Daily rest', provides:

'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.'

7. In accordance with Article 5 of Directive 2003/88, headed 'Weekly rest period':

'Member States shall take the measures necessary to ensure that, per each 7-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.

If objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied.'

8. Article 6 of Directive 2003/88, headed 'Maximum weekly working time', provides:

'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 7-day period, including overtime, does not exceed 48 hours.'

9. Article 22 of Directive 2003/88, headed 'Miscellaneous provisions', provides:

'1. A Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

(a) no employer requires a worker to work more than 48 hours over a 7-day period, calculated as an average for the reference period referred to in Article 16(b), unless he has first obtained the worker's agreement to perform such work;

(b) no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work;

(c) the employer keeps up-to-date records of all workers who carry out such work;

(d) the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours;

(e) the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of 7 days, calculated as an average for the reference period referred to in Article 16(b).

…

3. If Member States avail themselves of the options provided for in this Article, they shall forthwith inform the Commission thereof.'

10. Article 4(1) of 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 (3) provides:

'Member States shall take the necessary steps to ensure that employers, workers and workers' representatives are subject to the legal provisions necessary for the implementation of this Directive.'

11. Article 11(3) of Directive 89/391 states:

'Workers' representatives with specific responsibility for the safety and health of workers shall have the right to ask the employer to take appropriate measures and to submit proposals to him to that end to mitigate hazards for workers and/or to remove sources of danger.'

B. Spanish law

12. Article 34 of the Estatuto de los Trabajadores (Workers' Statute), in the version resulting from Real decreto legislativo 2/2015 (Royal Legislative Decree 2/2015) of 23 October 2015, which approved the amended text thereof (4) ('the Workers' Statute'), provides as follows:

'1. Working time shall be as specified in collective agreements or individual employment contracts. Normal working time shall average no more than 40 hours per week of actual work, calculated on an annual basis.

…

3. There must be at least 12 hours between the end of one working day and the beginning of the following working day. Normal working time shall not exceed nine hours of actual work per day unless a different pattern of daily working time applies by virtue of a collective agreement or, failing that, by agreement between the employer and the representatives of the workers, subject in all cases to the requirement for a rest period between working days.

…'

13. Article 35 of the Workers' Statute, headed 'Overtime', provides as follows:

'1. Hours worked in excess of the maximum working time established in accordance with Article 34 shall constitute overtime. …

2. Overtime shall not exceed 80 hours per annum.

…

4. Overtime shall be voluntary, unless otherwise stipulated in a collective agreement or an individual employment contract, and subject to the limits laid down in paragraph 2.

5. For the purposes of calculating overtime, every worker's working time shall be recorded on a daily basis and summarised at the time when remuneration is paid. Workers shall be given a copy of the summary with the relevant pay slip.'

14. The third additional provision of Real Decreto 1561/1995, de 21 de septiembre 1995, sobre jornadas especiales de trabajo (Royal Decree 1561/1995 of 21 September 1995 on special working time), (5) headed 'Powers of workers' representatives in relation to working time', states:

'Without prejudice to the powers enjoyed by workers' representatives in connection with working time under the Workers' Statute and this Royal Decree, such representatives shall have the right …:

(a) …

(b) to be informed each month by the employer of any overtime worked by workers, irrespective of the form of compensation decided upon. To that end, they shall receive a copy of the summary referred to in Article 35(5) of the Workers' Statute.'

II. The facts, the main proceedings and the questions referred for a preliminary ruling

15. On 26 July 2017, the Federación de Servicios de Comisiones Obreras (CCOO), a trade union which is part of the most representative trade union organisation at national level in Spain, brought a group action before the Audiencia Nacional (National High Court) against Deutsche Bank, seeking a judgment declaring the bank to be under an obligation to set up a system to record the actual daily working time of its employees.

16. CCOO alleged that the system should make it possible to check adherence to stipulated working times and compliance with the obligation to communicate to trade union representatives the information on monthly overtime worked, pursuant to Article 35(5) of the Workers' Statute and the third additional provision of Royal Decree 1561/1995.

17. In support of CCOO's position, four other trade unions intervened in the proceedings, namely the Federación Estatal de Servicios de la Unión General de Trabajadores (FES-UGT), the Confederación General del Trabajo (CGT), la Confederación Solidaridad de Trabajadores Vascos (ELA) and the Confederación Intersindical Galega (CIG).

18. In the applicant's opinion, the obligation to establish a system to record daily working time flows from the interpretation of Articles 34 and 35 of the Workers' Statute, read in conjunction with Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter') and Articles 3, 5, 6, 8 and 22 of Directive 2003/88. Deutsche Bank, on the other hand, maintains that it is clear from the judgments of the Tribunal Supremo (Supreme Court, Spain) of 23 March and 20 April 2017 that no such general obligation exists under Spanish law.

19. The Audiencia Nacional (National High Court) has taken note of the fact that, although the defendant undertaking is bound by various rules on working time, derived from a multiplicity of national collective sectoral agreements and company agreements, it does not use any type of system to record the actual working time of its staff members and to make it possible to check compliance with the rules on working time laid down in legislation and collective agreements, or to track any overtime worked. The defendant undertaking uses a computer system (an Absences Calendar) which solely permits the recording of absences for full working days (annual leave, exceptional leave, sick leave and so on).

20. The Inspección de Trabajo y Seguridad Social (Employment and Social Security Inspectorates) for the provinces of Madrid and Navarra called upon the defendant to set up a system to record daily working time. However, their requests were not complied with and so an infringement notice containing a provisional penalty was drawn up. The penalty has not been imposed, because of the judgment of the Tribunal Supremo (Supreme Court) of 23 March 2017.

21. The referring court states that, in that judgment, which was delivered by the full court, albeit with a number of dissenting opinions, the Tribunal Supremo (Supreme Court) ruled that there was no obligation under Spanish law to record ordinary working time. In particular, the Tribunal Supremo (Supreme Court) emphasised that Article 35(5) of the Workers' Statute merely required that a record of overtime worked be kept and that, at the end of each month, the number of hours of overtime completed by workers be communicated to their trade union representatives.

22. The Tribunal Supremo (Supreme Court) essentially gave the following reasons for its decision: the obligation to keep a record is contained in Article 35 of the Workers' Statute, which concerns overtime, and not in Article 34, which concerns working time; when in the past the Spanish legislature chose to impose a 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; Article 22 of Directive 2003/88, like Spanish law, imposes a requirement to keep a record of overtime, not of ordinary working time not in excess of the stipulated maximum; the keeping of such a record implies the processing of workers' personal data, which entails a risk of unjustified interference, on the part of the undertaking, in the private lives of workers; failure to keep such a record is not characterised as a clear and manifest violation in the rules on infringements and penalties in the field of social security; that interpretation does not undermine workers' rights of defence inasmuch as, under Spanish procedural law, workers are not prevented from relying on other evidence to prove that they have worked overtime.

23. The referring court has expressed doubt as to the consistency of the position taken by the Tribunal Supremo (Supreme Court) with European Union law. It observes, first and foremost, that a 2016 survey of the work force in Spain revealed that 53.7% of overtime had not been recorded. In addition, two reports (of 31 July 2014 and 1 March 2016) by the Directorate-General for Employment of the Spanish Ministry of Employment and Social Security have confirmed that, in order to determine whether overtime has been worked, it is necessary to know precisely how many hours have been worked. That explains why employment inspectors have requested the introduction of systems to record daily working time, regarded as the only means by which to check whether the specified limits have been exceeded during any reference period. The referring court also points out that one practical consequence of the interpretation of Spanish law adopted by the Tribunal Supremo (Supreme Court) would be that workers will lack an essential item of evidence to show that they have worked in excess of ordinary working time and their representatives will lack the necessary evidence to check compliance with the rules, with the further consequence that checking adherence to working times and periods of rest will be left to the discretion of employers.

24. According to the referring court, in such a situation, national law would be incapable of ensuring effective compliance with the obligations relating to the management of working time laid down in Directive 2003/88 and, in so far as concerns the rights of workers' representatives, in Directive 89/391.

25. It was in that context that the Audiencia Nacional (National High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must it be understood that the Kingdom of Spain, by means of Articles 34 and 35 of the Workers' Statute, as they have been interpreted in case-law, has taken the measures necessary to ensure the effectiveness of the limits on working time and of the weekly and daily rest periods established by Articles 3, 5 and 6 of Directive [2003/88] 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?

(2) Must Article 31(2) of the [Charter] and Articles 3, 5, 6, 16 and 22 of [Directive 2003/88] read in conjunction with Articles 4(1), 11(3) and 16(3) of [Directive 89/391] be interpreted as precluding national legislation such as Articles 34 and 35 of the Workers' Statute, from which, as settled case-law has shown, it cannot be inferred that it is compulsory for employers to set up a system for recording actual daily working time 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?

(3) Must the mandatory requirement laid down in Article 31(2) of the [Charter], and Articles 3, 5, 6, 16 and 22 of [Directive 2003/88] read in conjunction with Articles 4(1), 11(3) and 16(3) of [Directive 89/391] for the Member States to limit the working time of all workers in general, be understood to be satisfied for ordinary workers by the national provisions contained in Articles 34 and 35 of the Workers' Statute, from which, as settled case-law has shown, it cannot be inferred that it is compulsory for employers to set up systems for recording actual daily working time for full-time workers who have not expressly agreed, individually or collectively, to work overtime, by contrast with the case of mobile workers, persons working in the merchant navy and railway transport workers?'

III. Legal analysis

A. Preliminary observations

26. By way of a preliminary remark, I think it necessary to state that, as the European Commission pointed out in its observations, the three questions referred by the national court are interrelated and overlap in a number of ways.

27. Indeed, it is clear from reading the questions referred that the answer to the first question necessarily follows from the answers to the second and third questions, which too overlap in content.

28. In substance, by its request for a preliminary ruling, the referring court asks the Court of Justice whether provisions of national law, such as Articles 34 and 35 of the Workers' Statute, as interpreted by the Tribunal Supremo (Supreme Court), provide effective protection of workers in so far as concerns daily and weekly working times and daily and weekly rest periods, as is required in implementation of European Union law, even though they do not require that systems be maintained to record daily working time.

29. In those circumstances, I consider it appropriate to examine the three questions raised by the referring court together, reformulating them in the following terms: Do Article 31(2) of the Charter and Articles 3, 5, 6, 16 and 22 of Directive 2003/88, read in conjunction with Article 4(1), Article 11(3) and Article 16(3) of Directive 89/391, which provisions, by imposing limits on working time, pursue the aim of effective protection of the health and safety of workers in the workplace, preclude national provisions, such as those contained in Articles 34 and 25 of the Workers' Statute, as interpreted in Spanish case-law, from which it cannot be inferred that it is compulsory for employers to set up a system for recording actual daily working time 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?

30. Two opposing views have been put forward before the Court, albeit with slight variations.

31. The first view, adopted by the referring court, the Commission and the applicant trade unions, is that EU law certainly does imply an ancillary obligation upon employers to measure working time, with the consequence that it does preclude national provisions, such as the Spanish provisions, which, in the interpretation of the Tribunal Supremo (Supreme Court), rule out the existence of any such obligation.

32. The second view, adopted by the bank which is the defendant in the main proceedings, the Kingdom of Spain and the other Member States which have intervened before the Court, namely, the United Kingdom and the Czech Republic, is that, in the absence of a specific provision in Directive 2003/88, no general obligation may be imposed on undertakings to measure working time.

33. In order to answer the questions referred by the national court, I think it necessary first of all to clarify the scope of Directive 2003/88 within the system of EU social law in the light of the principles developed in the case-law of the Court of Justice in this field, in order then to determine, on the basis of that analysis, whether EU law, and Directive 2003/88 in particular, provides that there is a general obligation to measure working time.

B. Aim and content of Directive 2003/88

34. The aim of Directive 2003/88 is to lay down minimum requirements intended to improve the protection of health and safety in the workplace, an aim which is to be attained, inter alia, by the approximation of national legislation on working time. (6)

35. In order to attain that objective, the provisions of Directive 2003/88 stipulate minimum periods of daily rest (11 consecutive hours per 24-hour period under Article 3) and of weekly rest (24 hours per period of 7 days under Article 5), as well as an upper limit of 48 hours for the average working time for each 7-day period, including overtime (under Article 6(b)).

36. Those provisions implement Article 31 of the Charter, which, after recognising, in paragraph 1, that 'every worker has the right to working conditions which respect his or her health, safety and dignity', provides, in paragraph 2, that 'every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'. Those rights are directly related to respect for human dignity, which is protected more broadly in Title I of the Charter. (7)

37. Moreover, the right to the limitation of maximum working hours and the right to daily and weekly rest periods are an expression of the constitutional traditions common to the Member States, as is clear from the text of numerous national constitutions. (8)

38. Within that systematic framework, the Court has held that the rules laid down in Directive 2003/88 are rules of EU social law of particular importance from which every worker must benefit as minimum requirements necessary to ensure the protection of his safety and health, (9) and that such protection is not just in the worker's individual interests; it is also in the interests of the employer and in the general interest. (10)

39. An initial consequence that can, I think, be drawn from the functional link between Directive 2003/88 and the fundamental social rights recognised in the Charter is that Directive 2003/88 must be interpreted, and its scope determined in such a way as to ensure that individuals may fully and effectively enjoy the rights which the directive confers on workers and that any impediment that might in fact restrict or undermine the enjoyment of those rights is eliminated.

40. To that end, in interpreting and implementing Directive 2003/88 its must be borne in mind that, as the Court has emphasised on a number of occasions, the worker must be regarded as the weaker party in the employment relationship, and it is therefore necessary to prevent the employer from being in a position to impose on him a restriction of his rights. (11)

41. Consequently, any practice or omission on the part of an employer that may potentially deter a worker from exercising his rights must be regarded as incompatible with the purposes of the directive. (12)

42. In addition, the Court has also held that, on account of that position of weakness, it must be recognised that a worker might be dissuaded from explicitly claiming his rights vis-à-vis his employer

where doing so could expose him to measures taken by the employer likely to affect the employment relationship in a manner detrimental to the worker. (13)

43. In view of all this, an interpretation of Directive 2003/88 which permits the coherent attainment of its objectives and full and effective protection of the rights which it confers on workers ought to imply the identification of specific obligations for the persons involved in its implementation such as will serve to prevent the imbalance in the economic relationship between employer and employee from undermining the effective enjoyment of the rights conferred by the directive.

C. The need to ensure that Directive 2003/88 is effective

44. The systematic framework I have described makes it possible to determine more precisely the content of the obligations which Directive 2003/88 imposes on the various persons to which it applies.

45. First of all, the Member States must, in implementing the directive, 'take the measures necessary' to ensure that workers enjoy the rights which the directive guarantees (concerning daily and weekly rest, maximum weekly working time, and so on).

46. The opening words of all of the provisions which contain minimum requirements regarding the limitation of working time (Articles 3, 4, 5 and 6, in so far as is relevant in this case), 'the Member States shall take the measures necessary', have, in my opinion, a dual significance.

47. On the one hand, they confirm the importance of the phase of transposition in national legislation, with broad but carefully designed options for derogation.

48. On the other hand, in the light of the systematic framework I described in the preceding section, those opening words underscore the Member State's responsibility for securing the result of effectively safeguarding the health and safety of workers, the protection of whom is one of the fundamental objectives of Directive 2003/88, as is expressly stated, inter alia, in recital 4 of the directive.

49. The form of words which Directive 2003/88 repeatedly uses therefore seems to imply that, while the Member States remain free to choose the ways and means of implementing that directive, they must nevertheless adopt measures that are capable of ensuring that the rights which it guarantees are actually enjoyed, doing so by means of domestic legislation which is specifically suited to achieving the result of protecting the health and safety of workers by securing real compliance with the limits on working time.

50. I would add that it is settled case-law that, in relation to the transposition of a directive into the legal order of a Member State, it is essential that the national legislation in question effectively ensures that the directive is fully applied, that the legal position under national law is sufficiently precise and clear and that individuals are made fully aware of their rights. (14)

51. In particular, the obligation upon Member States to take the 'necessary measures' should extend not only to the transposition of the rules on working time into national law, but also to the introduction of whatever is necessary to safeguard the fundamental rights enshrined in Article 31 of the Charter and to eliminate any impediment that might in fact restrict or undermine the enjoyment of the rights conferred on individuals for that purpose by Directive 2003/88, which, as I observed in point 36 of this Opinion, is a measure implementing Article 31 of the Charter.

52. Moreover, it is clear from the case-law that the Member States 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, (15) that they must take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation (16) and that they must ensure that the effectiveness of the directive is not undermined, not even by omissions on the part of their national legislatures. (17)

53. With specific reference to the rules of European Union law on working time, the Court has had occasion to clarify that it is necessary for the effectiveness of the rights conferred on workers to be ensured in full, which necessarily implies an obligation on the Member States to guarantee that each of the minimum requirements laid down by the directive is observed. In fact, that is the only interpretation which accords with the objective of that directive, which is to secure effective protection of the safety and health of employees. (18)

54. A Member State's legislation must therefore wholly guarantee the practical effect of the rights conferred on workers by Directive 2003/88 in order to ensure the effective protection of their health and safety. (19)

55. Corresponding to the obligations which rest on the Member States when implementing the directive to ensure its practical effect is a special responsibility on the part of employers, (20) who must in turn take the appropriate measures to enable workers to exercise unimpeded the rights guaranteed them by Directive 2003/88.

D. The measurement of working time and the effectiveness of the protection of the rights of workers

56. It is within the legal framework which I have just described that it is necessary, in order to answer the questions put by the referring court, to determine whether the lack of a system for measuring the number and distribution of hours worked by employees would deprive the rights conferred by Directive 2003/88 of their substance, undermining the effectiveness of the provisions laid down in the directive and the protection of the rights which those provisions confer on workers in the European Union.

57. In the first place, I must observe that, in the absence of such a system, 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 confers on workers may be exercised without hindrance.

58. Indeed, in the absence of any system for measuring working time, there can be no way of establishing objectively and with certainty how much work has actually been done or precisely when it was done. Moreover, without such a system, it will not be possible to differentiate between ordinary working hours and overtime or, consequently, to verify with ease and certainty whether the limits introduced by Directive 2003/88 are being observed in practice.

59. Moreover, the powers of supervisory authorities such as employment inspectors cannot be sufficient to compensate the lack of safeguards to ensure that the rights associated with the observance of working times are effectively protected. Indeed, if there are no systems to measure working times, even the public authorities entrusted with monitoring compliance with the rules on safety at work will be deprived of any real possibility of discovering and pursuing breaches of the obligations.

60. It is important to observe in this connection that the difficulties involved in checking, in the absence of any reliable system for measuring working time, how many hours have actually been worked were made clear to the referring court in the two reports, mentioned in point 23 of this Opinion, by the Directorate-General for Employment of the Ministry of Employment and Social Security, which is the authority entrusted under Spanish law with monitoring responsibilities in the field of health and safety in the workplace. (21)

61. I would also point out that the Court has already emphasised the importance of there being a system to measure working time, in order to ensure the effectiveness of the rules of EU law on the limitation of working time. Indeed, in its judgment in *Worten* (judgment of 30 May 2013, C−342/12, EU:C:2013:355), the Court held that an obligation upon employers to provide the responsible authorities with immediate access to a record of working time could be necessary if it contributed to the more effective application of the legislation relating to working conditions. (22)

62. If it is possible for the immediate production of registers to be necessary in order to ensure that the provisions on working time which protect workers are actually effective, then, a fortiori the absence of any mechanism whatsoever to measure working time will deprive the persons responsible for monitoring of evidence that is essential in verifying compliance with the rules.

63. In the second place, the absence of any effective system to record working time not only impedes the actual verification of work done, it also makes it far harder for workers to obtain protection from the courts of the rights which Directive 2003/88 confers on them. Indeed, in the event that an employer requires workers to exceed the limits on working time 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.

64. In this connection, it does not seem sufficient to argue, as the Kingdom of Spain argued at the hearing, that workers are able to assert their rights in judicial proceedings. Without an appropriate system for measuring normal working hours, workers will in fact find themselves under a greater evidential burden should they bring proceedings against their employer in the event that the obligations laid down in Directive 2003/88 are breached.

65. While workers may, of course, adduce other evidence in order to prove in judicial proceedings that an employer has failed to meet its obligations under the rules on working time, such as witness evidence or other items such as emails or messages received or sent, it is equally true that the lack of objective evidence of the duration of their working days will deprive them of an essential first line ofevidence.

66. Furthermore, the effectiveness in judicial proceedings of witness evidence will be tempered by the position of weakness of employees in the employment relationship and the consequent possible reticence of colleagues to give evidence against their employer, for fear of reprisals.

67. It is important in this connection to recall the case-law mentioned in points 40 to 42 of this Opinion, in which the Court emphasised that that position of weakness in the employment relationship might in fact dissuade workers themselves from explicitly asserting their rights vis-à-vis their employer.

68. That deterrent effect, intrinsically linked to the employer's position in the contractual relationship, will be considerably intensified if the system lacks any mechanisms for measuring working time and thus makes in particularly difficult to adduce evidence in court.

69. It follows from the foregoing considerations that the absence of a mechanism for recording working time 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.

70. I would add that, even though Directive 2003/88 does not expressly provide for such an obligation, it follows from the foregoing that such an obligation is instrumental in, and essential to the attainment of the objectives which the directive pursues and to the enjoyment of the rights which it confers on individuals.

71. Moreover, the absence of any system for measuring working time significantly weakens the right to information and significantly undermines the associated monitoring role of workers' trade union representatives, which Article 4(1) and Article 11(3) of Directive 89/391 expressly recognise, in matters relating to the health and safety of workers, in a manner consistent with the provisions of Article 27 of the Charter. (23)

72. In short, the foregoing considerations show that the obligation to measure daily working time plays an essential role in furthering compliance 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, the limits on the duration of the working week, weekly rest, 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.

73. The interpretation given in the preceding points cannot, in my opinion, be called into question by the various arguments put forward in support of the opposite view propounded by the parties which have intervened before the Court.

74. First of all, I do not regard as decisive the argument which, in an endeavour to rule out the existence of any general obligation to introduce some mechanism or other for measuring the number of hours actually worked, relies on the fact that the EU rules in question do not expressly provide for a system for measuring working time, even though EU law does lay down an obligation to record working time in certain special cases. (24)

75. That argument, which is guided by the principle of legal construction expressed by the maxim *ubi lex voluit dixit, ubi noluit tacuit*, is nevertheless contradicted by the result of the systematic and teleological interpretation of Directive 2003/88 given in the preceding points, which has demonstrated the need for there to be some system for measuring the number of hours actually worked in order to ensure the effectiveness of the provisions of EU law on the limitation of working time.

76. Moreover, the fact that there is an express obligation to record working time in some special cases in no way contradicts the interpretation I suggest. Some categories of workers and workers in certain specific sectors, such as part-time workers and mobile workers, require special protection on account of the intrinsic characteristics of their work, and for them EU law provides for particularly rigorous and extensive monitoring systems.

77. By contrast, in the case of 'ordinary' workers who do not fall into any such specific category, Directive 2003/88 presumes that there will be some means of recording working time, such as a simple paper record, or an electronic record, or some other instrument fit for the purpose.

78. Secondly, in so far as concerns the undermining of fundamental rights associated with the processing of personal data that would allegedly result from the introduction of a system for measuring working time, the Court has already had occasion to clarify that, while the content of a record of working time may constitute 'personal data' for the purposes of EU law, EU law does not preclude national provisions which require that records of working time be made available to the national authority responsible for monitoring working conditions in such a way that they can be consulted immediately. (25)

79. Naturally, employers must only use the data available in the record in a lawful manner and must grant access only to persons who have a legitimate interest.

80. In the third place, in so far as concerns the argument that the requirements of Directive 2003/88 have been transposed into Spanish law in a manner that is in fact more favourable to workers (for example, with a reduction in the maximum number of hours that may be worked weekly), that argument confuses the value and significance of the substantive obligations (the minimum requirements laid down by the directive) with the different value and significance of the functional requirements (systems for monitoring compliance with the substantive obligations).

81. In the present case, the correct implementation of the obligations expressly imposed on the Member States by Directive 2003/88 (concerning minimum daily and weekly rest periods, the maximum duration of the working week and so on) is not in discussion. What is in discussion is whether or not it is necessary also to provide for an appropriate monitoring mechanism, in order to ensure that those obligations are complied with.

82. In the fourth place, I do not think it possible to refer to the protection accorded by the EU legal system to the freedom to conduct a business — which entails the right to choose organisational models

suited to the conduct of the business in question — in an endeavour to dispute the argument in favour of the existence of a legal obligation to provide for a system for measuring working time.

83. It must be remembered, in this connection, that recital 4 of Directive 2003/88 clearly states that 'the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations'.

84. Moreover, the representatives of the defendant in the main proceedings did not indicate at the hearing what practical impediments there might actually be to the adoption within an undertaking of a system for measuring working time.

85. Furthermore, if, as I shall go on to explain in the next section, the Member States enjoy a significant margin of discretion in the adoption of national rules on working time, they should also have a discretion as to the stipulation of different systems tailored to the organisational complexity and characteristics of various undertakings.

E. The autonomy of the Member States in the determination of the measuring system

86. While it follows from the interpretation which I proposed in the preceding points that there is an obligation to introduce a system to record working time, I do think that, as a result of the minimum harmonisation effected by Directive 2003/88 and in accordance with what I said in point 49 of this Opinion, it remains within the discretion of the Member States to choose the ways and means of implementing that obligation (26) and to define the practical arrangements which will make it easy to monitor compliance with the rules on limits on working time.

87. It must be emphasised in this connection that, thanks to current technology, a wide range of systems for recording working time is available (27) (paper records, computer systems, electronic access cards and so on) and different systems may be used, depending on the characteristics and requirements of individuals undertakings.

88. Even though the Member States have a broad discretion in choosing the ways and means of implementing the obligation to introduce systems to record working time, it follows from the reasoning set out above, and in particular from the obligation on the Member States, which I mentioned in point 45 et seq. of this Opinion, to ensure that Directive 2003/88 and the rights which it confers on workers are effective, that such systems must be suited to the attainment of the directive's objectives. (28)

F. The questions referred for a preliminary ruling

89. In my opinion, it follows from all the foregoing considerations that national legislation which does not impose any obligation upon undertakings to introduce a system to record the daily working time of all employees is inconsistent with European Union law. It nevertheless remains for the referring court to ascertain whether the national provisions under discussion in the main proceedings can in fact be interpreted in a manner consistent with the provisions of Directive 2003/88 at issue and Article 31(2) of the Charter.

90. In this regard, it must be borne in mind that the Court has consistently held that, when national courts apply domestic law, they are bound to interpret it, as far as possible, in the light of the wording and the purpose of the directive concerned, in order to achieve the result sought by the directive and consequently comply with Article 288 TFEU. (29)

91. For the purposes of the resolution of the case in the main proceedings, it must be recalled 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. Consequently, a national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law

merely because that provision has consistently been interpreted in a manner that is incompatible with EU law. (30)

92. Thus, it is for the referring court to determine whether it is possible, using the aids to interpretation available under Spanish law, to interpret the Workers' Statute in such a way as to find that it does lay down an obligation for undertakings to introduce a system to measure the daily attendance of full-time workers.

93. Where such an interpretation consistent with EU law is not possible, it will be necessary, given that Directive 2003/88 cannot have direct effect in horizontal relations between individuals, to ascertain whether Article 31(2) of the Charter can be applied in order to impose on undertakings an obligation to maintain a system for measuring daily attendance.

94. The Court has already held, with reference to the right to annual leave, that Article 31(2) of the Charter can have direct effect in horizontal relations between individuals. (31) Given that the structure of the right to the limitation of maximum working hours and to daily and weekly rest periods is the same as that of the right to annual leave, and given that these rights are all closely connected and are all intended to secure working conditions which respect the health, safety and dignity of workers, and that they are provided for in the same article of the Charter, the Court's case-law on the direct effect of Article 31(2) of the Charter in horizontal relationships between individuals can, in my opinion, be applied also with regard to the right to the limitation of maximum working hours and to daily and weekly rest periods.

95. Those rights can, therefore, be asserted directly vis-à-vis employers in situations which fall within the scope of EU law, (32) as does the situation in the present case, given that the national provisions here at issue transpose Directive 2003/88, which concerns certain aspects of the organisation of working time.

96. On this point, I think that the content of the right to the limitation of maximum working hours and to rest periods of workers guaranteed by Article 31(2) of the Charter and of the corresponding obligations of employers extends to the adoption of a system to measure working time.

97. In support of that broad interpretation of the right to the limitation of maximum working hours and to rest periods, it may be observed, first of all, that, this being a 'social' right, it is in the nature of such rights that the holder of such a right may expect positive action to be taken by the State and by other 'obligated parties'. Rights of this kind can only be guaranteed by means of positive action on the part of obligated parties, and if no such action is taken, or if it is insufficient, they will be rendered ineffective.

98. The foregoing observations on the interpretation of Directive 2003/88, from which it is clear that the effectiveness of the right to the limitation of maximum working hours and to rest periods is dependent on the existence of a specific, objective method for checking the number of hours actually worked, militate in favour of an interpretation of Article 31(2) of the Charter which implies the existence of an obligation on undertakings to adopt such monitoring mechanisms, while remaining free to decide which techniques are most appropriate, in view of their own specific organisational requirements.

IV. Conclusion

99. In the light of the foregoing considerations, I suggest that the Court answer the request for a preliminary ruling put to it by the Audiencia Nacional (National High Court, Spain) in the following terms:

(1) Article 31(2) of the Charter of Fundamental Rights of the European Union and Articles 3, 5, 6, 16 and 22 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 must be interpreted as imposing on undertakings an obligation to set up a system for recording actual daily working time 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 precluding national provisions from which no such obligation can be inferred.

(2) The Member States are free to determine what method of recording of actual daily working time is best suited to achieving the effectiveness of those provisions of EU law.

(3) However, the referring courts must determine, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, whether they 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 those at issue in the main proceedings in a manner consistent with Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights, it follows from the latter provision that the referring courts must disapply such provisions and ensure that the obligation on undertakings to equip themselves with an adequate system for recording actual daily working time is met.

---

1 Original language: Italian.

---

2 Directive of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

---

3 OJ 1989 L 183, p. 1.

---

4 BOE No 255 of 24 October 2015.

---

5 BOE No 230 of 26 September 1995.

---

6 See, to that effect, judgments of 9 November 2017, *Maio Marques da Rosa* (C−306/16, EU:C:2017:844, paragraph 45), and of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones Obreras* (C−266/14, EU:C:2015:578, paragraph 23).

---

7 See also, to that effect, Opinion of Advocate General Tanchev in *King* (C−214/16, EU:C:2017:439, point 36).

---

8 See, on this point, Opinion of Advocate General Trstenjak in *Schultz-Hoff* (C−520/06, EU:C:2008:38, point 53 and footnote 22) in which, albeit with reference to the right to annual leave, the Advocate General reviewed the wording of various constitutions of the Member States and concluded that Article 31(2) of the Charter is modelled on the constitutions of a large number of Member States.

---

9 Judgments of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones Obreras* (C−266/14, EU:C:2015:578, paragraph 24), and of 1 December 2005, *Dellas and Others* (C−14/04, EU:C:2005:728, paragraph 49 and the case-law cited), and order of 4 March 2011, *Grigore* (C−258/10, not published, EU:C:2011:122, paragraph 41).

---

10 See Opinion of Advocate General Bot in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C−684/16, EU:C:2018:338, point 52).

---

11 See judgment of 25 November 2010, *Fuß* (C−429/09, EU:C:2010:717, paragraph 80 and the case-law cited). See also judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*

(C−684/16, EU:C:2018:874, paragraph 41).

---

12 With reference to the right to annual leave, recognised in Article 7 of Directive 2003/88, see judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C−684/16, EU:C:2018:874, paragraph 42).

---

13 With reference to the right to annual leave, recognised in Article 7 of Directive 2003/88, see judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C−684/16, EU:C:2018:874, paragraphs 41and 42).

---

14 Judgment of 12 June 2003, *Commission* v *Luxembourg* (C−97/01, EU:C:2003:336, paragraph 32).

---

15 Judgment of 5 October 2004, *Pfeiffer and Others* (C−397/01 to C−403/01, EU:C:2004:584, paragraph 104).

---

16 See judgments of 26 June 2001, *BECTU* (C−173/99, EU:C:2001:356, paragraph 55), and of 25 November 2010, *Fuß* (C−429/09, EU:C:2010:717, paragraph 39), and Opinion of Advocate General Ruiz-Jarabo Colomer in *Pfeiffer and Others* (C−397/01 to C−403/01, EU:C:2003:245, point 23).

---

17 See, to that effect, Opinion of Advocate General Trstenjak in *Schultz-Hoff* (C−350/06, EU:C:2008:37, point 45 and the case-law cited in footnote 31).

---

18 Judgments of 7 September 2006, *Commission* v *United Kingdom* (C−484/04, EU:C:2006:526, paragraph 40), of 1 December 2005, *Dellas and Others* (C−14/04, EU:C:2005:728, paragraphs 45 and 53); and of 14 October 2010, *Fuß* (C−243/09, EU:C:2010:609, paragraph 64).

---

19 Order of 11 January 2007, *Vorel* (C−437/05, EU:C:2007:23, paragraph 36). On this point, see also Opinion of Advocate General Wathelet in *Hälvä and Others* (C−175/16, EU:C:2017:285, point 44).

---

20 Advocate General Bot mentions this special responsibility, with reference to the right to annual leave, in his Opinion in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C−684/16, EU:C:2018:338, point 35).

---

21 The reports state that systems to record daily working time are regarded as the only means by which to check whether the maximum limits have been exceeded during any reference period.

---

22 See paragraph 37 of the judgment.

---

23 That provision enshrines the right of workers and their representatives to information and consultation within the undertaking.

---

24 For example, in the case of part-time workers or mobile workers. See, on this point, Article 9(b) of Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities (OJ 2002 L 80, p. 35), Clause 8(1) of the agreement appended to Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers (OJ 1999 L 167, p. 33) and Clause 12 of the agreement appended to Council Directive 2014/112/EU of 19 December 2014 implementing the European Agreement concerning certain aspects of the organisation of working time in inland waterway transport (OJ 2014 L 367, p. 86).

---

25 Judgment of 30 May 2013, *Worten* (C−342/12, EU:C:2013:355, paragraphs 27 and 28).

---

26 See, on this point, judgment of 20 January 2009, *Schultz-Hoff and Others* (C−350/06 and C−520/06, EU:C:2009:18, paragraph 47). With reference to the right to annual leave, see, most recently, Opinion of Advocate General Bot in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C−684/16, EU:C:2018:338, point 25) and also, with reference to the duty of the Member States to determine the conditions for the exercise and implementation of this right, Opinion of Advocate General Trstenjak in *Schultz-Hoff* (C−520/06, EU:C:2008:38, points 45, 55 and 56).

---

27 The Commission highlighted this aspect in the observations which it submitted to the Court.

---

28 On the basis of the information available to the Court in the case file and from assertions made at the hearing, it would appear, prima facie, that the system used by the defendant in the main proceedings, mentioned in point 19 of this Opinion, does not satisfy that requirement of suitability. However, it will be for the referring court to determine whether or not that is the case.

---

29 See judgments of 24 January 2012, *Dominguez* (C−282/10, EU:C:2012:33, paragraph 24 and the case-law cited), and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C−684/16, EU:C:2018:874, paragraph 58).

---

30 See judgments of 24 January 2012, *Dominquez* (C−282/10, EU:C:2012:33, paragraph 27 and the case-law cited), and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C−684/16, EU:C:2018:874, paragraph 60).

---

31 Judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraphs 49 to 51 and 69 to 79).

---

32 See Article 51(1) of the Charter.