



RECORDING WORKING TIME IN THE EUROPEAN UNION:

How Companies Can Balance Control and Flexibility

By Andre Wolff, Giacomo Barbot, Axel Viaene, Julien Haure, and Marine Hamon

On May 14, 2019, the European Court of Justice (ECJ) issued a ruling that will affect all employers in the European Union. The decision requires EU member states to impose more detailed timekeeping requirements for employers. The judgment has generated extensive commenting among the European Union's member states and employers because it seems to mandate a return to punch-the-clock timekeeping at a time when many employers seek to offer flexibility and autonomy to all types of workers. In this article, we will examine how the ruling will lead to changes in national law, how companies can adjust their timekeeping strategies, and other challenges that may arise from the change.

CHEAT SHEET

- *ECJ ruling.*
As part of a ruling in May 2019 to address overtime, the European Court of Justice (ECJ) now requires member states to establish a system that measures the duration of time an employee works each day.
- *Questions remaining.*
It is unclear how the ruling will interact with different categories of employees or conflict with flexible work schedules that many employers are implementing.
- *Possible methods.*
To meet the ruling's parameters and remain flexible, employers can establish self-declaratory timekeeping tools that are also available on mobile devices. Employers should also meet with works councils to find a solution.
- *Member states.*
Germany, the United Kingdom, Romania, Bulgaria, and Slovakia may have to revise their employment laws to be compliant with the ruling.

By not mandating the recording of normal hours, the Spanish case-law deprived workers of evidence that they worked beyond their typical amount of hours, while also depriving unions of the ability to verify if employers followed compliance rules.

Background on the case

The case, *Federacion de Servicios de Comisiones Obreras (CCOO) v. Deutsche Bank SAE*, centered on whether the bank's Spanish subsidiary was accurately recording working time, as is mandated by national law (in this case, Spain's national law), as well as the Charter of Fundamental Rights of the European Union and the Working Time Directive. CCOO, the Spanish trade union, contended that Deutsche Bank SAE is obligated to set up a system for recording each employee's working time and petitioned the Audiencia Nacional, the national high court of Spain, to intercede. The bank countered that Spanish case-law requires only a record of overtime hours to be kept (except where there is an agreement to the contrary) and the numbers of hours worked communicated to the employees and their representatives at the end of the month.

The Audiencia Nacional had doubts about the interpretation of Spanish law and whether it complied with EU law, referring questions to

the ECJ. Among the information the Audiencia Nacional sent to the ECJ was the fact that 53.7 percent of overtime hours worked in Spain were not recorded. Furthermore, in order to determine overtime hours, it is necessary to know the exact number of normal hours worked. By not mandating the recording of normal hours, the Spanish case-law deprived workers of evidence that they worked beyond their typical amount of hours, while also depriving unions of the ability to verify if employers followed compliance rules.

The ECJ ruled that national laws that do not require a daily record of working hours are in violation of the Charter and Working Time Directive. Remembering that the worker must be regarded as the weaker party in the employment relationship, the ECJ held that it is excessively difficult, if not impossible in practice, for workers to ensure that their rights are protected without a system that

tracks each worker's time each day. In order to protect employees' rights, the ECJ requires member states to set up an objective, reliable, and accessible system that measures the duration of time each employee works each day.

Potential impacts of the ECJ's decision in France and elsewhere

Monitoring working time has always been a critical concern in France since, if litigation ensues, the company can face liability for the back payment of overtime hours — at an increased rate and with the related social security contribution — of up to three years (as per the statute of limitations).

In France, the ECJ's ruling has driven much discussion about the future of workplace timekeeping, as it has elsewhere in the European Union. Monitoring implies that the employer effectively follows up on each employee's working hours. The French legal arsenal already provides for sufficient means at the employer's disposal to



Andre Wolff is the managing director of Accenture where he oversees employment law in the EMEA region. andre.wolff@accenture.com



Giacomo Barbot is head of human resources at Loro Piana in France and in Monaco. giacomo.barbot@loropiana.com



Axel Viaene is group general counsel and company secretary for GrandVision. He contributed the sections regarding GrandVision. axel.viaene@grandvision.com



Julien Haure is a partner at Mayer Brown where he specializes in employment law. jhaure@mayerbrown.com



Marine Hamon is an associate at Mayer Brown where she specializes in employment law. mhamon@mayerbrown.com

measure the daily working time of employees subject to individualized hours. Concerning employees subject to collective working time, French law does not seem to sufficiently satisfy the monitoring requirement imposed by the European Court of Justice since working hours are merely posted on the premises (in practice, the related exposure would be low since employees subject to collective working time usually comply with it) and are not controlled by the employer.

Finally, concerning employees who are either subject to a working time arrangement in days and not in hours (i.e., autonomous employees) or not subject to any working time arrangement at all (i.e., managing executives), we could consider their situation as falling within the scope of article 17 of directive 2003/88 of November 4, 2003, which provides exceptions to the obligation of daily and weekly monitoring of working time.

The effect in France should be quite limited if employers comply with their monitoring obligations and, whatever the types of employees, implement sufficient means to control their workload in order to protect their health and safety at work.

How companies manage timekeeping in the European Union

At Accenture

At Accenture, there is a majority of executive employees, who either work under a “daily package” arrangement (218 days per year, with 10 additional rest days provided to the employees as compensation) or under an “hourly package” arrangement (40 hours per week, with at least 10 additional rest days per year as compensation). Our blue-collar population works either 37 or 39 hours per week with 11 or 23 additional rest days.

All employees record their daily working hours through a self-declaratory tool customized per category of employees. Executive employees record the number of hours worked every day and confirm whether they were able to comply with their daily and weekly rest obligations, whereas nonexecutive employees also record their work start time, end time, and break duration.

In terms of measures undertaken to enhance work-life balance over the past few years, Accenture has improved the tracking of workload/rest days by setting up individual accounts

The effect in France should be quite limited if employers comply with their monitoring obligations and, whatever the types of employees, implement sufficient means to control their workload in order to protect their health and safety at work.

Working Time Directive

The Working Time Directive is a directive in European Union law that provides worker rights. The purpose of the Working Time Directive is to protect people's health and safety by ensuring they are not overworked. Adopted in 2003, the directive requires all member states to enact its provisions in national legislation. It gives workers the right to at least four weeks in paid holidays each year, rest breaks, and rest of at least 11 hours in any 24 hours; restricts excessive night work; a day off after a week's work; and provides for a right to work no more than 48 hours per week. The 48-hour working week is the only requirement that can be adjusted by national legislation.

According to article 17 of directive 2003/88 of November 4, 2003, member states can derogate to the obligation of daily and weekly monitoring working time “when on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of managing executives or other persons with autonomous decision-taking powers.”

It is no small feat for a company to identify a system that, first, ensures compliance with all applicable rules and, second, fits the company culture. Therefore, a company may consider developing its own bespoke working-time management system.

showing the number of acquired paid holidays and rest days, which are closely monitored by HR. We have also reinforced messaging by HR and business leadership of employees taking vacation in timely/frequent manner as well as complying with the compulsory rest obligations.

At Loro Piana (an affiliate of LVMH, the French multinational luxury goods conglomerate)

The majority of Loro Piana France employees are nonexecutive employees and work in one of the six stores that the company has in France, 38 hours per week, including three hours of overtime, five days a week. Sunday is not necessarily a day off.

Each store is equipped with an electronic system that records working time, and each employee must use the punch clock four times a day (entry, exit and start/end of lunch break).

The rest of the staff are managers (executives) who work under a “daily package” arrangement (214 days per year, with around 11 additional rest days provided to the employees as compensation). They can manage their working time, but have to fill in a self-declaratory document and send it to their manager every month to monitor their workload and the compliance with working time limits.

The monthly planning is set one month in advance in order to strike a balance between professional and private life and ensure the maximum respect of individual needs, especially with regard to Sunday work.

Loro Piana has also entered into an agreement that guarantees and recognizes the right to stay disconnected during holidays and time off, and is implementing a “time saving account” agreement that allows the employees to have a more flexible management of their paid leaves.

At GrandVision

GrandVision employs optical professionals in over 7,000 optical retail stores in more than 40 jurisdictions around the world, where they selling spectacles, sunglasses, and contact lenses. The company is subject to a wide range of legal regimes regulating working time. A distinction is typically made between office staff and store staff. The company’s working time regimes generally cover definite term, indefinite term, and hourly contracts. Like many other companies in the retail space, the local operating companies use a variety of solutions to measure working time, ranging from fully manual solutions to sophisticated working-time software solutions.

A great variety of software solutions have evolved over the years in this space. These can take the form of a standalone timekeeping system or can also be integrated into the Point-Of-Sale system. Solutions vary from simple timekeeping systems to labor scheduling tools and personnel planning tools with various degrees of sophistication. It is no small feat for a company to identify a system that, first, ensures compliance with all applicable rules and, second, fits the company culture. Therefore, a company may consider developing its own bespoke working-time management system. In view of the diversity in legal regimes, it is challenging for

an international company to have one worldwide system. It should also be noted that implementing such a system will be heavily scrutinized by the works council in a number of jurisdictions, including the Netherlands, France, and Germany as they often hold consent rights in such matters.

This most recent ECJ decision does not come as a surprise and it is clear what the ECJ is trying to achieve, (i.e., protect the employees’ interests). Unfortunately, it does appear to be an anachronism as it is behind the current reality and does not anticipate the future of working. The millennial population in the workplace values flexibility, which also means that they have to be protected even more so than Generation X or baby boomers. Millennials tend to be “on” all the time, not necessarily leading to higher productivity or higher quality work. It also remains to be seen what the full extent will be of the health effects of intensive and long-term screen usage and permanent reachability.

How EU countries are meeting requirements

France is already largely compliant (by requiring daily time recording and prescribing a measuring system), while laws in Belgium, Italy, Luxembourg, the Netherlands, and (after recent amendments) Spain are partly compliant. However, laws in Germany, the United Kingdom, Romania, Bulgaria, Slovakia, fall short of EU law standards and will have to be revisited.

One of the questions that remains unanswered for the time being is whether the obligation to track working hours will be implemented by member states to all categories of employees or whether it should be limited to a number of them (overall compliance with the ECJ ruling will strongly depend on that as well).

Is the ECJ ruling an anachronism?

Beyond its practical consequences, it is also legitimate to question the relevancy of this decision.

Indeed, while the legal reasoning is understandable, this case could nevertheless be perceived as anachronistic and in contradiction with employees' current aspirations for more flexibility. For it is a fact — and not only for millennials — that 2020 employees do not want a “nine-to-five” job where their presence at the office is required throughout the week, especially since so many jobs these days can be performed with a computer and a high-speed internet connection. For many startup companies, this can also be a win-win situation: Employees working from home reduce the need for office space and the costs attached to it, at least temporarily. Even at larger companies, the possibility to work from home at least once per week has become an essential condition to attract the most talented workers.

The call for flexibility is not limited to the workplace and is intrinsically linked to the autonomy left to employees to manage their working time as they see fit. Not tying down employees to a strict timetable has proven critical to the success of modern companies operating in the services industry.

By way of example:

- The company's activity may fluctuate from one month to the other, justifying the accommodation of working time to the business needs;
- In our global economy, employees are oftentimes asked to collaborate with colleagues scattered around the world who are seldom in the same time-zone. The standard “nine-to-five, five days a week” organization is clearly not well-suited to the functioning of international businesses.
- For companies located in capital cities like London or Paris, with crowded public transports and

nightmarish traffic jams during peak hours, employees can be allowed to start and stop work at different times during the day, in an attempt to release the stress inherent to a difficult commute and enhance productivity. Such policies are undoubtedly more environmentally friendly, which should be factored in as well.

How companies can maintain flexibility without compromising compliance

At Accenture

We have now entered an era where millennials represent the strongest part of Accenture's workforce, and this generation's quest for passion and success, while making work-life balance a high priority, cannot be ignored.

The ideal work-life balance allows them to be part of a meaningful organization while remaining involved in their community. They value autonomy and independence in the workplace quite highly, which often translates to a desire to work outside the confines of a nine-to-five work schedule. They want to be able to organize their daily work around their personal needs and priorities, family often being one of them (i.e., taking breaks to go to the gym in the middle of the day, or pick up their children from school before resuming work in the evening, etc.).

In the digital era, employees also want to work from locations outside of their employer's primary site. The use of online chat tools that allow staff to work remotely is an important development.

Accenture has implemented the option for employees to work from home a few days per week. The flexibility that homeworking offers is a strong element of our people's engagement, but in a highly connected, “all-digital” world, employees risk remaining connected all the time. Thus, the company also reinforced its messaging on the right for people to disconnect, stressing that no emails should be sent after 9 pm and

Indeed, while the legal reasoning is understandable, this case could nevertheless be perceived as anachronistic and in contradiction with employees' current aspirations for more flexibility.

that no one should be expected to respond to email/calls solicitations during the daily and weekly rest periods.

In that context, tracking employees' working time will become increasingly challenging. One possible option may be to consider possible designs for a new time recording system. Recording time via apps on mobile devices could be one solution for flexible or trust-based working time models.

At Loro Piana

Every employee perfectly understands that the store must observe the precise opening and closing times, and that homeworking is not realistically compatible with our activity and the necessity to provide the best service to our clients. For the last few years, employees must also give their consent to work on Sunday.

Despite this understanding, the need to increase flexibility is always present.

Each store manager works on a monthly planning with a flexible approach, trying to take into account the personal needs of each employee. The solidarity between employees is also high, and there is a lot of flexibility in changing the planning to accommodate their colleagues.

Recently, employees have been provided with professional mobiles with specific tools allowing them to have a clear overview of each client and better manage the clientele activity. These new tools have been discussed a lot with employees, before and after their implementation to adequately address their needs in terms of flexibility (i.e., be able to register data regarding clients while

on the floor and send these data directly, thus limiting to the strict necessary the time spent in meetings with managers and in administrative paperwork).

We also included some specific provisions in our Sunday work agreement in order to mitigate this specific working time arrangement (e.g., economic advantage to compensate childcare expenses on Sunday). Some of the employees shared that Sunday working gives them more flexibility, as they can handle better their family planning, with days off not necessarily falling on Saturday and Sunday (i.e., being able to easily manage extra-school activities, as well as personal activities and hobbies).

Finally, a new "time saving account" agreement will certainly be seen as an additional step towards more flexibility.

At GrandVision

The issue of working time and time-keeping remains a complicated issue as it concerns a company's most valuable asset, (i.e., its people and the time these people invest in it). It sparks a wider debate on the balance between a number of important aspects of corporate life including productivity, compliance, management, privacy, environment, innovation, and health and safety.

The way a company manages and measures working time is a vital part of the company's cultural identity and typically gives a good indication of what kind of place it is to work. Company policies can vary between a pragmatic approach and a strict enforcement approach, depending on its history, works council, legal enforcement regime, and employer-employee relationship.

The traditional office, with a workplace for everyone, parking lot, rush hour commutes, and often digital perception management is not a sustainable solution for the economy, environment, and long-term employee health. We can probably expect an ever-increasing legislative wave to protect employees from the effects of around-the-clock digital reachability and screen usage, probably driven by the mounting healthcare cost.

Rather than focusing on measuring working time, lawmakers and companies should consider putting guardrails around the digital tools where people currently spend most of their time. This can take the form of mandatory cutoff of work email during holidays, vacation periods, weekends, and, at a certain point, in the evening to ensure that people are truly "off." This will have many additional benefits, including more effective work management, teamwork, and professional growth. This would also be a great tool in the compliance and ethics toolbox to increase transparency.

Final takeaways

In conclusion, the ECJ's decision certainly puts an additional strain on companies in the European Union to strike a satisfactory balance between the flexibility and autonomy given to employees and the monitoring of their working time. In many countries, the solution would have to be found jointly with the works council, which at the very least should be informed and/or consulted whenever a new working time monitoring system is being implemented in a company. **ACC**

ACC EXTRAS ON... Wage and hour

ACC Docket

Learning to Avoid Costly Wage and Hour Class Action Litigation (April 2017). accdocket.com/articles/wage-and-hour-class-action-litigation.cfm

Sample Forms, Policies, and Contracts

Wage and Hour InfoPak Research (Nov. 2016). acc.com/resource-library/wage-and-hour-infopak-research

Sample Overtime Calculation Fixed Salary Fluctuating Hours (Nov. 2016). acc.com/resource-library/sample-overtime-calculation-fixed-salary-fluctuating-hours

ACC HAS MORE MATERIAL ON THIS SUBJECT ON OUR WEBSITE. VISIT WWW.ACC.COM, WHERE YOU CAN BROWSE OUR RESOURCES BY PRACTICE AREA OR SEARCH BY KEYWORD.

— ACC —

GLOBAL GENERAL COUNSEL SUMMIT

10-12 JUNE, 2020 | ZURICH, SWITZERLAND

An exclusive global forum for chief legal officers



Championing Trust in Business

Collaborate, exchange ideas, and build meaningful relationships with chief legal officers from around the globe in this exclusive, engaging summit.



RSVP today.
Early Bird Rates End Feb. 29
acc.com/summit20