THE END OF TRUST-BASED WORKING HOURS? PRACTICAL EFFECTS OF THE DECISION OF THE BAG DATED 13/09/2022

I. THE BACKGROUND

With a judgment from 2019, the ECJ had clearly set the direction: From the Working Hours Directive in conjunction with Art. 31 of the Charter of Fundamental Rights of the European Union (CFR), there is the obligation of the Member States to ensure that employers introduce an "objective, reliable and accessible system that can be used to measure the daily working hours worked by employees"; this follows from the right of employees to effective health protection and compliance with the legally prescribed (weekly and daily) maximum working hours. However, the ECJ had not set a specific deadline for the Member States.

Over three full years, the requirements of the ECJ then remained without any significant practical consequences, with a few exceptions that we will present below on a country-specific basis. And it was probably generally assumed that legislative intervention would be required for the practical implementation of the judgment. However, the German Federal Labour Court has now taken the ball directly and formulated directly from existing law specific obligations incumbent on the employer even without legislative measures.

II. THE STATEMENTS OF THE FEDERAL LABOUR COURT

Based on the findings of the ECJ regarding the content and scope of the CFR and the Working Hours Directive, and in keeping with European Union law, the court has interpreted the Occupational Health and Safety Act (Art. 3), which implemented the Occupational Health and Safety Directive (*inter alia*), to the effect that the obligation incumbent on the employer set forth therein, the "required" occupational health and safety measures taking into account the health of the employees, also includes an obligation to specifically record all working hours.

III. COMMUNITY-WIDE SIGNIFICANCE OF THE DECISION

Although it is in concrete terms a purely German matter, the significance of the decision should not be underestimated in the other Member States, since the starting point, i.e. the interpretation of national law in accordance with EU law, can be transferred to other countries in each case. This is especially so in this case as it concerns legal norms (specifically: the Occupational Health and Safety Act) that were adopted when implementing EU law (Occupational Health and Safety Directive).

What do the statements of the Federal Labour Court mean? First of all, it is very simple that in fact all employee hours are to be recorded, i.e. regardless of what service is provided as well as how and where it is provided, and not just overtime. In other words, the working hours in the home office and in the field are to be recorded in detail. Whether senior executives or management are also covered by this will presumably depend on whether they are classified as being similar to employees or rather as corporate officers in the individual legal systems. In Germany, senior executives are not covered by the provisions of the Working Hours Act. If other rules apply in other legal systems, a corresponding extension to senior executives is also quite conceivable. This does not seem to be excluded in view of the at least indirect argumentative recourse to the CFR for future developments.

What does this mean for models of trust-based working hours? These are certainly not overridden. However, it is necessary that the specific working hours (and not just overtime) be meticulously recorded, which in practice will not always be easy to reconcile with the objectives of independent project implementation.

IV. CONCLUSION

Of course, the decision does not have any direct effect outside Germany. However, the argumentation of the Federal Labour Court can certainly also be transferred to other legal systems, so that elsewhere it is also to be expected that, in view of the widespread inaction of the respective legislators, the courts will take control of the situation and will read the requirements already formulated by the ECJ in 2019 directly from national law (in compliance with the directive). It therefore seems advisable that the companies prepare themselves for the new situation in advance with the help of appropriate legal advice and proactively develop appropriate solutions. Below we provide an overview of the existing situation and any need for adjustment in the various countries of the Schindhelm Alliance.

AUSTRIA

Under Austrian law, the employer is generally obliged to record the working hours for all employees. The obligation to record covers the daily working time, all breaks, as well as the start and end time of the working day. For employees who can largely determine their working hours and place of work themselves or who predominantly perform their work in their home, only records of the duration of the daily working hours must be kept. There is no recording obligation for employees who are exempt from the Austrian Working Hours Act, such as senior executives or other employees with decisive decision-making authority. The term “trust-based working hours” does not exist under Austrian law - although it is certainly used among heads of HR departments. The agreement on trust-based working hours would therefore only be permissible for employees who are exempt from the Working Hours Act.

The decision has no relevance for the Austrian legal situation, especially since there is a comprehensive recording obligation and the exceptions provided for under the Austrian legal system are covered by the Working Hours Directive.

According to the decision of the Federal Labour Court dated 13/09/2022, we do not see any need for adjustment for the national legal system because the obligation imposed by the ECJ in the judgment of 14 May 2019 in the legal case C 55/18 (Federación de Servicios de Comisiones Obreras v. Deutsche Bank SAE) was fulfilled with regard to the recording of working hours.

BULGARIA

The time recording regulations in Bulgarian labour law apply to the corresponding deviations from the regular 40 hours week. The Labour Code stipulates that when working remotely, the accounting for working hours on the part of the employees must be defined in the employment contract or in the company's internal rules. If working hours are extended, and in the case of overtime, the employer must keep a record of the hours of the extension or the overtime and its compensation. In the case of flexible working hours or an irregular working day, the time recording method should be determined in the company's internal rules or in the individual employment contract. The conditions for ordering compulsory work from the employer and the recording of the corresponding compulsory working hours must be regulated with the corresponding regulations of the Ministerial Council. The Labour Code specifies two possible ways to record time - by days (for the standard 40-hour week) and total time calculation (e.g. in the case of shift work and in compliance with the obligatory rest periods). Under Bulgarian law, it is mandatory for all employers. On the other hand, no special regulations and no specific requirements for automated time recording are anchored by law. Many employees use different systems depending on the special features of their work and working time organisation.

According to the corresponding provisions of the Bulgarian Labour Code, Bulgarian law applies to all employment relationships in which

one of the parties is located in Bulgaria, unless otherwise stipulated in a law or in an international contract that is binding for Bulgaria. As an exception, the law of another state may apply through a contract between the employee and the employer. Accordingly, it would have to be concluded in legal theory that the decision of the Federal Labour Court should have no effect on the Bulgarian legal system in labour law. As an exception, an effect in the tax area could be considered in rare cases in accordance with the double taxation agreement in the area of payroll accounting or in the event of the assignment of employees between Bulgaria and Germany.

CHINA

According to Chinese labour laws, the employer is not obliged to record and monitor the working hours of the employees. In practice, however, many Chinese companies introduce a working time system in their internal management policies to record the total duration of daily working time, including the start and end of daily working hours, break times and overtime.

Naturally, the decision of the Federal Labour Court dated 13/09/2022 will not have any influence on the Chinese labour law system. However, it should be noted that there are numerous comparable discussions about working time recording in connection with legal actions for overtime compensation in China, which Chinese employees regularly bring against their employers. When claiming overtime compensation, the employees must, in principle, prove the existence of overtime. However, the burden of proof is transferred to the employer if the employee proves that the employer has the corresponding evidence for the existence of overtime. In employee-friendly jurisdictions, for example, in Beijing, the courts demand that the employer prove the untruthfulness of the employee's overtime claims if the employee can only provide minor evidence that he has worked overtime without payment. If the employer is unable to submit working time records that prove the opposite, the court may admit the employee's action. Therefore, it is recommended that our customers implement a working time system or at least establish effective internal regulations (e.g. in the employee handbook), under which clear conditions (e.g. written approval) govern the performance of overtime.

CZECH REPUBLIC

Within the meaning of the Czech Labour Code, the employer is obliged to keep the evidence of working hours for all employees, namely with the start and end of the shift performed, overtime, night work and on-call duty. The evidence of the statutory work breaks within the framework of the shift performed is not explicitly prescribed, but their granting must be proven to the supervisory bodies on request. The employee has the right to inspect this evidence and to request copies of the evidence at the expense of the employer.

The precise form of recording working hours is not established by law, but the evidence must be clear and verifiable. The evidence is used in particular for processing wages and salaries and is subject to an archiving obligation. The supervisory bodies may review the manner of recording working hours and impose sanctions in the event of defects.

GERMANY

Based on its wording, German law only provides for the recording of working hours in certain cases. However, the Federal Labour Court (decision of 13/09/2022) has decided that there is a general obligation to record working hours (i.e. start and end of daily working hours and thus their duration including overtime). In the absence of express legal standardisation of such an obligation, the court derives this from an "EU law-compliant interpretation" of § 3 para. 2 no. 1 ArbSchG (Arbeitsschutzgesetz [Occupational Health and Safety Act]). The Federal Labour Court essentially states the following about the design of the system for recording working hours: As long as no regulations have (yet) been made in specific terms by the legislator, there is room for manoeuvre. The recording of working hours does not have to be done electronically without exception. Depending on the activity and company, paper records may also suffice. Also, delegating the recording to the employees is not excluded.

The Federal Ministry for Labour and Social Affairs announces that it is expected to make a "practical proposal" for the regulation of the recording of working hours in the Working Hours Act in the first quarter of 2023. Until it is clear what the statutory regulation will look like, employers should follow the case law of the Federal Labour Court described above. They should check existing time recording systems to see if they enable reliable and accurate recording of daily working hours (including overtime). If necessary, time recording must be implemented, or an existing recording system must be adjusted. It is recommended to look for solutions that involve as little effort and costs as possible, because the future statutory regulation, depending on what it will look like, can require an adjustment of the time recording system. If there is a works council, its right of co-determination pursuant to § 87 para. 1 no. 7 BetrVG (Betriebsverfassungsgesetz [Works Constitution Act]) must be observed.

HUNGARY

In Hungary, the employer's obligation to keep records of working and rest periods is anchored in the Labour Code. Pursuant to Article § 134, the employer registers the duration of ordinary and extraordinary working hours, on-call duty days and holidays. The records must also provide an up-to-date overview of the start and end of regular and extraordinary working hours as well as the on-call times. The records must clearly indicate when, for what period, and at what time what type of work was performed and whether the work was performed in connection with emergency service or on-call duty. The attendance list alone does not meet the legal requirements for recording working and rest times. The fact that the employee indicates on the attendance list the time of his arrival at work or his departure from work does not indicate anything about whether he had ordinary or extraordinary working hours or whether he worked in emergency service or on-call duty. The employee may also keep records of work and rest periods, which are later difficult to prove false or unfounded if they are not reviewed and corrected by the employer over a long period of time.

The Federal Labour Court dated 13/09/2022 has no effect on the Hungarian legal provisions in the sense that the Hungarian legal provisions already contain the requirements mentioned in the decision. Most recently, Curia issued a decision on 27 June 2022 in which it determines the above-mentioned practical requirements.

ITALY

In Italy, working hours are regulated by Legislative Decree 66/2003 on the implementation of the EU Working Hours Directive. This applies in principle, with some sector-specific exceptions, such as flying personnel, to all persons employed in the private sector and public service; there is no exception for senior executives. Even if time recording usually takes place in practice at least in large companies, a corresponding (express) obligation is not standardised either by statute or by case law. Rather, Art. 5 of the aforementioned decree is limited to the finding that overtime is to be calculated and remunerated separately without a specific obligation to record. In practice, it is therefore widespread that (due to the lack of reliable time recording) no correct remuneration of the overtime worked takes place. In addition, it corresponds to the contractual practice that a flat-rate remuneration for all overtime is contractually determined for employees in management functions and the employee is expressly released from the obligation to "punch in". Finally, the form of "smart working", i.e. the project-related work methods that are not linked to the location, are clearly prevalent in both the private sector and public service, where it has so far been assumed that this is not compatible with rigid working time models.

In view of the previously described realities of the Italian working world, measures for the implementation of the requirements formulated by the ECJ appear essential. While the Federal Labour Court in its decision was linked to the fact that an obligation to record at least overtime can already be derived from the existing statutory regulation, this does not apply according to the current interpretation of the law in Italy. Like in Germany (to date), it is also assumed in Italy that in particular the criterion

of "precise recording" demanded by the ECJ requires a legislative intervention. Since many aspects of working life are regulated in collective agreements in Italy, it would also be conceivable that the topic will be addressed by the social partners. However, it does not appear to be ruled out that even the Italian jurisdiction will sooner or later lose patience: From the indisputably statutorily standardised obligation to pay overtime and the likewise statutorily standardised requirement to "restrict" recourse to overtime, with a "trick" similar to the one the German Federal Labour Court applied, it is certainly possible to read the obligation to record working time, since otherwise it is hardly possible to assess to what extent overtime hours are actually worked. It is undisputed that changes are required. The future will show how this will happen.

POLAND

In Poland, there is an obligation to record working hours for each employee. Records of working hours affect the payment of remuneration and the determination of rest periods.
The most important element to include in each time recording is the number of hours worked by an employee. However, this means that all work hours performed by the employee must be recorded, including work on Sundays and public holidays, night work, overtime and days off resulting from a five-day week. In addition, the employer is obliged to keep records of on-call duty, holiday, leave of absence and other excused and unexcused absences. For young employees, these records must also include the time of their work in work that is prohibited to young people and whose exercise is permitted for the purpose of their vocational training. Exemptions from the complete recording of working hours are provided for employees who, for example, work hours dictated by their function, or for mobile workers (who travel a lot). In Poland, the practice shows that the biggest problem is recording overtime for employees. The recording of working hours must be made available to the employee on request. The original document is the property of the employer.
If the violations are only technical defects in the management of the recording of working hours, for example, the absence of a record of the use of annual leave by an employee, the labour inspector may only request the proper management of the complete records.

Under Art. 281 of the Polish Labour Code, violating working time regulations or failing to record working hours constitutes a violation of the rights of the employee. The labour inspector who identifies such a violation may also impose a fine of up to PLN 2,000 in the context of the so-called fine proceedings or, like a public prosecutor, may assert a fine of up to PLN 30,000 in the city court. If the supervisory activity of the labour inspector reveals that the records have been falsified, the labour inspector may, in such a situation, involve the public prosecutor for suspicion of a criminal offence.

ROMANIA

There are also regulations in Romania regarding the recording of working hours. In accordance with the provisions of the Romanian Labour Act, the employer is obliged to keep records of the working hours worked daily by each employee, including overtime, with emphasis on the start and end times of the work programme. These records must be submitted to the labour inspectorate in the event of an audit or corresponding request. Working hours must also be recorded by the employer for "mobile" employees, i.e. those employees who work from home or another place. Details or how exactly the working time should be recorded or the working time recording system should be designed are not regulated by law.

Even if the court decision or the decision of the Federal Labour Court of 13/09/2022 has no effect on the Romanian legal system, in light of the decision of the ECJ dated 14 May 2019 in the legal matter C-55/18, according to which an objective, reliable and accessible working time recording system must be set up with which the working time of the employees performed daily can be measured, a more precise regulation with regard to the design of the working time recording system is desirable.

SLOVAKIA

The Slovak Labour Code explicitly stipulates the employer's obligation to maintain evidence of working hours, overtime, night work, and active and inactive times of on-call time for all employees. The evidence must record the start and end of the period in which the employee performed work or had an ordered or agreed on-call service. During temporary assignments, the employer keeps evidence at the workplace of the temporarily assigned employee.
The evidence of the statutory work breaks within the framework of the shift performed is not explicitly prescribed.
The precise form of recording working hours is not established by law, but the evidence must be clear and verifiable. The evidence is used for processing wages and salaries in particular. The supervisory bodies may review the manner of recording working hours and impose sanctions in the event of defects.

According to the decision of the Federal Labour Court dated 13/09/2022, we do not see any need for adjustment for the national legal system in Slovakia because the obligation imposed by the ECJ in the judgment of 14 May 2019 in the legal case C 55/18 (Federación de Servicios de Comisiones Obreras v. Deutsche Bank SAE) was fulfilled with regard to the recording of working hours.

SPAIN

In Spain, since 12/05/2019, there has been an obligation for all companies to record the working hours of the entire workforce on a daily basis. It is mandatory to register the exact times of the start and end of work for all employees. The legal basis for this is the newly introduced paragraph Art. 34.9 of the Employee Act (Ley del Estatuto de los Trabajadores). The Royal Legislative Decree RDL 8/2019, which introduced the new regulation, does not specify a specific system for recording working hours, but leaves the form of this obligation to the collective agreements, company agreements or, where these are not available, to the decision of the employer (after consultation with the employee representatives). Thus, daily recording of working hours is permitted both using a corresponding document (in writing), as well as using a recording system (digital) or any other demonstrative form. The companies are obliged to keep the working time register for a period of four years. These must be submitted to employees, trade unions and the work inspection on request. Non-fulfilment of the obligation will be punished with a fine.

Spain has already met the requirements established by the Federal Labour Court since 2019. The ECJ ruling, which substantiated the decision of the Federal Labour Court dated last September, was based on a submission of a Spanish court (Audiencia Nacional C55/18 paragraph 62). In addition, the Ministry of Labour and Social Affairs / Department of Labour Inspection and Social Security reacted with the service instruction 101/2019 (Criterio Técnico) to the ECJ decision of May 2019 and specifies the specific inspection criteria for the review of work time recordings in accordance with the new Art. 34.9 ET.

TURKEY

Under Turkish law, the employer is obliged to record and document the daily working hours of the employees with the help of suitable means. However, it was not determined by law exactly how the recording of working hours must be carried out. As mentioned, recording and documentation with the help of suitable means is sufficient. Furthermore, the working hours do not have to be documented by the employer itself. If the working hours are documented by the employee, the employer must inform the employee, the employee must be provided with the corresponding forms and the employer must take appropriate administrative measures.

In the case of overtime, this must be recorded separately, submitted to the employee and signed by him or her. The signed document must be stored separately. If the employer violates its obligation to record and document daily working hours and overtime hours, no sanctions are provided for this.

In Turkey, there will probably be no adjustment to the judgement of the Federal Labour Court dated 13/09/2022.

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