

# Working time and time again: how to measure time?

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The CJEU decision in *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE (C55-18)*

Last month the ECJ handed down judgment in a case which determined what records employers need to keep regarding working time.

## The question

The question being considered was: whether the Working Time Directive ('the Directive') and related directives mean that a member state is precluded from having a law which doesn't require employers to set up a system enabling the duration of time worked each day by each worker to be measured.

In other words: is it necessary to record employees' working time on a daily basis?

## The answer

In short: the ECJ found that Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured. Measuring overtime alone isn't enough. Relying on employees' accounts of their hours of work isn't enough (save for limited exceptions). The ECJ said this is necessary to ensure compliance with the rights provided to employees under the Working Time Directive.

## The reasons

The rights provided by the Directive are:

- Maximum working week
- Minimum rest breaks (daily and weekly)

The court began by emphasising that these rights are “*of particular importance*” (para 30), and they are a “*fundamental right*”. [

The obligation on Member States is to “*take the measures necessary*” to ensure workers have these rights; the Directive doesn’t “*establish specific arrangements by which the Member States must ensure the implementation of the rights that they lay down*” (para 41). In those circumstances, one might expect the ECJ to be slow to dictate what is necessary to ensure implementation of the rights.

So what led the ECJ to its conclusion that daily records were necessary? The court began by reminding us that although Member States have a discretion, the arrangements made must not render the rights meaningless (para 43). The ECJ was also concerned that

- The objective of the working time directive is to ensure the effective protection of the living and working conditions of workers and better protection of their safety and health, both of which are particularly important
- The employee is the weaker party, so must be protected from the employer who could:
  - Put restrictions on the employee’s rights; or
  - Subject employees to a detriment if they explicitly claim their rights (paras 44-45)

These factors led the ECJ to conclude that:

- Objective and reliable determination of the number of hours worked each day and each week is essential to make sure that maximum working week and minimum rest periods are being observed. A law which allows employers to not record time was liable to render the working time rights meaningless (para 59).

The focus was very much on “objective and reliable” records of working hours. The court dismissed other ways of establishing working time, in particular a suggestion that the employee could shift the burden of proof to the employer using “*witness statements, the production of emails or the consultation of mobile telephones or computers*”. The ECJ said that such sources of evidence do not enable the number of hours the worker worked each day and each week to be objectively and reliably established (paras 53-54).

The court also said that investigatory powers for authorities weren't enough to ensure compliance with the Directive unless there were objective and reliable records (para 57). Spain and the UK argued that the cost of setting up a system would be significant; the ECJ gave that argument pretty short shrift as one of the Recitals to the Directive states that "*The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations*" (para 66).

## Effect of the judgment

The CJEU ruled that the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured (para 60). The exact form of that system is for Member States to decide.

There are (and have always been) exceptions: Member States may derogate from the working time rights 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*" (Article 17(1) of the Directive). Examples are given:

- Managing executives or others with autonomous decision-making powers
- Family workers
- Workers officiating at religious ceremonies



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