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ECJ ruling on working time records: practical impact for your European workforce

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Employers are required to establish a system to measure their employees' daily hours worked, the European Court of Justice (the **ECJ**) has said in a recent and widely-publicised ruling (*Federación de Servicios de Comisiones Obreras* (*CCOO*) v *Deutsche Bank SAE*). This may seem at odds with today's agile working environment, and its increasingly flexible and mobile workforce, but you need not take immediate action (unless already required by local laws), pending guidance on how Member States intend to apply the ruling. Some practical steps are, however, recommended to manage risk and prepare for the local law and regulatory enforcement changes that will inevitably follow across jurisdictions.

Establish a system to measure hours worked

According to the ECJ, Member States must require employers to establish "an objective, reliable and accessible system" for measuring their employees' daily working time. This information will help workers (and their representatives) to check if working time rights have been breached, and will help national authorities and courts to enforce those rights. Workers are not expected to rely on other sources of evidence, such as witness statements, e-mails, mobile phones or computers, to establish a breach of their rights.

Impact in Member States – A&O survey

The ruling relates to the compatibility of Spanish law (as it was previously worded) with the EU Working Time Directive, but is binding on other Member States as an interpretation of EU law. National rules must be in place, or otherwise amended, to require employers to establish a daily time recording system. National courts must also interpret local working time rules, so far as possible, to give effect to the ruling in cases where employers have not adequately documented working hours (the principle of "indirect effect").

We have conducted a **survey** across eight Member States (Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Spain and the UK) to assess how local rules and practices are likely to be impacted. This shows that French laws are already largely compliant (by requiring daily time recording and prescribing a measuring system), while laws in Belgium, Italy, Luxembourg, the Netherlands and (following recent amendments) Spain are partly compliant. Laws in Germany and the UK fall short of EU law standards and will have to be revisited.

Compliance is therefore patchy, and employers can expect further guidance from legislators and regulators clarifying what action is needed. It is for Member States to decide on the form and implementation of time recording systems, taking into account types of companies, including their size and area of activity.

Derogations are permitted under the Directive, and all Member States in our survey relax or exempt record-keeping requirements for senior employees (as defined by local law). The ECJ acknowledges derogation rights in its ruling, which suggests that employers may retain this flexibility.

Practical impact for employers – what next?

While the ruling is binding on EU Member States, it does not yet require you to introduce or adapt any time recording system (unless you are a public sector employer or a so-called "emanation of the state"), as such obligations will only crystallise when national laws are changed. Taking a "wait and see" approach makes sense, as you can then design a system in light of new guidance. That said, it would be prudent to take the following steps:

- **Conduct a compliance audit**: Record-keeping obligations already apply under national laws and, as our survey shows, breach of these (or of related obligations) can expose you to criminal liability, fines and employee claims. There has been a low level of enforcement to date, but we can expect an increased appetite for enforcement, and potentially litigation, following this ruling. Conducting an audit to identify workers, or categories of workers, whose actual hours worked (as opposed to contractual hours) will need to be captured will help you prepare for full compliance. It will be particularly important to consider how you will capture such hours for those employees who regularly travel as part of their role.
- **Consider system design**: Consider possible designs for a new time recording system in conjunction with your IT team and other business stakeholders. In this digital age, there will be many technical alternatives, and new market products will no doubt emerge in the months ahead. Recording time via apps on mobile devices may be one solution for flexible or trust-based working time models. Concerns that the ruling heralds the end of such arrangements are, in our view, premature. It will, however, be important how you communicate the need to record such hours so that it does not erode the cultural benefits flexible

working has in the workplace. Cost must not be a decisive factor, as the ECJ has clarified that the need for effective health and safety protection outweighs purely economic considerations.

– **Anticipate implementation hurdles**: Consider practical hurdles to implementing a new time recording system. In Germany, the Netherlands, Spain and – in certain cases – Luxembourg, for example, works councils have a co-determination right in the design and implementation of technical working time systems. In Belgium and France, they have specific information and consultation rights in this regard. It will therefore be important to engage with any works council at an early stage. Data privacy rights should be considered, and training and policy changes may be required to ensure employees' cooperation as well as their understanding as to the reasons for this increased scrutiny over their working hours.

Key contacts in Germany

If you would like to discuss any of the issues raised in more detail, please speak to any of the contacts below or your usual Allen & Overy Employment & Benefits Team contact.

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SNAPSHOT: IMPACT FOR EMPLOYERS OF ECJ RULING ON WORKING TIME RECORDS[1]

Impact on national law/regulatory enforcement approach?	Immediate risk exposure for employers?
◆ *Significant changes/new approach required*	◆ *Significant exposure/criminal liability/significant financial penalties*
◆ *Some changes/change in approach required*	◆ *Some exposure*
◆ *No changes required*	◆ *Low/no exposure*

Countries	Obligation to keep specific record of daily hours worked?	Is format of records prescribed?	Impact on national law/regulatory enforcement approach?	Immediate risk exposure for employers?[2]	Any other practical implications?
Belgium	No. There is no general obligation to keep a specific record of the daily hours worked. Only specific cases require the mandatory registration of working time, eg in the case of sliding work schedules, or deviations from part-time schedules. Employees who are in a leading position or a position of trust are excluded from the working time regulations and hence from	Yes – if there is an obligation to keep records of daily hours worked. For example, in the case of sliding work schedules, the employer must put in place a time registration system, keeping a record of the number of hours worked each day for each individual employee. Where part-time employees deviate from work schedules, the law requires that a register is kept in which work that they perform outside their working schedule is listed, or alternatively, a time registration system must be kept.	◆ There is currently a legal debate as to whether or not Belgian working time regulations comply with the ECJ ruling. The Belgian Minister of Work has announced that he will examine the ECJ ruling further to determine the state's legislative approach.	◆ If working time regulations are correctly implemented (ie no work outside of work schedules as laid down in the work regulations, strict observance of rules on overtime, etc.), there is a limited risk of exposure, unless and until the legislator takes further action in this regard. Failure to keep adequate records is a criminal offence. Criminal or administrative fines may be imposed.	Trade unions have adopted a strict position that time registration systems must now be implemented on a general basis. However, employers' organisations disagree. The works council has information and consultation rights with regard to the implementation of a new time-recording system.

[1] *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*. (Case C-55/18) This overview considers the ruling's impact for private sector employers; please seek separate advice if you are a state/public sector employer or a so-called "emanation of the state".

[2] Note that the following risks/consequences could also arise for any non-compliant Member State as a matter of EU law:
- The Member State could be sued for failure to adequately implement the EU Working Time Directive; and
- National courts are required to interpret local working time rules, so far as possible, to give effect to this ECJ ruling (the principle of "indirect effect").

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	record-keeping requirements.			Employees may also claim payments regarding work in excess of ordinary working time.	
 **France**	Yes, in many cases. Employers must record working hours only for employees who have individual working hours (ie where not all employees working within a given department/team have the same working hours). If employees follow collective working hours (ie same working hours in the whole team), the employer must only display and record the team's working hours. This obligation does not apply to senior executives ("*cadres dirigeants*") nor to autonomous executives subject to "*forfait jours*" arrangements (see last column). However, the latter must still benefit from minimum rest periods – a regularly contested aspect in France.	Yes. The time records must be in writing as staff representatives or the Labour Inspector can make a request to consult these documents at any time. According to a Labour Ministry instruction, there are 3 possible working time recording systems: ▪ IT recording, provided that it is reliable and records cannot be forged; ▪ Manual recording; or ▪ A self-reporting system.	 As French law already prescribes a measuring system, we do not expect this ruling to have any impact. That said, this decision increases the pressure on employers with non-compliant practices by raising awareness of the need for them to measure working time.	 Failure to keep adequate records of working time, where required, is a criminal offence punishable by a fine amounting to EUR 2,750 for the company and to EUR 750 for its legal representative. The Labour Inspector may impose as many fines as there are impacted employees. Employees have a direct right of action against an employer for non-compliance with record-keeping obligations and can claim for an injunction or damages as compensation for the harm suffered. Furthermore, failure to keep records of hours worked exposes the employer as regards overtime claims and damages claims for non-compliance with minimum rest periods.	This ruling might be used as an additional argument to support employee claims for overtime or to challenge the validity of their "*forfait jours*" arrangements in court. "*Forfait jours*" arrangements mean that the employee's working time is computed in days instead of hours (usually within the limit of 218 working days per year). Only executives who are autonomous in the organisation of their work schedule and who do not follow collective working hours because of the nature of their duties are eligible for this working time arrangement. A works council has information and consultation rights with regard to the implementation of a new time-recording system.

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 **Germany**	No, not for every employee. (i) Employers are only required to record employees' working hours which exceed 8 hours a day; in practice, this obligation is often passed on to employees (especially in the case of home office activities and field work), who often record overtime hours themselves. (ii) Employers must also keep a register of the employees who have consented to an extension of working time. The records must be kept for at least 2 years. Exceptions do exist for managerial employees (e.g. employees who are entitled to hire and dismiss employees independently (without prior approval) or who have been granted far-reaching authority in relation to the employer).	No. The German Working Time Act does not regulate the format in which the additional working hours have to be recorded.	◆	◆ German courts are very unlikely to interpret the legislation as being compliant with the ruling as they have shown no sign of taking a flexible approach previously. No sanctions will apply until the ruling is binding on German employers. It is likely that sanctions that apply for a breach of the current time-recording obligation for overtime hours (i.e. fines up to EUR 15,000) would then apply to a breach of any new legislation on time-recording.	In the medium term, the Government will likely codify a new regulation on time recording which imposes a direct obligation on German employers. This will be a hot topic for works councils in Germany, which have a co-determination right in the implementation and design of technical working time systems. It will be important to engage with any works council at an early stage.

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 **Italy**	Yes. Article 39 of Law Decree No. 112 of 25 June 2008 requires records to be kept, for each employee, of daily presence, daily working hours and overtime (together with paid/unpaid absences, holidays and days of rest). Such information must be kept in the so-called "*Libro Unico del Lavoro*" (the "***LUL***"). There is a partial exemption for some senior employees; in the *LUL*, only daily presence must be recorded for executives, or employees at a managerial level (ie "*Quadri*", who are not entitled to overtime), rather than the precise hours that they have worked.	Yes, to some extent. Employers are permitted to keep the *LUL* in 3 different ways, only one of which is automated (ie through the electronic badge system) and which represents an effective and objective record of each employee's working hours. Since the implementation and use of electronic badges is not compulsory for employers, Italian rules could be deemed non-compliant with the ECJ ruling.		 Failure to keep adequate *LUL* records is sanctioned with an administrative fine ranging between EUR 500 and EUR 2,500. Failure to present the *LUL* to the Inspectorate bodies is sanctioned with an administrative fine ranging between EUR 200 and EUR 2,000. Any detrimental impact on an employee's remuneration and social security or fiscal treatment caused by missing or inaccurate records is sanctioned with an administrative fine ranging between: ▪ EUR 150 and EUR 1,500, if there are between 1 and 5 affected employees; ▪ EUR 500 and EUR 3,000, if there are between 5 and 10 affected employees or the breach lasts for more than 6 months; or ▪ EUR 1,000 and EUR 6,000, if there are more than 10 affected employees or the breach lasts for more than 12 months.	Trade unions and work councils can be expected to pressurise employers into implementing an electronic system as the only format for records. While they have no information/consultation rights by law on the implementation of a working time system, applicable national collective bargaining agreements and company agreements should be checked in case they provide for such rights. Flexible working could be adversely impacted and there is likely to be a push to find concrete time recording solutions that also work for flexible working arrangements.

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 **Luxembourg**	Yes. An employer is required to list in a file or register: (i) the start, the end and the duration of the daily working time; (ii) any extensions of ordinary working time, Sunday work, work on public holidays and night work; and (iii) the payments made for any of the above. The register or file needs to be presented to the agents of the Labour Inspectorate upon their demand. Employers are exempted from completing the register/file in relation to senior-ranking employees.	No.		 Failure to keep adequate records is a criminal offence enforced by the Public Prosecutor/Labour Inspectorate. The Public Prosecutor/Labour Inspectorate is also responsible for enforcing working time limits so there is risk exposure if records are inadequate. Until now, there has been a low level of enforcement action. There is no direct employee right of action against an employer for non-compliance with record-keeping. However, employees may bring Employment Tribunal claims for payments regarding work in excess of ordinary working time. Employment Tribunals can be expected to facilitate the rules of evidence for employees whose employers have inadequate records.	It remains to be seen whether the exemption for senior-ranking employees will be upheld in Luxembourg law. The works council may have a co-determination right in the design and implementation of technical working time systems, depending on the system that is used and the size of the company.
 **Netherlands**	Yes, but only to some extent. (i) The Dutch Working Hours Act ("**ATW**") contains an obligation to keep records	No. In general, there are no specific form requirements.		 (i) The Inspectorate SZW has the authority to monitor	To date, the Dutch social partners have indicated that they do not expect significant changes to the current law.

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	that are sufficiently "adequate" to allow the competent authority to monitor compliance. This means that an employer must be able to prove, for each day, at what time an individual employee (actually) started and ended working, actual resting time and (notional) working hours. Employers have to retain these records for 1 year (and for longer in some cases, eg 2 years in the transport industry). (ii) The duty to register does not apply to employees who earn 3 times the minimum wage or more (from 1 January 2018: EUR 61,350, on a full-time basis for employees aged 18 or older), unless an applicable collective bargaining agreement determines otherwise. This excludes employees who perform night shift work, employees working on a	This approach may therefore be viewed as non-compliant. Dutch law does provide for specific registration requirements in certain industries which could be already compliant, eg the transport industry (goods and persons) and the mining industry.		compliance with the registration of working time and rest periods. Failure to keep adequate records can lead to administrative penalties. For failure of registration requirements, the general penalty amount ("*boetenormbedrag*") is EUR 10,000 per breach. The penalty amount depends, among other factors, on the number of employees (eg 100 employees or more: x1.5) and may increase, eg in the event of a repeated offence. (ii) Higher penalty amounts may apply to certain industries, eg the mining industry. (iii) Penalties may be imposed immediately if a failure to keep adequate records prevents an Inspectorate SZW investigation. (iv) There is no direct employee right of action against an employer for non-compliance with record-keeping. However, employees can file complaints with the Inspectorate SZW, the	Furthermore, more granular registration requirements already apply in certain industries where strong safety requirements apply. The market is expected to offer practical solutions on time registration and the Labour Inspectorate may issue further guidance on form. This will also be a hot topic for works councils, which have a co-determination right in the design and implementation of technical working time systems. It will be important to engage with any works council at an early stage. The blanket exemption for higher earners may face further scrutiny by the legislator, but in our view, given that the ECJ ruling allows some flexibility to derogate, employers can continue to rely on it unless and until legislation is changed.

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	mine or wind farm and employees who perform work where the safety or health of people is at stake. (iii) Employers are also exempted from keeping records for higher earners. (iv) Employers are required to keep a register of employees who have agreed to on-call duty time (> 48 hours per week).			works council or another employee representative body. In addition, an employer may be sued for possible damages resulting from non-compliance that exceed the amount of an imposed administrative penalty. (v) In industries where strong safety requirements apply (eg the transport industry), intensive monitoring is undertaken and penalties are regularly imposed.	
 **Spain**	Yes. As from 12 May 2019, employers must keep a daily register of employees' working time, which must include each employee's start and end hours (previously there was only an obligation to keep a daily register of working hours for part-time employees). Top executives subject to the provisions of Royal Decree 1382/1985 of 1 August on top executive contracts are outside the scope of this regulation.	No. There are no specific requirements on the format of records.	 Significant changes (as outlined) have been introduced by Royal Decree-Law 8/2019, on urgent measures for social protection and the fight against labour precariousness in working time.	 Failure to keep adequate records constitutes a serious breach which may be sanctioned by the labour authority with a penalty of up to EUR 6,250. This is a single fine per infringement not per employee. However, multiple sanctions could arise if the Labour Inspectorate considers that the company is repeatedly breaching the obligation. There is no direct employee right of action against an employer for non-compliance with record-keeping.	It is anticipated that this ruling, together with the recent changes to legislation, could impact on flexible working models as employers will have difficulty registering the "start working hour" and "end working hour" where a flexible working model applies. Employers must negotiate with the employees' representatives (ie works council/ personal delegate) regarding the design and implementation of the time-

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				However, employees may file a complaint before the Labour Inspectorate and/or may bring labour court claims to enforce rest break entitlements and payment of overtime with the relevant social security contributions.	recording system.
 UK	No. (i) Employers are required to keep records that are "adequate" to show whether limits on maximum working time/night work limits are being complied with, and to retain these records for 2 years. (ii) They are also required to maintain up-to-date records for workers who have "opted-out" of the maximum weekly working time limit. There are certain exceptions to this obligation, such as for managing executives or those with autonomous decision-taking powers.	No. Health & Safety Executive ("**HSE**") Guidance provides that specific records are not required and that employers may be able to rely on existing records maintained for other purposes, such as pay, in order to meet their record-keeping obligations. This approach is therefore likely to be viewed as non-compliant.		 Failure to keep adequate records is a criminal offence enforced by HSE. HSE is also responsible for enforcing working time limits so there is risk exposure if records are inadequate. Until now, there has been a low level of HSE enforcement action. There is no direct employee right of action against an employer for non-compliance with record keeping. However, employees may bring Employment Tribunal claims to enforce rest break entitlements if documentation is inadequate.	The ruling will remain applicable in UK law post-Brexit (as "retained EU law") so will continue to have an impact for employers when Tribunals/courts are interpreting EU law-derived working time obligations.