ECLI:EU:C:2019:318

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

11 April 2019 (*)

(Reference for a preliminary ruling — Directive 2003/88/EC — Organisation of working time — Protection of the safety and health of workers — Maximum weekly working time — Reference period — Rolling or fixed nature — Derogation — Police officers)

In Case C-254/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 4 April 2018, received at the Court on 12 April 2018, in the proceedings

Syndicat des cadres de la sécurité intérieure

v

Premier ministre,

Ministre de l'Intérieur,

Ministre de l'Action et des Comptes publics,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, T. von Danwitz, E. Levits, C. Vajda (Rapporteur) and P.G. Xuereb, Judges,

Advocate General: G. Pitruzzella,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 29 November 2018,

after considering the observations submitted on behalf of:

– the Syndicat des cadres de la sécurité intérieure, by P. Gernez, avocat,

– the French Government, by R. Coesme, A.-L. Desjonquères and E. de Moustier, acting as Agents,

– the European Commission, by C. Valero and by M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 February 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6(b), Article 16(b), Article 17(3) and the first paragraph of Article 19 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 (OJ 2003 L 299, p. 9).

2 The request has been made in proceedings between, on the one hand, the Syndicat des cadres de la sécurité intérieure (Union of higher-ranking security forces personnel; 'the SCSI') and, on the other hand, the Premier ministre (Prime Minister, France), the ministre de l'Intérieur (Minister for the Interior, France) and the ministre de l'Action et des Comptes publics (Minister for the Public Sector and Public Accounts, France) concerning the reference period used to calculate the average weekly working time of active officials of the national police force.

Legal context

EU law

Directive 89/391/EEC

3 Article 2 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 (OJ 1989 L 183, p. 1) states:

'1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.'

Directive 2003/88

4 Recital 15 of Directive 2003/88 is worded as follows:

‘In view of the question likely to be raised by the organisation of working time within an undertaking, it appears desirable to provide for flexibility in the application of certain provisions of this Directive, whilst ensuring compliance with the principles of protecting the safety and health of workers.’

5 Article 1 of Directive 2003/88 states:

‘...

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and

(b) certain aspects of night work, shift work and patterns of work.

3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Articles 14, 17, 18 and 19 of this Directive.

...

4. The provisions of Directive 89/391/EEC are fully applicable to the matters referred to in paragraph 2, without prejudice to more stringent and/or specific provisions contained in this Directive.’

6 Article 3 of Directive 2003/88, which concerns 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 Article 5 of that directive, entitled ‘Weekly rest period’, provides:

‘Member States shall take the measures necessary to ensure that, per each seven-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.

...’

8 Article 6 of Directive 2003/88, entitled ‘Maximum weekly working time’, reads as follows:

‘Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

...

(b) the average working time for each seven-day period, including overtime, does not exceed 48 hours.’

9 Article 16 of that directive, entitled ‘Reference periods’, provides:

‘Member States may lay down:

...

(b) for the application of Article 6 (maximum weekly working time), a reference period not exceeding four months.

The periods of paid annual leave, granted in accordance with Article 7, and the periods of sick leave shall not be included or shall be neutral in the calculation of the average;

...’

10 Article 17 of Directive 2003/88 provides for, inter alia, the following derogations:

‘...

2. Derogations provided for in paragraphs 3, 4 and 5 may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection.

3. In accordance with paragraph 2 of this Article, derogations may be made from Articles 3, 4, 5, 8 and 16:

...

(b) in the case of security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms;

(c) in the case of activities involving the need for continuity of service or production ...

...’

11 Article 19 of that directive, entitled ‘Limitations to derogations from reference periods’, states in the first and second paragraphs:

‘The option to derogate from Article 16(b), provided for in Article 17(3) and in Article 18, may not result in the establishment of a reference period exceeding six months.

However, Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months.’

French law

12 Article 3 of décret No 2000-815, du 25 août 2000, relatif à l’aménagement et à la réduction du temps de travail dans la fonction publique de l’État et dans la magistrature (Decree No 2000-815

of 25 August 2000 on the organisation of, and reduction in, working time in the public sector and in the judiciary) (JORF of 29 August 2000, p. 13301), as amended by décret No 2011-184 du 15 février 2011 (Decree No 2011-184 of 15 February 2011) (JORF of 17 February 2011, p. 2963), provides:

'I. – The organisation of work must comply with the minimum guarantees set out below.

The actual period of weekly working time, including overtime, may not exceed 48 hours in any one week, or 44 hours per week when averaged over any period of 12 consecutive weeks, and weekly rest, including in principle Sundays, cannot be less than 35 hours.

...

II. – Derogations from the rules set out in [point] I may be made only in the following cases and under the following conditions:

(a) Where the purpose itself of the public service in question requires that service to be provided on a permanent basis, in particular for the protection of persons and property, by decree in the Conseil d'État (Council of State), made following the opinion of the Health and Safety Committee, where appropriate, the Ministerial Technical Committee and the Conseil supérieur de la fonction publique (Higher Council of the Civil Service), which determines measures to compensate the categories of agents concerned;

...'

13 Article 1 of décret No 2002-1279, du 23 octobre 2002, portant dérogations aux garanties minimales de durée du travail et de repos applicables aux personnels de la police nationale (Decree No 2002-1279 of 23 October 2002 derogating from the minimum guaranteed working hours and periods of rest applicable to staff of the national police) (JORF of 25 October 2002, p. 17681), as amended by décret No 2017-109, du 30 janvier 2017 (Decree No 2017-109 of 30 January 2017) (JORF of 31 January 2017), is worded as follows:

'For the purpose of organising the work of active officials of the national police force, derogations from the minimum guarantees referred to in point I of Article 3 of the abovementioned Decree of 25 August 2000 shall apply where the tasks relating to public order and public safety, criminal investigations and intelligence gathering entrusted to such officials so require.

This derogation must, nonetheless, comply with the following conditions:

1. The measured weekly working time for each seven-day period, including overtime, may not exceed, on average, 48 hours in the course of a six-month period in a calendar year;

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 It is apparent from the order for reference that Decree No 2002-1279, as amended by Decree No 2017-109, lays down specific rules concerning working time and rest periods applicable to staff of the French national police force. That decree provides inter alia, in Article 1, that the measured weekly working time for each seven-day period, including overtime, may not exceed, on average, 48 hours in the course of a six-month period in a calendar year.

15 On 28 March 2017, the SCSI brought proceedings before the Conseil d'État (Council of State, France) seeking the annulment of that provision. The SCSI argues, in particular, that by using, for the calculation of the average weekly working time, a reference period expressed in six-month periods in the calendar year, and not a six-month reference period the start and end of which change with the passage of time, that provision fails to comply with the rules set out in Directive 2003/88.

16 The referring court is seeking to ascertain whether Article 6, in conjunction with Article 16, of Directive 2003/88 must be interpreted as imposing a reference period determined on a rolling basis or as allowing the Member States to choose whether to employ a rolling or a fixed reference period.

17 The referring court is also unsure, in the event that a rolling reference period alone is possible, whether that period may still be rolling in nature when it is extended to six months by virtue of the derogation provided for in Article 17(3(b) of Directive 2003/88.

18 In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Articles 6 and 16 of Directive [2003/88] be interpreted as imposing a reference period determined on a rolling basis or as allowing Member States to choose whether to employ a rolling or a fixed reference period?

(2) If those provisions are to be interpreted as requiring a rolling reference period, may the possibility afforded by Article 17 to derogate from Article 16(b) relate not only to the duration of the reference period but also to the requirement for a rolling period?'

Consideration of the questions referred

19 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 6(b), Article 16(b) and the first paragraph of Article 19 of Directive 2003/88 must be interpreted as precluding national legislation which lays down, for the purpose of the calculation of the average weekly working time, reference periods which start and end on fixed calendar dates, and not reference periods determined on a rolling basis.

20 Under Article 6(b) of that directive, 'the average working time for each seven-day period, including overtime, does not exceed 48 hours'.

21 Article 16(b) of that directive provides that the Member States may lay down, for the purpose of the calculation of the average weekly working time, a reference period not exceeding four months.

22 The reference period referred to in Article 16(b) of Directive 2003/88 may, pursuant to the first paragraph of Article 19 of that directive, be extended by way of derogation to up to six months in certain cases or for certain activities specified in particular in Article 17(3) of that directive, such as 'security and surveillance activities requiring a permanent presence in order to protect property and persons' or 'activities involving the need for continuity of service or production'. In the case in the main proceedings, the French Republic applied that derogation regime to active officials of the national police services.

23 It is thus clear from the provisions cited in paragraphs 21 and 22 of the present judgment that the average weekly working time may be calculated not over seven-day periods but over periods known as 'reference' periods of up to four months under the standard regime and of up to six months under the derogating regime. The calculation of the average weekly working time over such reference periods seeks, in accordance with recital 15 of Directive 2003/88, to provide for flexibility in the application of Article 6(b) of that directive, so that, should the maximum weekly working time be exceeded at certain times of the reference period, a corresponding reduction in working time may offset that excess at other times of the period. Therefore, an equal division of the number of working hours is not required over the entire duration of the reference period (judgment of 9 November 2017, *Maio Marques da Rosa*, C-306/16, EU:C:2017:844, paragraph 43).

24 It is also apparent from the provisions cited in paragraphs 21 and 22 of the present judgment that the concept of 'reference period' is, first, a single notion which has the same meaning under the standard regime and the derogating regime and, second, a concept that does not contain any reference to the national law of the Member States and must therefore be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union, irrespective of how it may be characterised in the Member States, taking into account the wording of the provisions at issue and also their context and the purpose of the rules of which they form part (see, by analogy, judgment of 9 November 2017, *Maio Marques da Rosa*, C-306/16, EU:C:2017:844, paragraph 38 and the case-law cited).

25 It is therefore necessary to determine, in the light of the wording and context of Articles 16 and 19 of Directive 2003/88 and of the objectives of that directive, whether the reference periods can be defined as periods which start and end on fixed calendar dates, namely fixed reference periods, or as periods the start and end of which move on a permanent basis with the passage of time, namely rolling reference periods.

26 In the first place, the fact remains, as noted by the Advocate General in point 46 of his Opinion, that Articles 16 and 19 of Directive 2003/88 have nothing to say on the question whether the reference periods must be determined on a fixed or on a rolling basis and that, therefore, the wording of those articles does not preclude the use of one of those methods more than that of the other.

27 In the second place, the context of Articles 16 and 19 of Directive 2003/88 also does not provide, as the Advocate General observed in point 58 of his Opinion, an answer to that question.

28 It is true, as the French Government and the European Commission noted in their written observations, that the Court has found, regarding the 'seven-day period' referred to in Article 5 of Directive 2003/88 concerning weekly rest and characterised by the Court as a 'reference period', within the meaning of that directive, that a reference period may be defined in that context as a set period within which a certain number of consecutive rest hours must be provided irrespective of when those rest hours are granted (judgment of 9 November 2017, *Maio Marques da Rosa*, C-306/16, EU:C:2017:844, paragraph 43). The French Government infers from the use of the word 'set' in paragraph 43 of that judgment that the concept of 'reference period' should rather be understood as a period determined on a fixed basis.

29 However, such an interpretation of paragraph 43 of the judgment of 9 November 2017, *Maio Marques da Rosa* (C-306/16, EU:C:2017:844), cannot be endorsed, as the Advocate General has noted in point 55 of his Opinion. The word 'set' used in that judgment must be understood not as a 'period necessarily coinciding with the calendar year', but as meaning a 'unit of measurement of time', namely, in that judgment, a seven-day period.

30 In the case which gave rise to the judgment of 9 November 2017, *Maio Marques da Rosa* (C-306/16, EU:C:2017:844), the question analysed by the Court concerned not the fixed or rolling nature of the reference period but solely the determination of whether the mandatory day of weekly rest referred to in Article 5 of Directive 2003/88 had to be granted no later than the day following a period of six consecutive working days or whether it had to be granted within each seven-day period. By choosing that latter solution, the Court interpreted a 'set period' as meaning a period of a specific duration, without, however, giving a ruling as to whether the start and end of that period must or must not coincide with the calendar year or, more generally, correspond to fixed dates such as those of the calendar week.

31 It follows from the foregoing that, in the absence of any indication stemming from the wording and context of Articles 16 and 19 of Directive 2003/88, the Member States are, in principle, free to determine reference periods in accordance with their chosen method, subject to respect for the objectives of that directive.

32 As regards, in the third place, the objectives pursued by Directive 2003/88, it must be recalled that it follows from settled case-law that that directive seeks to ensure better protection of the safety and health of workers, by providing in particular, in its Article 6(b), a maximum limit to the average weekly working time. That maximum limit constitutes a particularly important rule of EU social law from which every worker must benefit as a minimum requirement intended to ensure protection of his safety and health (judgments of 14 October 2010, *Fuß*, C-243/09, EU:C:2010:609, paragraphs 32 and 33 and the case-law cited, and of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*, C-266/14, EU:C:2015:578, paragraphs 23 and 24 and the case-law cited).

33 Moreover, in order to ensure that the rights conferred on workers by Directive 2003/88 are fully effective, Member States are under an obligation to guarantee that each of the minimum requirements laid down by the directive is observed and to prevent in particular the maximum average weekly working time as provided for in Article 6(b) of that directive from being exceeded. That interpretation is the only interpretation which meets the objective pursued by that directive, which is to guarantee effective protection of the safety and health of workers by allowing them to have a period of working time which does not, on average, exceed the maximum limit of 48 hours per week over the entire duration of the reference period (see, to that effect, judgments of 7 September 2006, *Commission* v *United Kingdom*, C-484/04, EU:C:2006:526, paragraph 40 and the case-law cited, and of 14 October 2010, *Fuß*, C-243/09, EU:C:2010:609, paragraph 51 and the case-law cited).

34 In that regard, the Court has held that that objective implies that each worker must, inter alia, enjoy adequate rest periods which must not only be effective in enabling the persons concerned to recover from the fatigue engendered by their work, but also preventive in nature, so as to reduce as much as possible the risk of affecting the safety or health of employees which successive periods of work without the necessary rest are liable to engender (see, to that effect, judgment of 7 September 2006, *Commission* v *United Kingdom*, C-484/04, EU:C:2006:526, paragraph 41 and the case-law cited).

35 It must also be noted that, as is apparent from recital 15 of Directive 2003/88, the flexibility provided by the directive in Articles 16 and 19 as regards the application, in particular, of Article 6(b) of that directive is without prejudice to compliance with the principles of the protection of the safety and health of workers.

36 Furthermore, it follows from the case-law of the Court that the derogations provided for in Article 17 of Directive 2003/88 must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected (see, to that effect, judgments of 26 July 2017, *Hälvä and Others*, C-175/16, EU:C:2017:617, paragraph 31, and of 21 February 2018, *Matzak*, C-518/15, EU:C:2018:82, paragraph 38).

37 It is in the light of those considerations that it is appropriate to determine whether both fixed reference periods and rolling reference periods comply with the objective of Directive 2003/88 consisting in guaranteeing the effective protection of the safety and health of workers.

38 In that regard, it must be noted that fixed and rolling reference periods comply, in themselves, with that objective of Directive 2003/88, in that they make it possible to verify that a worker does not work more than 48 hours on average per week over the entire duration of the period in question and that the requirements relating to his health and safety are thus met. For that purpose, it is irrelevant whether the start and end of the reference period are determined according to fixed calendar dates or according to the passage of time.

39 The effect of fixed reference periods on the safety and health of workers depends nevertheless on all the relevant circumstances, such as the nature of the work and its conditions, as well as, in particular, the maximum limit on weekly working time and the duration of the reference period adopted by the Member State concerned. As all the parties to the proceedings have agreed, fixed reference periods may, in contrast to rolling reference periods, create situations in which the objective of protecting the health and safety of workers may not be met.

40 In that regard, it must be noted that the fixed reference period method may lead an employer to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work and, while respecting the rest periods referred to in Articles 3 and 5 of Directive 2003/88, consequently make that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration. Such a situation cannot arise when the reference period is determined on a rolling basis, since, by definition, rolling reference periods lead to a continuous recalculation of the average weekly working time.

41 Thus, while fixed and rolling reference periods, taken separately, comply, in themselves, with the objective of protecting the health and safety of workers, the combination of two consecutive fixed reference periods may, depending on the maximum weekly working time and the duration of the reference period adopted by the Member State concerned, lead to situations in which that objective may be jeopardised, even though the rest periods referred to in Articles 3 and 5 of Directive 2003/88 have been respected.

42 In the present case, the French Republic did not only exhaust the margin granted to it by Directive 2003/88 in relation to the maximum weekly working time, by setting it at 48 hours, but it also invoked the derogation provided for in Article 17(3) of that directive, read in conjunction with the first paragraph of Article 19 thereof, to extend to six months the reference period used for calculating the maximum average weekly working time. In those circumstances, the use of fixed reference periods does not ensure that the maximum average weekly working time of 48 hours is respected during any six-month period straddling two consecutive fixed reference periods.

43 In the light of the case-law referred to in paragraphs 32 and 33 of the present judgment, it must be considered that the attainment of the objective of Directive 2003/88 would be compromised

if the use of fixed reference periods was not accompanied by mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods.

44 It must also be recalled that, pursuant to the second paragraph of Article 19 of Directive 2003/88, when a Member State wishes to extend the reference period beyond six months, a collective agreement or an agreement between the two sides of industry is necessary for that purpose. In the event that a reference period referred to in the first paragraph of Article 19 of that directive is determined on a fixed basis, this may lead to a situation in which a worker may be forced to work, during a six-month period straddling two consecutive fixed reference periods, in excess of 48 hours per week on average, without a collective agreement or an agreement between the two sides of industry having been concluded for that purpose. Thus, that straddling period may lead to situations which are in actual fact possible only in the context of a reference period referred to in the second paragraph of Article 19 of that directive. Such an outcome would undermine the derogation provided for in that provision.

45 It is consequently for the referring court to verify whether the national legislation at issue in the main proceedings has provided for mechanisms which, as is apparent from paragraph 43 of the present judgment, make it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods.

46 Moreover, it must be noted that the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (judgment of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 22 and the case-law cited).

47 As regards more specifically the principle of effectiveness, the referring court must in particular examine the effectiveness of the remedies available to the workers concerned under national law in order to bring promptly to an end, where appropriate by accelerated procedures or interlocutory proceedings, any practice which does not comply with the requirements of Article 6(b) of Directive 2003/88, as correctly transposed into national law.

48 In the light of all of the foregoing considerations, the answer to the questions referred is that Article 6(b), Article 16(b) and the first paragraph of Article 19 of Directive 2003/88 must be interpreted as not precluding national legislation which lays down, for the purpose of calculating the average weekly working time, reference periods which start and end on fixed calendar dates, provided that that legislation contains mechanisms which make it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 6(b), Article 16(b) and the first paragraph of Article 19 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 not precluding national legislation which lays down, for the purpose of calculating the average weekly working time, reference periods which start and end on fixed calendar dates, provided that that legislation contains mechanisms which make it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods.

[Signatures]

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* Language of the case: French.