ECLI:EU:C:2019:402

JUDGMENT OF THE COURT (Grand Chamber)

14 May 2019 (*)

(Reference for a preliminary ruling — Social policy — Protection of the safety and health of workers — Organisation of working time — Article 31(2) of the Charter of Fundamental Rights of the European Union — Directive 2003/88/EC — Articles 3 and 5 — Daily and weekly rest — Article 6 — Maximum weekly working time — Directive 89/391/EEC — Safety and health of workers at work — Requirement to set up a system enabling the duration of time worked each day by each worker to be measured)

In Case C-55/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Audiencia Nacional (National High Court, Spain), made by decision of 19 January 2018, received at the Court on 29 January 2018, in the proceedings

Federación de Servicios de Comisiones Obreras (CCOO)

v

Deutsche Bank SAE,

intervener:

Federación Estatal de Servicios de la Unión General de Trabajadores (FES-UGT),

Confederación General del Trabajo (CGT),

Confederación Solidaridad de Trabajadores Vascos (ELA),

Confederación Intersindical Galega (CIG),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, J.-C. Bonichot, A. Arabadjiev, E. Regan (Rapporteur), T. von Danwitz, F. Biltgen, K. Jürimäe and C. Lycourgos, Presidents of Chambers, J. Malenovský, E. Levits, L. Bay Larsen, M. Safjan, D. Šváby, C. Vajda and P.G. Xuereb, Judges,

Advocate General: G. Pitruzzella,

Registrar: L. Carrasco Marco, administrator,

having regard to the written procedure and further to the hearing on 12 November 2018,

after considering the observations submitted on behalf of:

– the Federación de Servicios de Comisiones Obreras (CCOO), by A. García López, abogado,

– Deutsche Bank SAE, by J.M. Aniés Escudé, abogado,

– the Federación Estatal de Servicios de la Unión General de Trabajadores (FES-UGT), by J.F. Pinilla Porlan and B. García Rodríguez, abogados,

– the Spanish Government, by S. Jiménez García, acting as Agent,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the United Kingdom Government, by Z. Lavery, acting as Agent, and by R. Hill, Barrister,

– the European Commission, by N. Ruiz García and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 31(2) of the Charter of Fundamental Rights of the European Union (‘the Charter’), Articles 3, 5, 6, 16 and 22 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) and Article 4(1), Article 11(3), and Article 16(3) 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).

2 The request has been made in proceedings between the Federación de Servicios de Comisiones Obreras (CCOO) and Deutsche Bank SAE concerning the lack of a system for recording the time worked each day by the workers employed by the latter.

Legal context

European Union law

Directive 89/391

3 Article 4(1) of Directive 89/391 provides:

‘Member States shall take the necessary steps to ensure that employers, workers and workers’ representatives are subject to the legal provisions necessary for the implementation of this Directive.’

4 Article 6(1) of that directive provides:

‘Within the context of his responsibilities, the employer shall take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organisation and means.

…’

5 Article 11(3) of the directive provides:

‘Workers’ representatives with specific responsibility for the safety and health of workers shall have the right to ask the employer to take appropriate measures and to submit proposals to him to that end to mitigate hazards for workers and/or to remove sources of danger.’

6 Article 16(3) of the same directive provides:

‘The provisions of this Directive shall apply in full to all the areas covered by the individual Directives, without prejudice to more stringent and/or specific provisions contained in these individual Directives.’

Directive 2003/88

7 Recitals 3 and 4 of Directive 2003/88 state:

‘(3) The provisions of [Directive 89/391] remain fully applicable to the areas covered by this Directive without prejudice to more stringent and/or specific provisions contained herein.

(4) The improvement of workers’ safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.’

8 Article 1 of Directive 2003/88, headed ‘Purpose and scope’, provides:

‘…

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.

…

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

9 Article 3 of that directive, entitled '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.'

10 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.

If objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied.'

11 Article 6 of Directive 2003/88, entitled 'Maximum weekly working time', provides:

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

(a) the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

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

12 Article 16 of Directive 2003/88 specifies the maximum periods of reference for the application of Articles 5 and 6 thereof.

13 Article 17 of that directive, under the heading 'Derogations', provides in paragraph 1 thereof as follows:

'With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Articles 3 to 6, 8 and 16 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:

(a) managing executives or other persons with autonomous decision-taking powers;

(b) family workers; or

(c) workers officiating at religious ceremonies in churches and religious communities. '

14 Article 19 of Directive 2003/88 concerns the limitations to the derogations from reference periods laid down in that directive.

15 Under Article 22(1) of that directive:

‘A Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

(a) no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in Article 16(b), unless he has first obtained the worker’s agreement to perform such work;

…

(c) the employer keeps up-to-date records of all workers who carry out such work;

(d) the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours;

…’

Spanish law

16 The Estatuto de los Trabajadores (Workers’ Statute), in the version following Real Decreto Legislativo 2/2015 por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 2/2015 approving the consolidated text of the Workers’ Statute) of 23 October 2015 (BOE No 255, of 24 October 2015, p. 100224) (‘the Workers’ Statute’) provides in Article 34, entitled ‘Working time’:

‘1. The duration of working time shall be as specified in collective agreements or employment contracts.

Normal working time shall average no more than 40 hours per week of actual work, calculated on an annual basis.

…

3. There must be at least 12 hours between the end of one period of work and the beginning of the following period of work.

The number of normal hours of actual work shall not exceed nine hours per day unless a different pattern of daily working time applies by virtue of a collective agreement or, failing that, by agreement between the employer and the representatives of the workers, subject in all cases to compliance with the rest period between two periods of work.

…’

17 Article 35 of the Workers’ Statute, entitled ‘Overtime’, provides:

‘1. Hours worked in excess of the maximum normal working time fixed in accordance with the preceding article shall constitute overtime. …

2. Overtime shall not exceed 80 hours per annum …

…

4. Overtime shall be voluntary, unless that work was agreed in a collective agreement or in an individual contract of work, within the limitations laid down in paragraph 2.

5. For the purpose of calculating overtime, every worker's working time shall be recorded on a daily basis and the total calculated at the time fixed for payment of remuneration. Workers shall be given a copy of the summary with the corresponding payslip.'

18 Real Decreto 1561/1995 sobre jornadas especiales de trabajo (Royal Decree 1561/1995 on special working time) of 21 September 1995 (BOE No 230, of 26 September 1995, p. 28606), provides in its third supplementary provision, entitled 'Powers of workers' representatives in connection with working time':

'Without prejudice to the powers of workers' representatives in connection with working time under the Workers' Statute and this Royal Decree, those representatives shall have the right:

…

(b) to be informed each month by the employer of any overtime worked by the workers, irrespective of the form of compensation adopted. To that end, they shall receive a copy of the summary referred to in Article 35(5) of the Workers' Statute.'

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

19 On 26 July 2017, CCOO, a workers' union which is part of a trade union organisation represented at national level in Spain, brought a group action before the Audiencia Nacional (National High Court, Spain) against Deutsche Bank, seeking a judgment declaring the bank to be under an obligation, under Article 35(5) of the Workers' statute and the third supplementary provision of Royal Decree 1561/1995, to set up a system for recording the time worked each day by its members of staff, in order to make it possible to verify compliance with, first, the working times stipulated and, second, the obligation to provide union representatives with information on overtime worked each month.

20 According to CCOO, the obligation to set up such a recording system is derived from Articles 34 and 35 of the Workers' Statute, as interpreted in the light of Article 31(2) of the Charter, Articles 3, 5, 6, and 22 of Directive 2003/88, as well as the Hours of Work (Industry) Convention (No 1) and the Hours of Work (Commerce and Offices) Convention (No 30), adopted by the International Labour Organisation in Washington on 28 November 1919, and Geneva on 28 June 1930, respectively.

21 Deutsche Bank submits, on the other hand, that it follows from judgments No 246/2017 of 23 March 2017 (REC 81/2016) and No 338/2017 of 20 April 2017 (REC 116/2016) of the Tribunal Supremo (Supreme Court, Spain) that Spanish law does not lay down such an obligation of general application.

22 The Audiencia Nacional (National High Court) observes that despite numerous rules on working time, flowing from a wide range of national sectoral collective conventions and company collective agreements, which apply to Deutsche Bank, the latter has not set up within its organisation any system for recording the time worked by its staff members that enables the verification of observance of the working hours agreed and calculation of overtime hours that may

be worked. In particular, Deutsche Bank uses a computer application (absences calendar) which enables exclusively whole day absences to be recorded, such as holidays or other leave, without however measuring the duration of time worked by each worker or the number of overtime hours worked.

23 The Audiencia Nacional (National High Court) also observes that Deutsche Bank has not complied with the request by the Inspección de Trabajo y Seguridad Social de las provincias de Madrid y Navarra (Employment and Social Security Inspectorate for the Madrid and Navarre provinces, Spain) to set up a system of recording time worked each day and that the inspectorate subsequently drew up a notice of infringement containing a proposal to impose a penalty. That proposal for a penalty was however rejected following the judgment of the Tribunal Supremo (Supreme Court) of 23 March 2017, cited in paragraph 21 above.

24 The Audiencia Nacional (National High Court) states that it is clear from the case-law of the Tribunal Supremo (Supreme Court), cited in paragraph 21 above, that Article 35(5) of the Workers' Statute merely requires, except where there is an agreement to the contrary, that a record be kept of overtime hours worked by workers and the communication, at the end of each month, to workers and their representatives of the number of hours of overtime thus worked.

25 According to the Audiencia Nacional (National High Court), that case-law rests on the following considerations. First, the obligation to keep a record is laid down in Article 35 of the Workers' Statute, which concerns overtime hours, and not Article 34 of that Statute which concerns 'normal' working time, defined as working time which does not exceed maximum working time. Second, on all occasions when the Spanish legislature wished to require time worked to be recorded, it provided for that specifically, as in the case of part-time workers and mobile workers working in the merchant navy or rail transport. Third, Article 22 of Directive 2003/88, like Spanish law, lays down the obligation to maintain a record of time worked in particular cases, but not an obligation to maintain a record of 'normal' working time. Fourth, establishing a record of time worked by each worker would involve processing personal data with the risk of an unjustified interference in the private lives of workers. Fifth, the failure to keep such a record cannot be regarded as a clear and manifest infringement under the national law concerning infringements and penalties in social matters. Sixth, the case-law of the Tribunal Supremo (Supreme Court) does not prejudice workers' rights since Article 217(6) of Ley de Enjuiciamiento Civil 1/2000 (Civil Procedure Law 1/2000), of 7 January 2000, (BOE No 7, of 8 January 2000, p. 575), while not allowing it to be presumed that hours of overtime were worked in the absence of a record of 'normal' time worked, is nevertheless unfavourable to an employer that has not kept such a record where the worker proves by other means that he or she has worked overtime hours.

26 The Audiencia Nacional (National High Court) has doubts as to whether the interpretation of Article 35(5) of the Workers' Statute adopted by the Tribunal Supremo (Supreme Court) is consistent with EU law. The referring court observes, first of all, that a 2016 survey of the work force in Spain revealed that 53.7% of overtime worked had not been recorded. In addition, it was clear from two reports by the Dirección General de Empleo del ministerio de Empleo y Seguridad Social (Directorate-General for Employment of the Spanish Ministry of Employment and Social Security) of 31 July 2014 and 1 March 2016, that it was necessary, in order to determine whether overtime was worked, to know precisely the number of normal hours worked. That explains why the employment inspectorate asked Deutsche Bank to establish systems for recording time worked by each worker, since such a system was regarded as the only means of verifying whether the maximum limits laid down were exceeded in the course of a reference period. The interpretation of Spanish law by the Tribunal Supremo (Supreme Court) would in practice, first, deprive workers of a source of evidence essential for demonstrating that they have worked in excess of maximum

working time limits and, second, deprive their representatives of the necessary means for verifying whether the applicable rules on the matter were complied with, such that the monitoring of compliance with working times and rest periods depended upon the employer's good will.

27 According to the referring court, in such a situation, Spanish national law is not capable of ensuring effective compliance with the obligations laid down by Directive 2003/88 as regards minimum rest periods and maximum weekly working time, nor, as regards the rights of workers' representatives, the obligations flowing from Directive 89/391.

28 In those circumstances, the Audiencia Nacional (National High Court, Spain) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must it be understood that by Articles 34 and 35 of the Workers' Statute, as they have been interpreted by [Spanish] case-law, the Kingdom of Spain has taken the measures necessary to ensure the effectiveness of the limits to working time and of the weekly and daily rest periods established by Articles 3, 5 and 6 of [Directive 2003/88] for full-time workers who have not expressly agreed, whether individually or collectively, to work overtime and who are not mobile workers or persons working in the merchant navy or railway transport?

(2) Must Article 31(2) of [the Charter] and Articles 3, 5, 6, 16 and 22 of [Directive 2003/88], read in conjunction with Articles 4(1), 11(3) and 16(3) of [Directive 89/391], be interpreted as precluding internal national legislation such as Articles 34 and 35 of the Workers' Statute from which, as settled [Spanish] case-law has determined, it cannot be inferred that employers must set up a system for recording actual daily working time [worked] by full-time workers who have not expressly agreed, whether individually or collectively, to work overtime and who are not mobile workers or persons working in the merchant navy or railway transport?

(3) Must the mandatory requirement laid down in Article 31(2) of [the Charter] and Articles 3, 5, 6, 16 and 22 of [Directive 2003/88], read in conjunction with Articles 4(1), 11(3) and 16(3) of [Directive 89/391] for the Member States to limit the working time of all workers generally, be understood to be satisfied for ordinary workers by the internal national legislation, contained in Articles 34 and 35 of the Workers' Statute from which, as settled [Spanish] case-law has determined, it cannot be inferred that employers are required to set up a system for recording actual daily working time for full-time workers who have not expressly agreed, whether individually or collectively, to work overtime, unlike mobile workers or persons working in the merchant navy or railway transport?'

Consideration of the questions referred

29 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 3, 5, 6, 16 and 22 of Directive 2003/88, read in conjunction with Article 4(1), Article 11(3) and Article 16(3) of Directive 89/391 and Article 31(2) of the Charter, must be interpreted as precluding a law of a Member State that, according to the interpretation given to it by national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured.

30 As a preliminary matter, it must be recalled that the right of every worker to a limitation of maximum working hours and to daily and weekly rest periods not only constitutes a rule of EU social law of particular importance, but is also expressly enshrined in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties (see, to that effect, the judgments of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01,

EU:C:2004:584, paragraph 100, and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 20).

31 The provisions of Directive 2003/88, in particular Articles 3, 5 and 6, give specific form to that fundamental right and must, therefore, be interpreted in the light of the latter (see, to that effect, the judgments of 11 September 2014, *A*, C-112/13, EU:C:2014:2195, paragraph 51 and the case-law cited, and of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 85).

32 In particular, in order to ensure respect for that fundamental right, the provisions of Directive 2003/88 may not be interpreted restrictively at the expense of the rights that workers derive from it (see, by analogy, judgment of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 38 and the case-law cited).

33 In those circumstances, it is necessary, for the purpose of answering the questions referred, to interpret the latter directive having regard to the importance of the fundamental right of every worker to a limitation on the maximum number of working hours and to daily and weekly rest periods.

34 In that regard it must be noted, first of all, that the referring court's second and third questions refer, inter alia, to Article 22 of Directive 2003/88, paragraph 1 of which provides that if Member States have recourse to the option of not applying Article 6 concerning maximum weekly working time, they must, inter alia, ensure, by taking the measures necessary for that purpose, that the employer keeps up-to-date records of all the workers concerned and that those records are placed at the disposal of the competent authorities.

35 However, as became clear from the oral exchanges at the hearing, the Kingdom of Spain has not availed itself of that option. Therefore, Article 22 of Directive 2003/88 is not applicable in the case in the main proceedings and, consequently, it is not necessary to interpret that provision in the present case.

36 Having made that clarification, it is necessary to recall that the purpose of Directive 2003/88 is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time (see, inter alia, the judgments of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, paragraph 37; of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*, C-266/14, EU:C:2015:578, paragraph 23; and of 20 November 2018, *Sindicatul Familia Constanţa and Others*, C-147/17, EU:C:2018:926, paragraph 39).

37 That harmonisation at European Union level in relation to the organisation of working time is intended to guarantee better protection of the safety and health of workers by ensuring that they are entitled to minimum rest periods — particularly daily and weekly — as well as adequate breaks, and by providing for a ceiling on the duration of the working week (see, inter alia, the judgments of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 76; of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 43; and of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*, C-266/14, EU:C:2015:578, paragraph 23).

38 Thus, the Member States are required, under Articles 3 and 5 of Directive 2003/88, to 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 and, during each 7-day period, to a minimum uninterrupted

rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3 (judgment of 7 September 2006, *Commission* v *United Kingdom*, C-484/04, EU:C:2006:526, paragraph 37).

39 Furthermore, Article 6(b) of Directive 2003/88 requires the Member States to fix a 48-hour limit for average weekly working time, a maximum which is expressly stated to include overtime, and from which, otherwise than in a situation, which is not relevant in the present case, covered by Article 22(1) of the directive, no derogation whatsoever may be made in any case, even with the consent of the worker concerned (see, to that effect, judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 33 and the case-law cited).

40 In order to ensure that Directive 2003/88 is fully effective, the Member States must ensure that those minimum rest periods are observed and prevent the maximum weekly working time laid down in Article 6(b) of Directive 2003/88 from being exceeded (judgment of 14 October 2010, *Fuß*, C-243/09, EU:C:2010:609, paragraph 51 and the case-law cited).

41 It is true that Articles 3, 5 and 6(b) of Directive 2003/88 do not establish the specific arrangements by which the Member States must ensure the implementation of the rights that they lay down. As is clear from their wording, those provisions leave the Member States to adopt those arrangements, by taking the 'measures necessary' to that effect (see, to that effect, judgment of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, paragraph 55).

42 While Member States thus enjoy a discretion for that purpose, it remains the case that, having regard to the essential objective pursued by Directive 2003/88, which is to ensure the effective protection of the living and working conditions of workers and better protection of their safety and health, they are required to ensure that the effectiveness of those rights is guaranteed in full, by ensuring that workers actually benefit from the minimum daily and weekly rest periods and the limitation on the duration of average weekly working time laid down in that directive (see, to that effect, judgments of 1 December 2005, *Dellas and Others*, C-14/04, EU:C:2005:728, paragraph 53; of 7 September 2006, *Commission* v *United Kingdom*, C-484/04, EU:C:2006:526, paragraphs 39 and 40; and of 14 October 2010, *Fuß*, C-243/09, EU:C:2010:609, paragraph 64).

43 It follows that the arrangements made by the Member States to implement the requirements of Directive 2003/88 must not be liable to render the rights enshrined in Article 31(2) of the Charter and Articles 3, 5 and 6(b) of that directive meaningless (see, to that effect, judgment of 7 September 2006, *Commission* v *United Kingdom*, C-484/04, EU:C:2006:526, paragraph 44).

44 In that regard, it must be recalled that the worker must be regarded as the weaker party in the employment relationship and that it is therefore necessary to prevent the employer from being in a position to impose a restriction of his rights on him (judgments of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 82; of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 80; and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 41).

45 Similarly, it must be observed that, on account of that position of weakness, a worker may be dissuaded from explicitly claiming his rights vis-à-vis his employer where, in particular, doing so may expose him to measures taken by the employer likely to affect the employment relationship in a manner detrimental to that worker (see, to that effect, judgments of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 81, and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 41).

46 Whether, and to what extent, it is necessary to set up a system enabling the duration of time worked each day by each worker to be measured in order to ensure effective compliance with maximum weekly working time and minimum daily and weekly rest periods must be examined in the light of those general considerations.

47 In that regard, it must be observed, as the Advocate General notes in points 57 and 58 of his Opinion, that in the absence of such a system, it is not possible to determine objectively and reliably either the number of hours worked by the worker and when that work was done, or the number of hours worked beyond normal working hours, as overtime.

48 In those circumstances, it appears to be excessively difficult, if not impossible in practice, for workers to ensure compliance with the rights conferred on them by Article 31(2) of the Charter and by Directive 2003/88, with a view to actually benefiting from the limitation on weekly working time and minimum daily and weekly rest periods provided for by that directive.

49 The objective and reliable determination of the number of hours worked each day and each week is essential in order to establish, first, whether the maximum weekly working time defined in Article 6 of Directive 2003/88, including, in accordance with that provision, overtime, was complied with during the reference period set out in Article 16(b) or Article 19 of that directive and, second, whether the minimum daily and weekly rest periods, defined in Articles 3 and 5 of that directive respectively, were complied with in the course of each 24-hour period, as regards the daily rest period, or in the course of the reference period referred to in Article 16(a) of the same directive, as regards the weekly rest period.

50 Having regard to the fact that, as is clear from the case-law cited in paragraphs 40 and 41 above, the Member States must take all the measures necessary to ensure that minimum rest periods are observed and to prevent maximum weekly working time being exceeded so as to guarantee the full effectiveness of Directive 2003/88, a national law which does not provide for an obligation to have recourse to an instrument that enables the objective and reliable determination of the number of hours worked each day and each week is not capable of guaranteeing, in accordance with the case-law recalled in paragraph 42 above, the effectiveness of the rights conferred by Article 31(2) of the Charter and by this directive, since it deprives both employers and workers of the possibility of verifying whether those rights are complied with and is therefore liable to compromise the objective of that directive, which is to ensure better protection of the safety and health of workers.

51 In that regard it is irrelevant that the maximum weekly working time laid down in the present case by Spanish law may, as the Spanish Government submits, be more favourable to the worker than that provided for in Article 6(b) of Directive 2003/88. It remains the case, as that government itself moreover submitted, that the national provisions adopted in the matter contribute to the transposition into national law of the directive, with which Member States must ensure compliance by adopting the requisite arrangements to that end. In the absence of a system enabling the duration of time worked each day to be measured it remains equally difficult, if not impossible in practice, for a worker to ensure effective compliance with a maximum duration of weekly working time, irrespective of what that maximum duration may be.

52 That difficulty is by no means mitigated by the requirement for employers in Spain to set up, under Article 35 of the Workers' Statute, a system for recording the overtime hours worked by workers who have given their consent in that respect. The classification of hours as 'overtime' presupposes that the amount of time worked by each worker concerned is known and therefore measured beforehand. The requirement to record only overtime hours worked does not therefore provide workers with an effective means of ensuring, first, that the maximum weekly working time

laid down by Directive 2003/88 — which includes overtime hours — is not exceeded and, second, that the minimum daily and weekly rest periods provided for by that directive are observed in all circumstances. In any event, that requirement is not capable of compensating for the lack of a system which, as regards workers who have not consented to work overtime hours, could guarantee actual compliance with rules concerning, inter alia, maximum weekly working time.

53 It is true, in the present case, that it is clear from the case file before the Court that, as Deutsche Bank and the Spanish Government contend, where there is no system enabling working time to be measured, a worker may, under Spanish procedural rules, rely on other sources of evidence, such as, inter alia, witness statements, the production of emails or the consultation of mobile telephones or computers, in order to provide indications of a breach of those rights and thus bring about a reversal of the burden of proof.

54 However, unlike a system that measures time worked each day, 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.

55 In particular, it must be emphasised that, taking into account the worker's position of weakness in the employment relationship, witness evidence cannot be regarded, in itself, as an effective source of evidence capable of guaranteeing actual compliance with the rights at issue, since workers are liable to prove reluctant to give evidence against their employer owing to a fear of measures being taken by the latter which might affect the employment relationship to their detriment.

56 By contrast, a system enabling the time worked by workers each day to be measured offers those workers a particularly effective means of easily accessing objective and reliable data as regards the duration of time actually worked by them and is thus capable of facilitating both the proof by those workers of a breach of the rights conferred on them by Articles 3 and 5 and 6(b) of Directive 2003/88, which give specific form to the fundamental right enshrined in Article 31(2) of the Charter, and also the verification by the competent authorities and national courts of the actual observance of those rights.

57 Nor can it be held that the difficulties resulting from there being no system enabling the duration of time worked each day by each worker to be measured may be surmounted through the powers to investigate and impose penalties conferred by national law on supervisory bodies, such as the employment inspectorate. Indeed, in the absence of such a system, those authorities are themselves deprived of an effective means of obtaining access to objective and reliable data as to the duration of time worked by the workers in each undertaking, which may prove necessary in order to exercise their supervisory function and, where appropriate, impose a penalty (see, to that effect, the judgment of 30 May 2013, *Worten*, C-342/12, EU:C:2013:355, paragraph 37 and the case-law cited).

58 It follows that in the absence of a system enabling the time worked each day by each worker to be measured there is nothing to ensure, as is clear moreover from the elements provided by the referring court referred to in paragraph 26 above, that actual compliance with the right to a limitation on maximum working time and minimum rest periods conferred by Directive 2003/88 is fully guaranteed to workers, since that compliance is left to the discretion of the employer.

59 While it is true that the employer's responsibility for observance of the rights conferred by Directive 2003/88 cannot be without limits, it remains the case that the law of a Member State that, according to the interpretation given to it by national case-law, does not require the employer to

measure the duration of time worked, is liable to render the rights enshrined in Articles 3, 5 and 6(b) of that directive meaningless by failing to ensure, for workers, actual compliance with the right to a limitation on maximum working time and minimum rest periods, and is therefore incompatible with the objective of that directive, in which those minimum requirements are considered to be essential for the protection of workers' health and safety (see, by analogy, judgment of 7 September 2006, *Commission* v *United Kingdom*, C-484/04, EU:C:2006:526, paragraph 43 and 44).

60 Consequently, in order to ensure the effectiveness of those rights provided for in Directive 2003/88 and of the fundamental right enshrined in Article 31(2) of the Charter, 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.

61 That conclusion is corroborated by the provisions of Directive 89/391. As is clear from Article 1(2) and (4) and recital 3 of Directive 2003/88 and Article 16(3) of Directive 89/391, the latter directive is fully applicable to matters of minimum daily and weekly rest periods and maximum weekly working time, without prejudice to more stringent and/or specific provisions contained in Directive 2003/88.

62 In that regard, the introduction of an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured falls within the general obligation, for Member States and employers, laid down in Article 4(1) and Article 6(1) of Directive 89/391, to provide the organisation and means necessary for the protection of the safety and health of workers. Moreover, such a system is necessary in order to enable worker representatives, who have a specific responsibility in respect of the protection of the safety and health of workers, to exercise their right, laid down in Article 11(3) of that directive, to ask the employer to take appropriate measures and to submit proposals to it.

63 Nevertheless, in accordance with the case-law recalled in paragraph 41 above, it is for the Member States, in the exercise of their discretion in that regard, to determine, as the Advocate General has stated in points 85 to 88 of his Opinion, the specific arrangements for implementing such a system, in particular the form that it must take, having regard, as necessary, to the particular characteristics of each sector of activity concerned, or the specific characteristics of certain undertakings concerning, inter alia, their size, and without prejudice to Article 17(1) of Directive 2003/88, which permits Member States, while having due regard for the general principles of the protection of the safety and health of workers, to derogate, inter alia, from Articles 3 to 6 of that directive, 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.

64 The foregoing considerations are not undermined by the fact that certain specific provisions of EU law relating to the transport sector, such as, inter alia, Article 9(b) of Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities (OJ 2002 L 80, p. 35) and paragraph 12 of the Annex to Council Directive 2014/112/EU of 19 December 2014 implementing the European Agreement concerning certain aspects of the organisation of working time in inland waterway transport, concluded by the European Barge Union (EBU), the European Skippers Organisation (ESO) and the European Transport Workers' Federation (ETF) (OJ 2014 L 367, p. 86), expressly lay down a requirement to record the working time of workers covered by those provisions.

65 While the need for particular protection was able to lead the EU legislature to provide explicitly for such an obligation as regards defined categories of workers, a similar obligation,

consisting of setting up an objective, reliable and accessible system enabling the duration of time worked each day to be measured, is necessary more generally for all workers in order to ensure the effectiveness of Directive 2003/88 and to take account of the importance of the fundamental right enshrined in Article 31(2) of the Charter, set out in paragraph 30 above.

66 In addition, as regards the costs, emphasised by the Spanish and United Kingdom Governments, that setting up such a system may involve for employers, it should be recalled that, as is clear from recital 4 of Directive 2003/88, the effective protection of the safety and health of workers should not be subordinated to purely economic considerations (see, to that effect, judgments of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, paragraph 59, and of 9 September 2003, *Jaeger*, C-151/02, EU:C:2003:437, paragraphs 66 and 67).

67 Moreover, as the Advocate General observed in point 84 of his Opinion, neither Deutsche Bank nor the Spanish Government identified clearly or specifically the practical obstacles that might prevent employers from setting up, at a reasonable cost, a system enabling the time worked each day by each worker to be measured.

68 Finally, it must be recalled that, according to settled case-law, the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty, under Article 4(3) TEU, to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see, inter alia, judgments of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 30, and of 13 December 2018, *Hein*, C-385/17, EU:C:2018:1018, paragraph 49).

69 It follows that, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of national law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and, consequently, to comply with the third paragraph of Article 288 TFEU (judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 31 and the case-law cited).

70 The requirement to interpret national law in a manner that is consistent with EU law includes the obligation for national courts to change their established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (judgments of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 33; of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 72; and of 11 September 2018, *IR*, C-68/17, EU:C:2018:696, paragraph 64).

71 In the light of the foregoing, the answer to the questions referred is that Articles 3, 5 and 6 of Directive 2003/88, read in the light of Article 31(2) of the Charter, and Article 4(1), Article 11(3) and Article 16(3) of Directive 89/391, must be interpreted as precluding a law of a Member State that, according to the interpretation given to it in national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured.

Costs

72 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 (Grand Chamber) hereby rules:

Articles 3, 5 and 6 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, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, and Article 4(1), Article 11(3) and Article 16(3) 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, must be interpreted as precluding a law of a Member State that, according to the interpretation given to it in national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured.

[Signatures]

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* Language of the case: Spanish.