ECLI:EU:C:2022:529

Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

7 July 2022 (*)

(Reference for a preliminary ruling – Social policy – Article 153 TFEU – Protection of workers – Directive 2003/88/EC – Organisation of working time – Night work – Collective agreement which provides for a lower supplementary allowance for regular night work than that established for irregular night work – Equal treatment – Article 20 of the Charter of Fundamental Rights of the European Union – Implementation of Union law for the purposes of Article 51(1) of the Charter of Fundamental Rights)

In Joined Cases C-257/21 and C-258/21,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decisions of 9 December 2020, received at the Court on 22 April 2021, in the proceedings

Coca-Cola European Partners Deutschland GmbH

v

L.B. (C-257/21),

R.G. (C-258/21),

THE COURT (Seventh Chamber),

composed of J. Passer, President of the Chamber, F. Biltgen and M.L. Arastey Sahún (Rapporteur), Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Coca-Cola European Partners Deutschland GmbH, by C. Böttger, Rechtsanwalt,

– L.B. and R.G., by R. Buschmann and A. Kapeller, Prozessbevollmächtigte,

– the European Commission, by B.-R. Killmann and D. Recchia, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation 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), as well as Article 20 and Article 51(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in proceedings between Coca-Cola European Partners Deutschland GmbH ('Coca-Cola') and, first, L.B. (Case C-257/21) and, secondly, R.G. (Case C-258/21) (together, 'the interested parties') concerning supplementary allowances payable, pursuant to a collective agreement, for hours of night work performed.

Legal context

International law

3 Article 3(1) of the International Labour Organisation (ILO)'s Night Work Convention, 1990 (No. 171) ('the ILO Night Work Convention'), provides:

'Specific measures required by the nature of night work, which shall include, as a minimum, those referred to in Articles 4 to 10, shall be taken for night workers in order to protect their health, assist them to meet their family and social responsibilities, provide opportunities for occupational advancement, and compensate them appropriately. Such measures shall also be taken in the fields of safety and maternity protection for all workers performing night work.'

4 Article 8 of that convention provides:

'Compensation for night workers in the form of working time, pay or similar benefits shall recognise the nature of night work.'

European Union law

5 Directive 2003/88 was adopted on the basis of Article 137(2) EC, now Article 153(2) TFEU.

6 Recitals 1, 2 and 4 to 6 of that directive state:

‘(1) Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time [(OJ 1993 L 307, p. 18)], which lays down minimum safety and health requirements for the organisation of working time, in respect of periods of daily rest, breaks, weekly rest, maximum weekly working time, annual leave and aspects of night work, shift work and patterns of work, has been significantly amended. In order to clarify matters, a codification of the provisions in question should be drawn up.

(2) Article 137 [EC] provides that the [European] Community is to support and complement the activities of the Member States with a view to improving the working environment to protect workers’ health and safety. Directives adopted on the basis of that Article are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

…

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

(5) All workers should have adequate rest periods. The concept of “rest” must be expressed in units of time, i.e. in days, hours and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours.

(6) Account should be taken of the principles of the [ILO] with regard to the organisation of working time, including those relating to night work.’

7 Article 1 of that directive, headed ‘Purpose and scope’, provides, in paragraph 1 thereof:

‘This Directive lays down minimum safety and health requirements for the organisation of working time.’

8 Article 7 of that directive provides:

‘1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.’

9 Article 8 of Directive 2003/88, headed ‘Length of night work’, states:

‘Member States shall take the measures necessary to ensure that:

(a) normal hours of work for night workers do not exceed an average of eight hours in any 24-hour period;

(b) night workers whose work involves special hazards or heavy physical or mental strain do not work more than eight hours in any period of 24 hours during which they perform night work.

For the purposes of point (b), work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the specific effects and hazards of night work.'

10 As set out in Article 9 of that directive, headed 'Health assessment and transfer of night workers to day work':

'1. Member States shall take the measures necessary to ensure that:

(a) night workers are entitled to a free health assessment before their assignment and thereafter at regular intervals;

(b) night workers suffering from health problems recognised as being connected with the fact that they perform night work are transferred whenever possible to day work to which they are suited.

2. The free health assessment referred to in paragraph 1(a) must comply with medical confidentiality.

3. The free health assessment referred to in paragraph 1(a) may be conducted within the national health system.'

11 Article 10 of that directive, headed 'Guarantees for night-time working', provides:

'Member States may make the work of certain categories of night workers subject to certain guarantees, under conditions laid down by national legislation and/or practice, in the case of workers who incur risks to their safety or health linked to night-time working.'

12 Article 11 of that directive, headed 'Notification of regular use of night workers', provides:

'Member States shall take the measures necessary to ensure that an employer who regularly uses night workers brings this information to the attention of the competent authorities if they so request.'

13 Article 12 of Directive 2003/88, headed 'Safety and health protection', states:

'Member States shall take the measures necessary to ensure that:

(a) night workers and shift workers have safety and health protection appropriate to the nature of their work;

(b) appropriate protection and prevention services or facilities with regard to the safety and health of night workers and shift workers are equivalent to those applicable to other workers and are available at all times.'

14 As set out in Article 13 of that directive, headed 'Pattern of work':

'Member States shall take the measures necessary to ensure that an employer who intends to organise work according to a certain pattern takes account of the general principle of adapting work to the worker, with a view, in particular, to alleviating monotonous work and work at a

predetermined work-rate, depending on the type of activity, and of safety and health requirements, especially as regards breaks during working time.'

German law

15 Article 3 of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) of 23 May 1949 (BGBl. 1949 I, p. 1), in the version applicable to the disputes in the main proceedings, provides:

'(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. The State shall promote the actual implementation of equal rights for men and women and shall take action to eliminate existing disadvantages.

(3) No person shall be discriminated against or favoured on grounds of sex, parentage, race, language, homeland and origin, belief, or religious or political opinions. No person shall be discriminated against on grounds of disability.'

16 Paragraph 7 of the Manteltarifvertrag zwischen dem Verband der Erfrischungsgetränke-Industrie Berlin und Region Ost e.V. und der Gewerkschaft Nahrung-Genuss-Gaststätten Hauptverwaltung (Framework Collective Agreement between the Soft Drinks Industry Association for Berlin and the Eastern Region e.V. and the Central Administration of the Food, Beverages and Catering Union) of 24 March 1998 ('the MTV') provides, in points 1 and 3 thereof, relating to 'supplementary allowances for work performed at night, on Sundays and on public holidays':

'1. The following supplementary allowances shall be paid for work performed at night, on Sundays and on public holidays:

Overtime from 41 hours per week 25%

Overtime at night from 41 hours per week 50%

Regular night work from 1998 17.5%

Regular night work from 1999 20%

Irregular night work from 1998 40%

Irregular night work from 1999 50%

…

3. Supplementary allowances shall be calculated on the basis of the overall remuneration provided for in the collective agreement.'

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

17 The interested parties performed night shift work for Coca-Cola, an undertaking in the beverage industry which concluded a company-level collective agreement with the Gewerkschaft Nahrung-Genuss-Gaststätten (Food, Beverages and Catering Union), under which that undertaking is bound by the provisions of the MTV.

18 During the period from December 2018 to June 2019, L.B. performed regular night work within the meaning of the MTV, for which she received a supplementary allowance of 20% per hour.

19 In December 2018 and January 2019, as well as during the period from March to July 2019, R.G. performed regular night work within the meaning of the MTV, for which his remuneration was supplemented by 25% per hour.

20 Submitting that, by providing for a higher supplementary allowance for irregular night work than that established for regular night work, the MTV introduced a difference in treatment contrary to the principle of equal treatment under Article 3 of the Basic Law for the Federal Republic of Germany and Article 20 of the Charter, the interested parties each brought an action before the appropriate Arbeitsgericht (Labour Court, Germany) in order to obtain, for the relevant periods, payment of an amount equivalent to the difference between the remuneration they received and that payable in accordance with the supplementary rates prescribed by the MTV for irregular night work. In that regard, they maintained that persons who regularly perform night work were exposed to significantly greater health risks and disruptions to their social environment than those who perform night work only on an irregular basis.

21 Coca-Cola contended, on the contrary, that irregular night work occurred much less frequently than regular night work and that the higher supplementary allowance applicable to irregular night work was justified, inter alia, by the fact that it generally involved additional work. Furthermore, regular night work gives rise to an entitlement to additional benefits, particularly in terms of leave. The higher supplementary allowance for irregular night work is intended not only to compensate for the difficulty of such work, but also to deter an employer from resorting to it and spontaneously encroaching on its employees' leisure time and social lives.

22 As the actions brought by the interested parties were dismissed by the Arbeitsgericht (Labour Court), those parties brought appeals against the judgments of that court before the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin-Brandenburg, Germany), which acknowledged their entitlements in respect of part of the relevant periods but declared them time-barred as to the remainder.

23 Coca-Cola brought appeals on a point of law (Revision) against those judgments before the Bundesarbeitsgericht (Federal Labour Court, Germany), which is the referring court.

24 On the assumption that the Charter is applicable in this instance, the referring court is unsure as to whether a provision of a collective agreement which provides for a supplementary allowance for night work is compatible with the Charter, and in particular as to whether the difference in treatment between regular night work and irregular night work resulting from point 1 of Paragraph 7 of the MTV is in conformity with Article 20 of the Charter.

25 In those circumstances the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions, formulated in identical terms in Cases C-257/21 and C-258/21, to the Court of Justice for a preliminary ruling:

'(1) Does a collectively agreed rule implement [Directive 2003/88], within the meaning of the first sentence of Article 51(1) of the [Charter], if that collectively agreed rule provides for a higher level of compensation for irregular night work than for regular night work?

(2) If Question 1 is answered in the affirmative:

Is a collectively agreed rule that provides for a higher level of compensation for irregular night work than for regular night work compatible with Article 20 of the [Charter] if that rule is intended to compensate not only for the adverse effects on health caused by night work but also for the burden arising from the greater difficulty in planning for irregular night work?'

The joinder of Cases C-257/21 and C-258/21

26 By decision of the President of the Court of 26 May 2021, Cases C-257/21 and C-258/21 were joined for the purposes of the written and oral parts of the procedure and of the judgment.

The requests seeking the opening of the oral part of the procedure

27 By letters lodged at the Court Registry on 10 March 2022 and 13 June 2022, the interested parties requested that the oral part of the procedure be opened, claiming that they disagreed, first, with the decision to proceed to judgment without the Advocate General's Opinion and, secondly, with the European Commission's observations.

28 In that regard, it should be noted that the Court, pursuant to Article 76(2) of its Rules of Procedure, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided not to hold a hearing, considering, on reading the observations lodged during the written part of the procedure, that it had sufficient information to give a ruling in the present cases.

29 Furthermore, it should be borne in mind that, under Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

30 In this instance, the Court considers, after hearing the Advocate General, that it has all the information necessary to answer the questions submitted by the referring court.

31 Consequently, the requests by the interested parties seeking the opening of the oral part of the procedure must be refused.

Consideration of the questions referred

Admissibility

32 The Commission contends that the requests for a preliminary ruling are inadmissible because the referring court has not shown that an interpretation of Directive 2003/88 is necessary for it to be able to resolve the disputes in the main proceedings, since the questions submitted concern only the interpretation of the Charter. It argues that, in so far as those disputes fall outside the scope of Directive 2003/88, the question of the interpretation of the Charter does not arise.

33 In that regard, it should be borne in mind that the procedure for referring questions for a preliminary ruling under Article 267 TFEU establishes a relationship of close cooperation between the national courts and the Court of Justice based on the assignment to each of different functions and constitutes an instrument by means of which the Court provides the national courts with the criteria for the interpretation of EU law which they need in order to dispose of disputes which they

are called upon to resolve (judgment of 23 November 2021, *IS (Illegality of the order for reference)*, C-564/19, EU:C:2021:949, paragraph 59 and the case-law cited).

34 In accordance with the Court's settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling (judgment of 23 November 2021, *IS (Illegality of the order for reference)*, C-564/19, EU:C:2021:949, paragraph 60 and the case-law cited).

35 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 23 November 2021, *IS (Illegality of the order for reference)*, C-564/19, EU:C:2021:949, paragraph 61 and the case-law cited).

36 In this instance, it is clear from the requests for a preliminary ruling and from the wording of the questions submitted that an interpretation of Directive 2003/88 is necessary in order to answer the question whether point 1 of Paragraph 7 of the MTV is implementing that directive for the purposes of Article 51(1) of the Charter.

37 In those circumstances, the arguments relied on by the Commission, which relate to the interpretation of Directive 2003/88 and which therefore fall to be considered as part of the examination of the substance of the requests for a preliminary ruling, cannot rebut the presumption that the questions submitted by the referring court are relevant (see, by analogy, judgment of 22 October 2020, *Sportingbet and Internet Opportunity Entertainment*, C-275/19, EU:C:2020:856, paragraph 36).

38 Consequently, the questions referred for a preliminary ruling are admissible.

The first question

39 By its first question, the referring court asks, in essence, whether a provision of a collective agreement which provides for a higher supplementary allowance for irregular night work than that established for regular night work is implementing Directive 2003/88 for the purposes of Article 51(1) of the Charter.

40 Under Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing Union law and, in accordance with settled case-law, the concept of 'implementing Union law' referred to in that provision presupposes a degree of connection between an act of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other, having regard to the assessment criteria laid down by the Court (judgment of 28 October 2021, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo*, C-319/19, EU:C:2021:883, paragraph 44 and the case-law cited).

41 In that context, the Court has found, inter alia, that EU fundamental rights could not be applied in relation to national legislation because the provisions of EU law in the area concerned did not impose any specific obligation on Member States with regard to the situation at issue in the main proceedings. Consequently, the mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law and, therefore, cannot render the Charter applicable (judgment of 14 October 2021, *INSS (Widow's pension based on a de facto partnership)*, C-244/20, not published, EU:C:2021:854, paragraph 61 and the case-law cited).

42 Furthermore, it is also apparent from the Court's case-law that, where the provisions of EU law in the area concerned do not govern an aspect of a given situation and do not impose any specific obligation on Member States with regard thereto, the provision of a collective agreement concluded between the two sides of industry as regards that aspect falls outside the scope of the Charter and the situation concerned cannot be assessed in the light of the provisions of the Charter (judgment of 19 November 2019, *TSN and AKT*, C-609/17 and C-610/17, EU:C:2019:981, paragraph 53 and the case-law cited).

43 It is therefore necessary to ascertain whether Directive 2003/88 governs the supplementing of workers' pay for night work at issue in the main proceedings and imposes a specific obligation with regard to such situations.

44 In this instance, the referring court considers, in essence, that point 1 of Paragraph 7 of the MTV is capable of being covered by, first, Articles 8 to 13 of Directive 2003/88 and, secondly, Article 3(1) and Article 8 of the ILO Night Work Convention, read in conjunction with recital 6 of that directive.

45 In the first place, it should be mentioned that, save in the special case covered by Article 7(1) of Directive 2003/88 concerning paid annual leave, that directive is limited to regulating certain aspects of the organisation of working time in order to protect the safety and health of workers, with the result that, in principle, it does not apply to the remuneration of workers (see, to that effect, judgments of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 57, and of 9 March 2021, *Stadt Offenbach am Main (A firefighter's period of stand-by time)*, C-580/19, EU:C:2021:183, paragraph 56).

46 It follows both from Article 137 EC (now Article 153 TFEU), which is the legal basis of Directive 2003/88, and from the wording of Article 1(1) of that directive itself, read in the light of recitals 1, 2, 4 and 5 thereof, that the purpose of the directive is to lay down minimum requirements intended to improve the living and working conditions of workers through the approximation of national provisions concerning, in particular, the duration of working time (see, to that effect, judgment of 20 November 2018, *Sindicatul Familia Constanţa and Others*, C-147/17, EU:C:2018:926, paragraph 39 and the case-law cited).

47 Furthermore, pursuant to paragraph 5 thereof, Article 153 TFEU does not apply to pay, the right of association, the right to strike or the right to impose lock-outs. That exception is explained by the fact that fixing the level of pay falls within the contractual freedom of the social partners at national level and within the relevant competence of Member States. In those circumstances, in the present state of EU law, it was considered appropriate to exclude determination of the level of pay from harmonisation under Article 136 EC et seq. (now Article 151 TFEU et seq.) (judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 123 and the case-law cited).

48 It is true that Articles 8 to 13 of Directive 2003/88 relate to night work. However, those articles concern only the length and pattern of night work (Articles 8 and 13 of that directive, respectively), the protection of night workers' health and safety (Articles 9, 10 and 12 of that directive) and the notification of the competent authorities (Article 11 of that directive). Those articles do not therefore govern workers' pay for night work and, consequently, do not impose any specific obligation on Member States with regard to the situations at issue in the main proceedings.

49 In the second place, it should be noted that Article 3(1) and Article 8 of the ILO Night Work Convention, read in conjunction with recital 6 of Directive 2003/88, likewise do not impose, under EU law, specific obligations on Member States concerning the supplementing of workers' pay for night work.

50 It is true that Article 3(1) of the ILO Convention on Night Work provides that specific measures required by the nature of night work must be taken for night workers, including compensating them appropriately, while Article 8 of that convention provides that compensation for night workers in the form of working time, pay or similar benefits must recognise the nature of night work.

51 However, it should be noted that, since that convention has not been ratified by the European Union, it does not, in itself, have binding legal force in the EU legal order; it should also be noted that recital 6 of Directive 2003/88 likewise does not confer binding effect on that convention (see, by analogy, judgment of 3 September 2015, *Inuit Tapiriit Kanatami and Others* v *Commission*, C-398/13 P, EU:C:2015:535, paragraph 64).

52 Consequently, the supplementing of workers' pay for night work at issue in the main proceedings, provided for in point 1 of Paragraph 7 of the MTV, is not covered by Directive 2003/88 and cannot be regarded as implementing Union law for the purposes of Article 51(1) of the Charter.

53 In the light of all the foregoing considerations, the answer to the first question is that a provision of a collective agreement which provides for a higher supplementary allowance for irregular night work than that established for regular night work is not implementing Directive 2003/88 for the purposes of Article 51(1) of the Charter.

The second question

54 In the light of the answer given to the first question, there is no need to answer the second question.

Costs

55 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 (Seventh Chamber) hereby rules:

A provision of a collective agreement which provides for a higher supplementary allowance for irregular night work than that established for regular night work is not implementing 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 for the purposes of Article 51(1) of the Charter of Fundamental Rights of the European Union.

[Signatures]

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* Language of the case: German.