JUDr. Marcel Dolobáč, PhD.
Právnická fakulta
Univerzita Pavla Jozefa Šafárika v Košiciach

Working Time under the European Union Law

Abstract

Harmonizing legislation on working time is at the forefront of priorities of European lawmakers. The aim of this article is to provide a complex interpretation of the working time legislation in the EU, highlighting the most problematic areas which result from the rich case law of the Court of Justice of the European Union. Given such aim, the Author focused on the contemporary issues regarding work stand-by and workers' rights to annual holidays. These areas can be considered problematic and in addition, the EU anticipates adoption of a new directive which should deal with the indicated uncertainties of interpretation. In the end, the Author emphasizes that the issues raised are not purely academic, their goal is rather to protect individual social rights which one can invoke through a claim for damages caused by national legislators' misconduct.

Key words: *working time, work stand-by, leave, Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time, case law of the Court of Justice of the European Union.*

Czas pracy w prawie Unii Europejskiej

Streszczenie

Harmonizacja ustawodawstwa dotyczącego czasu pracy stoi na czele priorytetów europejskich prawodawców. Celem artykułu jest dokonanie kompleksowej interpretacji ustawodawstwa dotyczącego czasu pracy w Unii Europejskiej, zwracając uwagę na najbardziej problematyczne aspekty, które powstają w obszernym orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej. W tym celu Autor skoncentrował się na współczesnych zagadnieniach dotyczących work stand-by – pracy w trybie czuwania i praw pracowników do corocznych urlopów. Obszary te mogą być uważane za problematyczne. Na dodatek Unia Europejska przewiduje przyjęcie nowej dyrektywy, która powinna rozstrzygnąć wskazane wątpliwości w interpretacji. Na końcu Autor podkreśla, że podniesione problemy nie mają

charakteru czysto akademickiego, ich celem jest raczej ochrona indywidualnych praw społecznych, do których można się odwołać poprzez wniesienie skargi odszkodowawczej z powodu szkody wyrzadzonej przez krajowego ustawodawcę.

Słowa kluczowe: *czas pracy, praca w trybie czuwania, urlop, Dyrektywa 2003/88/WE Parlamentu Europejskiego i Rady dotycząca pewnych aspektów organizacji czasu pracy, orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej.*

Introduction[1]

Working time is a key attribute of labour relations. Since the beginning of the past century, there have been tendencies, on an international scale, to shorten the length of working time and at the same time to stabilize the minimum length of rest after work. These rights of employees were gradually taking the dimension of fundamental rights and progressively became respected by wider international community. In this respect, the activities of the International Labour Organization played an important role, namely the first ILO Convention 1/1919 that governed the length of working time in industry and after that, other conventions that followed, including for example the Convention No. 14/1921 on Weekly Rest, Convention No. 30/1930 on Hours of Work in Commerce and Offices and also the Convention No. 47/1935 on Forty-Hour Week.

In the law-making of the European Union, the first efforts to harmonise legislation on working time did not appear until the 1970s, when the Recommendation of the Council of 22 July 1975 on the principle of the 40-hour week and the principle of four weeks' annual paid holiday was adopted. Even though the recommendation was not binding, the Union urged that both principles expressed in the text of the recommendations had to be implemented into the member states' legislation by the end 1978 the latest. In 1979, the Council adopted the resolution on the organization of working time, which required member states to limit the systematic use of overtime, limit the annual amount of work and implement measures to increase flexibility. The second recommendation draft of 23 September 1983 also appeared, which, however, remained only a draft due to the controversial nature of issues that it raised and that were heavily discussed in times of crisis of social politics of the Single European Act that inserted the Article 118a into the Title III of the Treaty of Rome; and the Charter of the

[1] This contribution was prepared under the grant VEGA no. 1/0851/12 named "Creation and Implementation of the Labor Law with Regard to the Regional Aspects of the Labor Market".

Fundamental Social Rights of Workers recognized that the length and organization of working time played an important role in convergence of the living conditions of workers, and by that triggered a process that resulted in issuance of directives governing the minimum legal working time arrangements.

1. Legal Regulation Governing Working Time in the EU Law

Primary Law

The legal basis of secondary law governing working time is contained in the provision of Article 151 of the Treaty on the Functioning of the European Union (hereinafter referred to as "TFEU"), which dictates the goal of the Union and member states: to support employment of workers and improve living and working conditions. To achieve this goal, the EU complements activities of member states in the following areas:

- improving working environment, especially with regards to health protection and workers' safety,
- working conditions,
- social security and social protection of workers (Article 153 of the TFEU), *inter alia*.

The stated goals aiming to support improvement of living and working conditions should be realized in the form of adoption of directives that stipulate the minimum requirements with regards to conditions and technical regulations adopted in each of the member states. The TFEU also stipulates that such directives must not impose such administrative, financial and legal limitations that would prevent creation and development of small and medium enterprises.

Finally, in relation to the regulation of working conditions and protection of workers, the TFEU puts forth the so-called principle of rights maintenance, which means that the secondary EU law in this area cannot forbid any state from formulating stricter protection legislation compatible with the founding treaties of the European Union.

Secondary Law – Directive Regulating Working Time

Binding legal framework on working time was firstly adopted by the Directive 1993/104/EEC of the Council on some aspects of working time regulation (the "Directive 1993/104/EEC"), which mainly appealed to the principles of the International Labour

Organizations[2]. The gist of the implied content of the Directive 1993/104/EEC is also contained in the current legislation.

The current legislation on working time at the EU level is constituted by the Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time (the "Directive on Working Time"), which lays down the minimum safety and health requirements for the organisation of working time. For this purpose, the Directive on Working Time lays down the minimum periods of daily rest, weekly rest, annual leave, breaks and maximum weekly working time, as well as certain aspects of night work, shift work and patterns of work.

Apart from the Directive on working time, there are other directives governing atypical working circumstances (mainly the Directive on Short-Term Work), protection of special worker categories (Directive on Parent Leave) and some particular industrial activities (for example the Directive on Organization of Working Time of Seafarers or Directive on Organisation of Working Time of Mobile Workers of Civil Aviation). In such cases, instead of the Directive on Working Time, other special directives will be applicable[3].

Finally, to complete the legal framework dealing with the regulation of working time, one must mention the 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 (the "Directive on Safety and Health at Work"), which lays down all general principles of health protection of workers. The mentioned directive forms the legal basis for regulation of working time, since the above-mentioned special directives were adopted on its basis, developing the principles of safety and protection expressed therein into greater depth[4]. All the mentioned norms of secondary law have a common aim, which is to provide grounds for the notion of flexicurity, which means finding a balance between the flexibility of labour market and the social protection of workers[5].

---

[2] The Directive 1993/104/EEC was adopted by qualified majority, despite the disapproval of the United Kingdom. However, the Court of Justice of the European Union (formerly the European Court of Justice, hereinafter "the Court of Justice") rejected the claim of the United Kingdom. The decision of the Court of Justice no. C-84/94, *United Kingdom of Great Britain and Northern Ireland c/a Council of the European Union,*12th of November 1996. Coll. 1996, s. I-05755

[3] See also: J. Kakaščíková, *Časová flexibilita priaznivá k rodine zamestnanca*, 'Zamestnanec a právne aspekty jeho postavenia. Zborník vedeckých prác doktorandov', 27. február 2012, Košice: Univerzita Pavla Jozefa Šafárika v Košiciach 2012, pp. 52-64.

[4] Compare the decision of the Court of Justice no. C-173/99, *The Queen c/a Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU),* 26th of June 2001, Coll. 2001, s. I-04881, p. 5.

[5] M. Barinková, *Flexikurita – nový rozmer sociálnej ochrany zamestnancov v pracovných vzťahoch. Habilitačná prednáška*, 'Právny obzor. Teoretický časopis pre otázky štátu a práva' 2008, Roč. 91, č. 2, pp. 109-118. See

Material and Personal Scope of the Directive on Working Time

The scope of application of the Directive on Working Time is expressed in Article 1 with reference to Article 2 of the Directive on Safety and Health at Work, according to which the Directive applies to all sectors of activity, both public and private (industry, agriculture, commerce, administration, services, education, culture, leisure time etc.). The Directive, however, does not apply to specific activities of public service, including for example armed forces, the police or to certain specific activities in the civil protection services (Article 2 of the Directive on Safety and Health). The exclusion of these specific activities stem from their very nature that inherently prevents application of the same minimum rules that the EU law guarantees to "ordinary" workers. Similarly, seafarers, who are defined in a separate directive, are also excluded from the scope of the Directive on Working Time.

Given the fact that the personal scope of the Directive and also the carve-outs of its application (certain specific public service activities or civil protection services) are defined only in general terms, individual member states had different approaches to its interpretation and in several cases, such occupations were classified as exceptions falling out of the scope of the Directive, the nature of which was not particularly specific so as to exclude them from the application of the Directive on Working Time. Therefore, the Court of Justice repeatedly expressed its opinion in this matter and in its case law constantly emphasized that the scope of application of the Directive on Working Time should be perceived in wider and broad-minded terms, and on the other hand, the exemptions from application should be interpreted strictly in a restrictive manner[6]. The Court of Justice stated that the Directive on Working Time (and therefore also the Directive on Safety and Health) governs also the doctors, who work in the public medical services[7] but also rescue assistants, unless their work concerns performing "certain specific activities" related to, for example, protection against aftermaths of natural disasters[8]. According to the Court, the characteristic features of working time are present when doctors are present at the health centre where they are physically on call. On the other hand, when they are simply contactable at any time, the Court considers that they are in

also: M. Barinková, V. Žofčinová, *Social Status of an Employee in the Context of Social Legislation*, 'Ius et Administratio' 2013, No 2, pp. 4-15.

[6] At this point it shall be noted that even the under mentioned decisions apply to the formerly directive 1993/104/EEC, they are still fully applicable to the current content of the Directive on Working Time.

[7] The decision of the Court of Justice no. C-303/98, *Sindicato de Médicos de Asistencia Pública (Simap) c/a Conselleria de Sanidad y Consumo de la Generalidad Valenciana,* 3rd of October 2000. Coll. 2000, s. I-07963.

[8] The decision of the Court of Justice no. C-397/01 až C-403/01, *Bernhard Pfeiffer* (C-397/01), *Wilhelm Roith* (C-398/01), *Albert Süß* (C-399/01), *Michael Winter* (C-400/01), *Klaus Nestvogel* (C-401/01), *Roswitha Zeller* (C-402/01) *a Matthias Döbele* (C-403/01) *c/a Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, 5th of October 2004, Coll. 2004, s. I-08835.

a position to manage their time with fewer constraints: only time actually spent providing primary health care service will therefore be classifiable as working time. The Court also considered that work performed by doctors on primary health care teams whilst on call constitutes shift work within the meaning of the European law: the workers concerned are assigned successively to the same work posts, on a rotational basis which makes it necessary for them to perform work at different hours over a given period of days or weeks. Finally, the Court ruled that individuals affected by any derogations from certain aspects of the Community rules on working time must give their own consent and that a collective agreement cannot be substituted for such consent [9].

Exceptions to which the Directive on Working Time does not apply must be distinguished from possible derogations, which are stipulated for a relatively wide area of activities in accordance with the provisions of Articles 17-19 of the Directive on Working Time. While in case of exceptions the Directive is not applied either at all or only partially (which is given by the scope of the Directive), in case of potential derogations, the Directive on Working Time will be applied to the full extent, unless the national legislation provides otherwise. In other words, unless national laws impose specific rules to govern the specific category of workers (occupations) that the Directive classifies as potential derogations, the same minimum rules, as stipulated in the Directive on Working Time, apply so much to "ordinary" workers, or "ordinary" occupations, than to other special worker categories.

It is possible to deviate from some provisions of the Directive on Working Time if it concerns for example:

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.

2. Definition of Working Time in the EU Law

The term "working time" is one of the fundamental terms of the Directive on Working Time and also one of the most disputed notions. According to Article 2 section 1 of the Directive on Working Time, the working time means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice. The definition of working time is then followed by the negative

[9] See the footnote No. 7.

definition of the term "rest period", which means any period which is not working time (Article 2 section 2 of the Directive on Working Time).

The definition of working time was repeatedly formulated by the Court of Justice, which accentuated that the terms "working time" and "rest time" must be interpreted universally at the EU level and not according to the national laws of individual member states, because that is the only way of attaining the goal of the Directive by means of stipulating the same minimum requirements for safety and health protection at work for each of the member states.

From the cited definitions of working time and rest period, it can be deduced that the Directive on Working Time institutes the so-called dichotomy of working time, which, in simpler words, means that a worker either carries out their activity during working time (if all cumulative conditions of the definition of working time are met) or enjoys their rest period. It is exactly this fact that is criticised by the professional public, pointing out that the Directive does not take into account the qualitative differentiation of rest period, which can pose problems with legal qualification of work stand-by. From the strict grammatical interpretation of working time, it can be derived that if a worker is ready to carry out work, either in the workplace or other agreed place, but is not carrying out the work, this does not fulfil the definition of working time ("... carrying out their activity ..."), and therefore this should be classified as rest period. This interpretation, however, hardly meets the reality, a worker ready for carrying out his work cannot be perceived as a worker who is on a rest period. The debatable interpretation of the terms "working time" and "rest period" in relation to work stand-by was, for the stated reasons, also the subject of decision making of the Court of Justice. The decisive criterion that the Court of Justice used was whether a worker spends his work stand-by in the workplace or other place determined by an employer, or whether he is ready for carrying out his work at a place of his own choice and consideration. A worker who is at disposal at the place determined by an employer cannot be regarded as a worker on his rest period, even though he is not exactly carrying out activity. Work stand-by carried out by a worker present at the workplace is regarded by the Court of Justice as working time regardless of whether or not the worker is actually carrying out the work. The fact that the work stand-by includes a certain period of inactivity is irrelevant. Only the period of work stand-by when the worker is not present at the workplace, but at another place chosen by him, is to be excluded from working time[10]. In its case law, the Court of Justice further noted that it

[10] The decision of the Court of Justice no. C-14/04, *Abdelkader Dellas c/a Premier ministre a Ministre des Affaires sociales, du Travail et de la Solidarité*, 1st of December 2005. Coll. 2005, s. I-10253 and the decision of

would be ideal if there were an in-between category defined between the category of working time and rest period[11]. Case *Abdelkader Dellas and Others v Premier minister and others* has had a significant impact in the UK. In Watermeadows Hotel v Wigmore, a live-in "hotel person" whose job included providing breakfast, greeting guests and dealing with emergencies in the night, was paid £4.80 an hour on the basis of a 36 hour week. She claimed that she was earning £1.33 an hour based on a 132 hour week. The Employment Appeal Tribunal (EAT) found that her home was part of her workplace over which the hotel had control. All the hours worked therefore constituted working time[12].

The European legislator expatiated further on these conclusions made by the Court of Justice. The Commission prepared a draft of the directive amending and supplementing the Directive on Working Time and which defines also some new terms – "stand-by time", "inactive period of work stand-by" and the related term "workplace". In accordance with this directive draft, the term of "work stand-by" is understood as a period during which the worker is obliged to be present at the workplace to be able to take action and carry out his activities or function at the instruction of the employer. Inactive period of work stand-by is defined as a period during which the worker is on stand-by at the workplace of the employer, but is not being instructed by the employer to carry out his activity or function.

The period during which a worker carries out his activities or functions during the work stand-by is always understood as working time. Inactive period during work stand-by is not understood as working time, unless the national legislation or other national rules (e.g. agreement of social partners) stipulates so. In this matter, the draft directive diverges from the opinion of the Court of Justice case law, since the draft directive considers the inactive period of work stand-by to be out of scope of working time, even though it takes place at the workplace. At the same time the directive rightly adds that inactive period during work stand-by (despite not being working time) cannot be counted into the daily or weekly rest period.

---

the Court of Justice no. C-151/02, *Landeshauptstadt Kiel c/a Norbert Jaeger,* 9th of September 2003. Coll. 2003, s. I-08389. See also: J. Komendová, *Požadavky komunitárního práva v oblasti úpravy pracovní doby*, [in:] *Pracovní právo 2009. Pracovní doba – teorie a praxe. Sborník príspevků z medzinárodní konference konané 30. září až 2. října 2009*, Brno: Masarykova univerzita 2009.

[11] H. Barancová, *Európske pracovné právo. Flexibilita a bezpečnosť pre 21. Storočie*, Bratislava: Sprint dva 2010, p. 461. Also the decision of the Court of Justice no. C-14/04, *Abdelkader Dellas c/a Premier ministre a Ministre des Affaires sociales, du Travail et de la Solidarité*, 1st of December 2005. Coll. 2005, s. I-10253 and the decision of the Court of Justice no. C-437/06, *Securenta Göttinger Immobilienanlagen und Vermögensmanagement AG c/a Finanzamt Göttingen,* 11st of January 2007. Coll. 2007, s. I-01597.

[12] See On-call work: *Cases C-14/04 Abdelkader Dellas and Others v Premier ministre and Others [2006] IRLR 225, Watermeadows Hotel v Wigmore, UKEAT/0033/05/RN W and MacCartney v Overley House Management [2007] IRLR 514 (05-05-2008).* http://www.labourlawnetwork.eu/ *national_labour_law_latest_country_reports/ national_court_rulings/court_decisions*

Even though one can agree with the mentioned legislative solution, draft proposal of the directive has still not dealt with the inactive part of work stand-by carried out outside the workplace. Such period of a worker is regarded, by the Directive on Working Time in conjunction with the mentioned case law of the Court of Justice, as the rest period. Evidently, the rest period cannot be compared, in qualitative terms without limitation, with the inactive period during work stand-by carried out outside the workplace, during which the worker is ready to carry out his duties. It remains a question to be answered in scholarly debate, whether such a component of work stand-by should be included in the rest period to the full extent, or whether it would be suitable to adopt legislative measures, also at the EU level, to limit the scope of inactive period of work stand-by outside the workplace.

3. Limitations Related to Certain Aspects of Working Time

There exists some basic equality. Regardless of social data, a day is 24 hours long for everyone. Technically, time is something that cannot be produced. Working activity, as any other activity is carried out in time. Its daily or weekly extent is determined according to economic criteria and must be sufficiently long for a worker to earn the salary to satisfy his "natural needs". On the contrary, the employer needs this activity in order to generate profit, because he has to supply the market with goods and services. From the point of view of both ends of the spectrum, a working day is extended by time necessary to i) satisfy the worker by the value gained by his work performance and to cover his costs and earn him a living, and to ii) generate profit for the second party. While from the economic point of view, it is necessary to set the minimum below which the profit of employer falls to zero; from the social and legal perspective it is necessary to set the maximum for protection of workers' health[13].

The contemplated considerations can be perceived also in relation to the contents of the Directive on Working Time, the aim of which is to be attained by setting the maximum for working time and minimum for rest periods.

4. Maximum Weekly Working Time and Night Work

The Directive on Working Time states that member states are obliged to set the maximum weekly working time in such a way that the average working time for the period of 7 days including overtime shall not exceed 48 hours. At the same time, the reference period must not exceed four months (with exception to approved derogations).

[13] Advocate General's Opinion – Ruiz-Jarabo Colomera, 12th of July 2005 in case no. C -14/04, *Abdelkader Dellas a iní c/a Premier ministre a Ministre des Affaires sociales, du Travail et de la Solidarité*.

Special attention is devoted to night work. When regulating the work at night, the Directive on Working Time takes into account the findings stating that the human body is sensitive to night work, the inproportionate amount of which can lead to increasing the risk of jeopardizing the safety and health of a worker. The situation of night workers therefore requires that the level of safety and health protection be adjusted to the nature of their work and that the organising and functioning of services and means for protection and prevention be efficient[14].

When defining working time the national laws must take into account that night work must not be shorter than seven hours and that must, in any case, include the period between midnight and 05.00 a.m.

Under Article 2 section 4 of the Directive on Working Time, the night worker is:

a) on the one hand any worker, who, during night time, works at least three hours of his daily working time as a normal course and
b) on the other hand, any worker who is likely during night time to work a certain proportion of his annual working time, as defined at the choice of the Member State concerned:
    i) by national legislation, following consultation with the two side of industry; or
    ii) by collective agreements or agreements concluded between the two sides of industry at national or regional level.

The basis of night work regulation at EU level lies in the setting of its maximum limits. Member States shall take all necessary measures ensuring 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 at work.

Other obligations of Member States are related to special preventive health care of night workers and are as follows:

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

[14] See also J. Komendová, *Požadavky komunitárního práva … op. cit.*

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.

5. Minimum Length of Rest

The minimum length of rest is regulated at the EU level from various viewpoints, the Directive on Working Time governs daily rest, weekly rest, breaks and annual leave.

Member states shall take all necessary measures to ensure that every worker is entitled to minimum daily rest period of 11 consecutive hours per 24-hour period. The regulation on minimum daily rest is followed by the regulation on weekly rest, every worker is entitled to a minimum of 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. The reference period must not exceed 14 days.

Rest period must be distinguished from breaks at work, which are regulated by the Directive on Working Time only in very general terms. In cases where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including the terms on which it is granted, shall be laid down in laws of individual member states.

The Directive on Working Time sets the minimum annual leave in the period of at least four weeks and at the same time forbids to replace the annual leave by an allowance in lieu. Exceptions are allowed only where the employment relationship is terminated when the worker has not had the possibility to exhaust the total extent of the minimum period of paid annual leave[15].

In relation to taking leave, the Court of Justice in the joint cases *Schulz-Hoff*[16] was confronted with the question whether the right of a worker to take a leave, or respectively the financial compensation in lieu ceases to exist in case the employment relationship is terminated, if the worker has been on a sick leave on a long-term basis, which is why he was not carrying out work during the entire year (reference period). The Court of Justice also

[15] The decision of the Court of Justice no. C-173/99, *The Queen proti Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU),* 26th of June 2001. Coll. 2001, s. I-04881, the decision of the Court of Justice no. C-342/01, *María Paz Merino Gómez c/a Continental Industrias del Caucho SA,* 18th of March 2004. Coll. 2004, s. I-02605, as well as the decision of the Court of Justice no. C-131/04 a C-257/04, *C. D. Robinson-Steele c/a R. D. Retail Services Ltd* (C-131/04), *Michael Jason Clarke proti Frank Staddon Ltd a J. C. Caulfield c/a Hanson Clay Products Ltd* (C-257/04), 16th of March 2006, Coll. 2006, s. I-02531.

[16] The decision of the Court of Justice no. C-350/06 a C-520/06, *Gerhard Schultz-Hoff c/a Deutsche Rentenversicherung Bund* (C-350/06) *and Stringer c/a Her Majesty's Revenue and Customs* (C-520/06), 20th of January 2009. Coll. 2009, s. I-00179.

considered whether or not the regulation of member states that allows/does not allow to take a leave, or provide financial compensation throughout the duration of a sick leave, is in accordance with the EU law.

It is certain that the aim of worker's entitlement to an annual paid leave is to enable the worker to have a rest and to provide him with time for rest and recovery. This aim is different from the aim derived from the entitlement to a sick leave. The latter right is admitted to a worker for the purposes of recovering from an illness. The Court of Justice already adjudicated that a leave guaranteed by the EU law must not impact on the entitlement to take a different type of a leave guaranteed under this law[17].

On the Right to Take a Paid Annual Leave during the Period that Clashes with a Sick Leave (Worker's Sickness Absence)

Regarding the right to a paid annual leave, as it is evident from the wording of the Directive on Working Time and case law of the Court of Justice, member states are free to define, in their national legislation, the conditions of asserting this right together with the specification of concrete conditions under which workers may assert this right while they must not set any condition on the very formation of this right, which results directly from the mentioned Directive.

In the described legal matter of *Schulz-Hoff*, with reference to the abovementioned legally relevant considerations, the Court of Justice first dealt with the question of whether or not member states may be allowed to forbid taking a leave during worker's sickness absence.

The Court of Justice concluded that, in essence, the Directive on Working Time does not forestall national legislation or practice, according to which a worker on a sick leave does not have the right to take a paid annual leave during the period of his lasting sickness leave, on a condition that such a worker has the possibility to assert the right that is guaranteed to him by the Directive, during a different time period[18]. In connection to this conclusion, the Court of Justice added that the Directive on Working Time, on the other hand, does not rule out adoption of such national legislation or practice that would allow the worker on a sick leave to take paid annual leave during this period.

[17] The decision of the Court of Justice no. *„Merino Gómez"* (mentioned above), and the decision of the Court of Justice no. C-519/03, *Council of the European Union c/a Luxemburg,* 14th of April 2005. Coll. 2005 s. I-03067 see also the decision of the Court of Justice no. C-116/06, *Sari Kiiski c/a Tampereen kaupunki, 20th* of September 2007. Zb. 2007 s. I-07643.

[18] The decision of the Court of Justice no. C-124/05, *Federatie Nederlandse Vakbeweging c/a Staat der Nederlanden,* 6th of April 2006. Coll. 2006 s. I-03423.

On the Right to a Paid Annual Leave in Case of Worker's Sickness (a Sick Leave) Lasting for the Entire Reference Period

Conditions of exercising the right to a paid annual leave together with the specification of concrete circumstances, under which workers assert this right, are governed by national laws. It can be deduced from the above, that the question of carrying forward the leave, in other words, determining the period during which an employee who could not take a paid annual leave in the course of the reference period may still take this annual leave, is also governed by national legislation and national practice, as well as asserting this right. The Court of Justice follows this argumentation and considers it to be acceptable. However, there are certain limitations posed.

Firstly, the Court of Justice reminded that according to the Declaration No. 6 of the Directive on Working Time, it is necessary to take into account the principles of the International Labour Organization with regards to the organisation of working time. From this point of view, it must be stated that according to Article 5 section 4 of the Convention of the International Labour Organization No. 132 of 24 June 1970 on Holidays with Pay (new version) "absence from work for such reasons beyond the control of the employed person concerned as illness, (...) shall be counted as part of the period of service." Moreover, when entitling workers to take a paid annual leave, the Directive on Working Time does not distinguish between the workers who are not present at work during the reference period for reasons of a short-term or a long-term sick leave and the workers who actually worked during the given period.

Based on the abovementioned, the Court of Justice inferred that the right to a paid annual leave guaranteed by the Directive on Working Time may not be dependent on a condition of a member state relating to the obligation to work *de facto* during the reference period stated by this state.

Extinction of the right to a paid annual leave without the possibility of a worker to actually assert this right, or respectively the financial compensation for it, is according to the conclusions of the Court of Justice, a breach of social rights that are guaranteed to every worker directly, in accordance with Article 7 of the Directive on Working Time.

On the Amount of Compensation for an Unused Leave at Termination of Employment Relationship

Finally, in the matter *Schultz-Hoff*, the Court of Justice also dealt with the question of the amount of financial compensation for an unused leave. On this question, the Court briefly

stated that no provision of the Directive on Working Time expressly stipulates the way of calculating the financial compensation for minimum period or period of a paid annual leave in case of employment relationship termination. It further made reference to the decision in the matter *Robinson-Steele and others*, in which the Court of Justice already stated that a worker on a paid leave should be paid an "ordinary remuneration" and the financial compensation should match that amount accordingly.

Conclusions

In summary, we can turn back to the first sentence in the introduction of this article; working time is a key feature of employment relations. Along with the remuneration for work, it is exactly working time that constitutes a significant meeting point of the social fight of employers and employee representatives not only at the national level, but also at the EU level, possibly on a world scale. Given these implied facts, it cannot be surprising that the European Union has been striving to adopt new legislation on working time, which would follow from the current valid and effective legislation, while, *inter alia*, specifying the problematic areas in more depth, for example the question of work stand-by or leave. Newly adopted legislation shall then be recast into individuals' rights protection.

Finally, it is important to point out that the current legislation supported by ample case law of the Court of Justice can also have a direct impact on the protection of individuals' rights. If a member state breaches obligations arising out of the Directive on Working Time, the party in stake may not claim indemnities directly on its basis (*expressis verbis* from the provisions of the Directive), since the Directive does not provide for such an option. However, one may consider applying the process of claiming indemnities pursuant to the established case law of the Court of Justice while taking into account mainly i) the objective of the breached provisions of an EU norm, ii) the scope of breach, iii) potential existence of direct causal link between the breach of an obligation, which is to be assumed by the state and the damage caused to the aggrieved individuals. Deciding on such indemnities then falls under jurisdiction of national courts, which, in their decision, (said in broad terms), shall apply the EU law but also the specifications of their national law.