



5 de outubro de 2015

## NOTION OF «WORKING TIME» OF EMPLOYEES WITHOUT A FIXED OR HABITUAL PLACE OF WORK

In ECJ ruling of September 10, 2015, Case C-266/14<sup>1</sup>, the Court concluded that, the journeys made by employees without fixed or habitual place of work between their homes and the first and last customer of the day constitute working time, since excluding these journeys from working time would be contrary to the objective of protecting the safety and health of workers pursued by EU law.

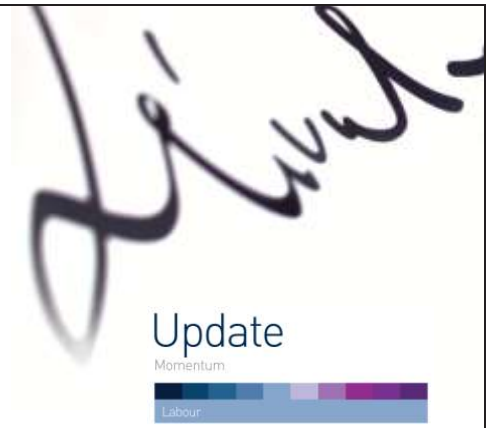
Directive 2003/88/EC of the European Parliament and of the Council, of November 4, 2003, concerning certain aspects of the organisation of working time, is transposed into Portuguese Law (see Article 2, Paragraph n) of Law No. 7/2009) and defines “*working time*” as any period during which the worker is working, at the employer's disposal and carrying out his/her activity or duties, in accordance with national laws and/or practice. Any period which is not working time is regarded as a rest period. A similar notion is foreseen in Article 197 of the Portuguese Labour Code (“PLC”)<sup>2</sup>.

The main facts under assessment can be summarized as follows:

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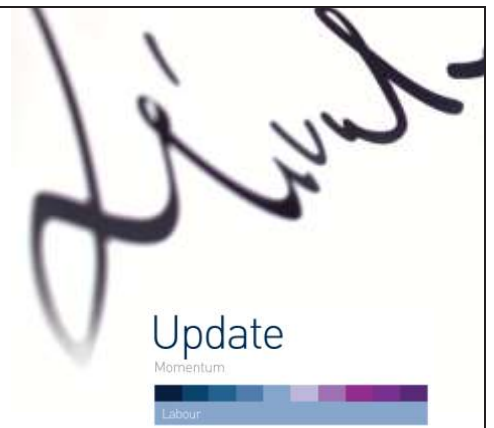
<sup>1</sup> *Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL, Tyco Integrated Fire & Security Corporation Servicios SA*, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=167291&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=65497>.

<sup>2</sup> Approved by Law No. 7/2009, of February 12, and amended by Laws No. 105/2009, of September 14, 53/2011, of October 14, 23/2012, of June 25, 47/2012, of August 29, 69/2013, of August 30, 27/2014, of May 8, and 55/2014 of August 25, 28/2015, of April 4 and 120/2015, of September 1. See also Rectification No. 38/2012, of July 10.



- The technicians employed by Tyco install and maintain security equipment in homes and on industrial and commercial premises located within the geographical area assigned to them, so they have no fixed place of work;
- This area can consist of all or part of the province in which they work and sometimes more than one province;
- The employees each have the use of a company vehicle for travelling every day from their homes to the various places of work and to return home at the end of the day;
- The distances between the employees' homes and the places where they are to carry out work vary a great deal and are sometimes more than 100 kilometres, taking up to three hours to drive. In order to carry out their duties, the workers are each provided with a mobile phone, which they use to communicate remotely with the central office in Madrid;
- On the eve of their working day, the employees receive a task list identifying the various premises that they are required to visit the next day within their geographical area of work and the times of their customer appointments;
- Tyco counts the time spent travelling between home and customers (i.e. the daily journeys between the homes of the employees and the premises of the first and last customers designated by Tyco) not as working time, but as a rest period;
- Tyco calculates daily working hours by counting the time elapsing between when its employees arrive at the premises of the first customer and when they leave the premises of the last customer; thus, only the period of work on the premises and of the journeys between each customer is taken into account;
- Before the closure of the regional offices, however, Tyco used to count the daily working time of its employees as starting when they arrived at the office (the employees then picking up the vehicle they were to use and receiving the list of customers to be visited and the task list) and ending when they returned to the office in the evening (to leave the vehicle there).

By this judgment, the ECJ declared that, where employees, such as those in the situation at issue, do not have a fixed or habitual place of work, the time spent travelling each day between their homes and the



premises of the first and last customers designated by their employer constitutes working time within the meaning of the directive<sup>3</sup>:

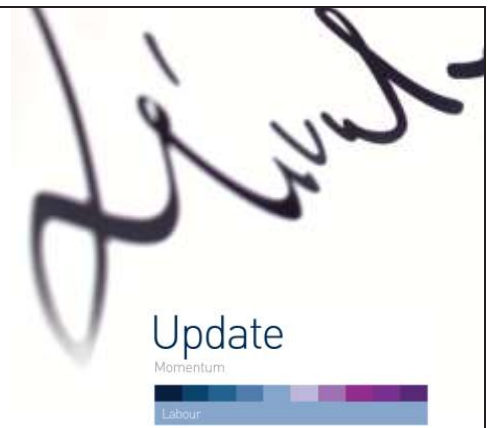
***The Court considered employees in such a situation to be carrying out their activity or duties over the whole duration of those journeys.*** The journeys of the employees to the customers their employer designates is a necessary means of providing their technical services at the premises of those customers. Not taking those journeys into account would enable Tyco to claim that only the time spent carrying out the activity of installing and maintaining the security systems falls within the concept of working time, which would distort that concept and jeopardise the objective of protecting the safety and health of employees. The fact that the journeys of the employees at the beginning and at the end of the day to or from customers were regarded by Tyco as working time before the abolition of the regional offices also shows that the work consisting in driving a vehicle of a regional office to the first customer and from the last customer to that office was previously among the duties and activity of those employees. Yet the nature of those journeys has not changed since the abolition of the regional offices. It is only the departure point of the journeys that has changed.

***The Court takes the view that the employees are at the employer's disposal for the time of the journeys.*** During those journeys, the employees act on the instructions of the employer, who may change the order of the customers or cancel or add an appointment. During the necessary travelling time – which generally cannot be shortened – the employees are therefore not able to use their time freely and pursue their own interests.

In addition, ***the Court considers the employees to be working during the journeys.*** If an employee who no longer has a fixed place of work is carrying out his duties during his journey to or from a customer, that employee must also be regarded as working during that journey. Given that travelling is an integral part of being such an employee, the place of work of that employee cannot

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<sup>3</sup> Please refer to ECJ's press release No 99/15, of September 10, 2015, available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-09/cp150099en.pdf>.



be reduced to the physical areas of his work on the premises of the employer's customers. The fact that the employees begin and finish the journeys at their homes stems directly from the decision of their employer to abolish the regional offices and not from the desire of the workers themselves. Requiring them to bear the burden of their employer's choice would be contrary to the objective of protecting the safety and health of employees pursued by the directive, which includes the necessity of guaranteeing employees a minimum rest period.

This ruling clarifies the notion of working time applicable to a wide range of employees who perform their functions without fixed or habitual place of work (such as medical sales representatives or external sellers). Similar decisions can be found in Portuguese courts: in Coimbra Court of Appeal ruling No. 261/06, of May 4, 2006, it was decided that: (i) the Labour Code defines working time as any period during which the employee performs his activity or continues to be bound to the obligation of performing functions, as well as interruptions and breaks legally established; and (ii) the employee's journey time from the company's headquarters to the places of work designated by the employer (and vice-versa) shall be included in the employee's daily timetable<sup>4</sup>.

Having regard to the above, although Article 197 of the PLC would already validate the interpretation followed by the ECJ, this ruling clarifies and strengthens the solution to be applicable by national courts in similar cases.

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<sup>4</sup> Decision available at <http://www.dgsi.pt/jtrc.nsf/8fe0e606d8f56b22802576c0005637dc/a3ec702a17c381fa8025716f004bed6f?OpenDocument> (Portuguese version). Please refer also to the Porto Court of Appeal ruling of June 16, 2014, Case No. 165/12.9TTSTS.P1, available at <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/558dd06542bc14ef80257d0300479187?OpenDocument> (Portuguese version).