Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 28 February 2019 [1]

Case C-254/18

Syndicat des cadres de la sécurité intérieure
v
Premier ministre,
Ministre de l'Intérieur,
Ministre de l'Action and des Comptes publics

(Request for a preliminary ruling
from the Conseil d'État (Council of State, France))

(Reference for a preliminary ruling — Social policy — Organisation of working time — Directive 2003/88/EC — Article 6(b) and Article 16 — Maximum weekly working time — Derogation — Article 17(2) and (3) and the first paragraph of Article 19 — Police officers — Reference period — Rolling or fixed nature — Protection of the safety and health of workers)

1. Must the 'reference period' that the Member States may lay down, within the meaning of Directive 2003/88/EC, [2] in order to calculate the maximum average weekly working time be understood as a 'rolling' period, that is to say, a period the start of which moves with the passage of time, or can it also be determined on a 'fixed' basis, in the sense that that period can begin and end on a fixed calendar date?

2. That, essentially, is the question that the Court will have to answer in this case, which concerns a request for a preliminary ruling from the Conseil d'État (Council of State, France) on the interpretation of a number of provisions of Directive 2003/88.

3. That question has arisen in proceedings brought by the Syndicat des cadres de la sécurité intérieure (Union of higher-ranking security forces personnel; 'the SCSI'), a police officers' trade union, which has applied to the Conseil d'État (Council of State) for annulment of a decree amending the provisions that derogate from the minimum working and rest time guarantees applicable to staff of the French national police force. According to the SCSI, that decree infringes Directive 2003/88 because it establishes a 'fixed' reference period for calculating the maximum average weekly working time.

4. Whether a reference period established on a 'rolling' or on a 'fixed' basis is chosen does undoubtedly affect the arrangements for determining the maximum weekly working time established by Directive 2003/88. Indeed, the use of a 'rolling' reference period ensures that the maximum average weekly working time is complied with at all times, whereas the use of a 'fixed' period crystallises the period to be taken into account for counting the time that employees actually work.

1 Original language: French.

2 Directive 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).

5. In this case the Court is therefore required to clarify the scope of the concept of 'reference period' for the purposes of calculating the maximum weekly working time, as it is laid down by Directive 2003/88, in the light of the fundamental objective of that directive, that is to say, protecting the safety and health of workers.

I. Legal context

A. EU law

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

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

…

(b) the average working time for each 7-day period, including overtime, does not exceed 48 hours.'

7. Article 16 of Directive 2003/88, which concerns reference periods, reads as follows:

'Member States may lay down:

…

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

…'

8. Article 17(2) and (3) of Directive 2003/88 establishes the following derogations, among others:

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

3. In accordance with paragraph 2 of this Article, derogations may be made from [Article] 16:

…

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

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

…

9. Article 19 of Directive 2003/88, entitled 'Limitations to derogations from reference periods', sets out the following provisions:

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

B. French law

10. In French law, as a general rule, the actual weekly working time of civil servants and members of the judiciary, including overtime, cannot exceed 48 hours in a single week, or 44 hours when averaged over any period of 12 consecutive weeks (point I of Article 3 of Decree No 2000-815).[3] That rule can be derogated from only where, inter alia, the purpose of the public service in question itself requires the service to be provided continuously, in particular to protect persons and property, by decree of the Conseil d'État (Council of State), adopted pursuant to the opinion of certain administrative committees and of the Conseil supérieur de la fonction publique (Higher Council of the Civil Service), establishing the compensatory measures granted to the categories of officials concerned (point II(a) of Article 3 of Decree No 2000-815).

11. Derogations from the minimum working and rest time guarantees applicable to the staff of the national police force are governed by Decree No 2002-1279 of 23 October 2002. Article 1 of that decree was modified by Decree No 2017-109 of 30 January 2017 ('Decree No 2017-109'). That article, as amended, reads as follows:

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

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

1. The measured weekly working time for each 7-day period (including overtime), may not exceed, on average, 48 hours over a 6-month period in a calendar year;

…'

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

12. On 28 March 2017, the SCSI applied to the Conseil d'État (Council of State) for annulment of Article 1 of Decree No 2017-109. The SCSI argues, in particular, that the article in question infringes the rules in Directive 2003/88 by using a fixed reference period, expressed in six-month periods of the calendar year, to calculate average weekly working time instead of an undefined period of six months expressed on a rolling basis.

13. The referring court is unsure as to whether Article 6, in conjunction with Article 16, of Directive 2003/88 must be interpreted as requiring a reference period defined on a rolling basis or as allowing the Member States to choose whether that period should be rolling or fixed.

3 Décret du 25 août 2000 relatif à l'aménagement et à la réduction du temps de travail dans la fonction publique de l'Etat et dans la magistrature (Decree of 25 August 2000 on the organisation of and reduction in working time in the public sector and in the judiciary) ('Decree No 2000-815').

14. It is also seeking to ascertain, in the event that only a rolling reference period is possible, whether that period must remain rolling when it is extended to six months under the derogation provided for in Article 17(3)(b) of Directive 2003/88.

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

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

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

III. Legal analysis

A. Preliminary observations

16. The questions raised by the referring court in this case concern the concept of the 'reference period' that the Member States may lay down in order to apply the provisions of Directive 2003/88 on the maximum weekly working time.

17. It should be noted, at the outset, that Directive 2003/88 establishes two regimes for the maximum average weekly working time: a standard regime and a derogating regime.

18. Specifically, for the standard regime, the maximum weekly working time is defined in Article 6(b) and Article 16(b) of Directive 2003/88. Under Article 6(b), the average working time for each 7-day period, including overtime, does not exceed 48 hours. Under Article 16(b), in order to calculate that maximum average time, the Member States may lay down a reference period not exceeding four months.

19. However, Directive 2003/88 also contains provisions giving the Member States the option to derogate from the standard regime governing maximum weekly working time. Accordingly, under Article 17(3)(b) and (c) of Directive 2003/88, the Member States have an option to derogate, in particular, from Article 16 of that directive in the case of 'security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms' and 'in the case of activities involving the need for continuity of service or production'. However, under the first paragraph of Article 19, that option 'may not result in the establishment of a reference period exceeding six months'.

20. Decree No 2017-109, the annulment of which is sought in the main proceedings, concerns a derogation from the standard regime for the maximum weekly working time of civil servants and, specifically, from the derogation applicable to active officials in the national police force. As can be seen from the file available to the Court and as confirmed at the hearing by the various parties which have submitted observations to the Court, the French Republic, by adopting that decree, exercised its option under Article 17(3) of Directive 2003/88 to derogate from the standard regime governing the maximum weekly working time.

21. It follows that the provisions of Directive 2003/88 referred to in point 19 above that establish the option to derogate from the standard regime for maximum weekly working time are relevant to this case. [4]

22. Furthermore, the provisions of Directive 2003/88 on both the standard regime and the derogating regime governing the maximum weekly working time use the same concept of 'reference period' in Article 16(b) and in the first paragraph of Article 19 of that directive.

23. That being so, the concept of 'reference period' for the purposes of calculating the maximum average weekly working time should be found, in the context of Directive 2003/88, to be a *single* concept that, in that context, has the same meaning and must be interpreted in the same way in relation to both regimes.

24. Furthermore, since those provisions of Directive 2003/88 contain no reference to the national law of the Member States, that concept must also be regarded as an *autonomous* concept of EU law requiring uniform interpretation throughout the European Union, irrespective of characterisation in the Member States. [5]

25. I nevertheless note, in this context, that it is apparent from reading the two questions referred by the Conseil d'État (Council of State) that they presuppose that the concept of a 'reference period' might be interpreted differently depending on whether a situation comes under the standard regime or under the derogating regime governing the maximum weekly working time. [6]

26. However, since the concept of 'reference period' for the purposes of calculating the maximum average weekly working time is a single concept, it must be found that both those questions in actual fact refer to the interpretation of the same concept and must, therefore, be examined jointly.

27. Under those circumstances, by its two questions the referring court is, in my view, asking the Court, essentially, whether the relevant provisions of Directive 2003/88 — referred to in points 18 and 19 above — must be interpreted as meaning that, whether in relation to the standard regime or to the derogating regime governing the maximum weekly working time, the Member States must define the reference period to be used to calculate that working time on a 'rolling' basis or whether they have the option also of defining it as a 'fixed' period.

28. Two positions, in essence, have emerged on that point among the parties that have participated in the proceedings before the Court.

29. Both the European Commission and the French Government, on the one hand, and the SCSI, on the other, submit that the provisions of Directive 2003/88 must be interpreted as leaving the Member States to choose whether the reference period used to calculate weekly working time is rolling or fixed.

30. Unlike the Commission and the French Government, however, the SCSI takes the view that, if the Member State has availed itself of the option to derogate from the standard regime and has established a six-month reference period in accordance with Article 19 of Directive 2003/88, only a rolling reference period can then be used.

4 See, to that effect, judgment of 9 November 2017, *Maio Marques da Rosa* (C-306/16, EU:C:2017:844, paragraphs 35 and 36).

5 See judgment of 9 November 2017, *Maio Marques da Rosa* (C-306/16, EU:C:2017:844, paragraph 38 and the case-law cited).

6 The second question referred in fact implies the possibility that the concept of 'reference period' used in relation to the derogating regime might refer to a fixed reference period in the event that the reference period used for the standard regime had to be on a rolling basis.

31. In order to respond to the referring court's request, it is to my mind appropriate first to analyse the scheme of Directive 2003/88 in which the concept of 'reference period' operates, in the light of the principles which the Court has developed in its case-law on the topic. Thereafter, on the basis of that analysis, it will be possible to provide an interpretation of that concept.

B. Directive 2003/88 in the case-law of the Court of Justice

32. It is apparent from settled case-law that the objective of Directive 2003/88 is to lay down the minimum requirements intended to improve the living and working conditions of workers by approximation of the provisions of national law, in particular those governing working time. [7]

33. This harmonisation of the organisation of working time at EU level is designed 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 — and to adequate breaks and by setting a maximum limit on the weekly working time. [8]

34. Accordingly, the provisions of Directive 2003/88 cited in points 18 and 19 above lay down the rules governing the maximum limit on weekly working time. The right to a limit on maximum working time is furthermore expressly enshrined in Article 31(2) of the Charter of Fundamental Rights of the European Union.

35. The Court has noted in this regard that the maximum average limit of 48 hours, including overtime, for each 7-day period, compliance with which the Member States must ensure by taking the necessary measures, in accordance with Article 6(b) of Directive 2003/88, is based on the need to act in keeping with the requirement to protect the safety and health of workers. [9]

36. The Court has also clarified that the maximum limit in question is one of the requirements of Directive 2003/88 that constitute a rule of EU social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure the protection of the worker's safety and health. [10]

37. In that context, the Court has also stated that the minimum requirements under Directive 2003/88 intended to ensure protection for the safety and health of workers impose clear and precise *obligations* on the Member States *as to the result to be achieved* by the rights which that directive confers on them. [11] That applies specifically to the rule set out in that directive consisting of establishing a ceiling of 48 hours, including overtime, for average weekly working time. [12]

7 See, inter alia, judgments of 14 October 2010, *Fuß* (C-243/09, EU:C:2010:609, paragraph 32 and the case-law cited), and of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:578, paragraph 23 and the case-law cited).

8 Ibid.

9 See, to that effect, judgment of 14 October 2010, *Fuß* (C-243/09, EU:C:2010:609, paragraph 33).

10 See, in particular, judgments of 14 October 2010, *Fuß* (C-243/09, EU:C:2010:609, paragraph 33 and the case-law cited), and of 23 December 2015, *Commission* v *Greece* (C-180/14, not published, EU:C:2015:840, paragraph 34). On the Member States' obligation to ensure that Directive 2003/88 is effective, see the findings in points 45 to 54 of my Opinion in *CCOO* (C-55/18, EU:C:2019:87 and the case-law cited).

11 See, to that effect, judgment of 7 September 2006, *Commission* v *United Kingdom* (C-484/04, EU:C:2006:526, paragraph 37), in so far as concerns Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 (OJ 2000 L 195, p. 41) ('Directive 93/104') the relevant provisions of which were worded in substantially the same terms as that in Directive 2003/88. My italics.

12 See, to that effect, in so far as concerns Directive 93/104, judgment of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 104).

38. In the same vein, basing itself on the wording of the articles that lay down those minimum requirements, and on the objectives that Directive 2003/88 pursues and the scheme which it puts in place, the Court has also highlighted the need for workers *actually* to benefit from the rights that the directive in question confers on them. [13]

39. The Court has thus stated that, in order to ensure that the rights conferred on workers by Directive 2003/88 are fully effective, Member States are under an obligation to guarantee that each of the minimum requirements laid down by the directive is observed. That is, indeed, the only interpretation which accords with the objective of Directive 2003/88, which is to secure effective protection of the safety and health of employees by allowing them actually to enjoy the rights which it confers on them. [14]

40. That said, although the minimum requirements under Directive 2003/88 impose obligations of result on the Member States in order to ensure that the rights which it confers on workers are fully effective, it is nevertheless apparent from the same directive, in particular recital 15, that it also provides Member States with a degree of flexibility in the implementation of its provisions. [15]

41. It thus emerges that the Member States have some discretion as to how they implement those minimum requirements, although they are nevertheless obliged, as is explicitly clear from the same recital of Directive 2003/88, to ensure that the principles of the protection of the safety and health of workers are upheld. [16]

C. Interpretation of the concept of 'reference period' for the purposes of calculating the maximum average weekly working time

42. The context described in the foregoing points should form the basis for defining the concept of 'reference period' as used in Directive 2003/88 in order to calculate the maximum average weekly working time and, specifically, for determining whether, according to that directive, the Member States must define that period on a 'rolling' basis or whether they can also define it on a 'fixed' basis.

43. According to the case-law, an autonomous concept of EU law, such as the concept of 'reference period', must be defined uniformly throughout the European Union, irrespective of characterisation in the Member States, in accordance with objective characteristics, taking into account the wording of the provisions that use it and also its context and the purpose of the rules of which it forms part. [17] Such an autonomous interpretation alone is capable of securing full effectiveness for Directive 2003/88 and uniform application of that concept in all the Member States. [18]

44. It should be noted in this regard, first of all, that it is impossible to determine from the expression 'reference period' and the wording of the provisions of Directive 2003/88 that use that concept for the purpose of calculating the maximum average weekly working time whether that period must be 'rolling' or 'fixed'.

13 See, to that effect, judgment of 7 September 2006, *Commission* v *United Kingdom* (C-484/04, EU:C:2006:526, paragraph 39); my italics.

14 See, to that effect, judgment of 7 September 2006, *Commission* v *United Kingdom* (C-484/04, EU:C:2006:526, paragraph 40 and the case-law cited).

15 See judgment of 9 November 2017, *Maio Marques da Rosa* (C-306/16, EU:C:2017:844, paragraph 46).

16 On the discretion that Directive 2003/88 gives to the Member States, see also point 86 et seq. of my Opinion in *CCOO*, cited in footnote 10 above.

17 See, to that effect, judgment of 9 November 2017, *Maio Marques da Rosa* (C-306/16, EU:C:2017:844, paragraph 38 and the case-law cited).

18 See, to that effect, order of 4 March 2011, *Grigore* (C-258/10, not published, EU:C:2011:122, paragraph 44 and the case-law cited), and, in relation to Directive 93/104, judgment of 1 December 2005, *Dellas and Others* (C-14/04, EU:C:2005:728, paragraph 44 and the case-law cited).

45. Indeed, neither the expression 'reference period' per se nor the text of Directive 2003/88, in particular Article 16(b) and the first paragraph of Article 19, provides any information indicating whether the start of that period must be fixed or whether it must be rolling over time. That directive therefore does not specify how that period should be taken into account for the purpose of calculating the maximum average weekly working time. An analysis of the various language versions of that expression and of those articles does nothing to alter that finding.

46. However, although that directive's silence on this point makes it impossible to draw any definitive conclusions, that silence nevertheless appears to militate in favour of an interpretation that gives the Member States a degree of leeway by allowing them freedom to choose whether to define the reference period for the purposes of calculating the maximum average weekly working time on a 'fixed' or on a 'rolling' basis.

47. Secondly, as regards the context surrounding the concept of 'reference period', it must, first, be pointed out that the EU legislature used that concept in several provisions of Directive 2003/88 in order to set the period within which the maximum average weekly working time must be calculated.

48. It has done so in Article 16(b) of Directive 2003/88, which provides that the Member States may lay down a reference period not exceeding four months for the application of the maximum weekly working time within the meaning of Article 6 of the directive, and in the first paragraph of Article 19 of the directive, which provides that the option to derogate from Article 16(b), provided for in particular in Article 17(3), may not result in the establishment of a reference period exceeding six months.

49. In Directive 2003/88, the concept of 'reference period' is used explicitly for the purposes of calculating the maximum weekly working time, in particular in Article 17(5), in relation to the derogations for doctors in training, in Article 20(2), in relation to workers who mainly perform offshore work, in the second subparagraph of Article 21(1), in relation to workers on board seagoing fishing vessels flying the flag of a Member State, and in Article 22(1)(a) and (e), in respect of the option granted to the Member States, under strict conditions, not to apply Article 6 of Directive 2003/88. However, those provisions provide no precise indication as to whether the concept of 'reference period' refers to a 'rolling' or to a 'fixed' period.

50. As regards its context, Directive 2003/88 also uses the concept of 'reference period' for purposes other than for calculating the maximum average weekly working time. Thus, on the one hand, Article 16(a) of that directive determines the reference period that the Member States can lay down for application of Article 5 of that directive on the minimum weekly rest period and, on the other hand, Article 16(c) of that directive uses the same concept for the purposes of applying Article 8 thereof on the length of night work.

51. As regards, specifically, the concept of 'reference period' in relation to calculation of the minimum weekly rest period, within the meaning of Article 5 and Article 16(a) of Directive 2003/88, it should be noted that in its judgment of 9 November 2017, *Maio Marques da Rosa* (C-306/16, EU:C:2017:844), in particular in paragraph 43, the Court held that 'a reference period may be defined in that context as a *set* period within which a certain number of consecutive rest hours must be provided irrespective of when those rest hours are granted'. [19]

52. Basing itself on that definition used by the Court, which nevertheless related to the minimum period of weekly rest under Article 5 of Directive 2003/88, the French Republic contends that the reference period under Article 16(b) of that directive for the purposes of calculating the maximum average weekly working time must, by analogy, be defined as a fixed period.

19 My italics.

53. It must, however, be noted in this respect that the matter under discussion before the Court in *Maio Marques da Rosa* was different from that at issue in the present case. In that case, the Court was required to determine whether or not the minimum uninterrupted weekly rest period of 24 hours, to which a worker is entitled within the meaning of the first paragraph of Article 5 of Directive 2003/88, had to be provided no later than the day following a period of six consecutive working days.

54. In that context the Court held that the seven-day period under Article 5 could be regarded as a 'reference period' and, as can be seen in point 51 of the present Opinion, defined the concept of 'reference period' for those purposes by using the expression 'set period'.

55. In my view, however, by using the term 'set' in that definition the Court did not intend to rule that the concept of 'reference period' should be interpreted as meaning that the start of that period must necessarily be set, that is to say that it must correspond to an immovable date. Moreover, that issue was not the subject matter of the case before it. By contrast, to my mind, when it used the term 'set' the Court meant that the reference period is a fixed period in the sense that it has a defined duration, in that instance, in accordance with Article 5 of Directive 2003/88, a duration of seven days. I would also add that, in paragraph 43 of the judgment in *Maio Marques da Rosa*, the Court expressly limited the scope of the definition to 'that context', that is to say, the context of the provision relating to weekly rest.

56. Under those circumstances, contrary to the French Republic's argument, it is not, to my mind, possible to draw definitive conclusions from the definition of the concept of 'reference period' that the Court used in paragraph 43 of the judgment in *Maio Marques da Rosa* (C-306/16, EU:C:2017:844) in relation to minimum weekly rest as regards whether the reference period that the Member States can use, in accordance with Directive 2003/88, for the purposes of calculating the maximum weekly working time must be 'rolling' or 'fixed'.

57. By contrast, it is possible to draw on the definition that the Court used in the judgment in *Maio Marques da Rosa* in order to define the reference period for the maximum weekly working time as a defined period within which the average weekly working time cannot exceed a certain number of hours.

58. It follows from the foregoing that the contextual analysis likewise does not provide any conclusive determination as to whether the concept of 'reference period' for the purposes of calculating the maximum average weekly working time must be understood as requiring the Member States to define that period on a 'rolling' basis or whether, in contrast, the Member States also have an option to define it on a 'fixed' basis.

59. Thirdly, the objective of Directive 2003/88, as I summarised in points 32 and 33 above, is effectively to protect the safety and health of workers.

60. That fundamental objective of Directive 2003/88 has a key role in the context of the rules governing the maximum weekly working time, as confirmed both by the fact that Article 6 of Directive 2003/88 explicitly provides that the Member States must take the necessary measures relating to the maximum weekly working time 'in keeping with the need to protect the safety and health of

workers',[20] and by the fact that the Court has on several occasions described Article 6(b) of Directive 2003/88 as a provision that the Member States must ensure is fully effective, obliged as they are to prevent the maximum weekly working time laid down in Article 6(b) of Directive 2003/88 from being exceeded.[21]

61. The concept of 'reference period' at issue here must therefore be interpreted in the light of that fundamental objective of Directive 2003/88 and of the obligation imposed on the Member States, in order to achieve that objective, of ensuring that the requirements of Directive 2003/88 concerning maximum weekly working hours are fully effective.

62. In that respect, as the Commission correctly highlighted, a method of calculating the maximum weekly working time that uses a rolling reference period is the best way of achieving the fundamental objective of Directive 2003/88 of protecting the safety and health of workers.

63. Accordingly, in the first place, the application of such a calculation method means that the start of the reference period is not immovable, but moves with the passage of time, thereby guaranteeing, in such a case, that the maximum average weekly working time is complied with irrespective of the time chosen for the start of the period. In other words, such a method ensures that the maximum average weekly working time is complied with at all times.

64. Secondly, the choice of such a method makes it possible to avoid a situation in which a worker engages in intense periods of work back to back over two successive reference periods and it therefore removes the risk of a worker exceeding the weekly limit of 48 hours' work averaged over long periods and thus the risk of situations arising in which, notwithstanding formal compliance with maximum working time, the safety and health of the worker are jeopardised.[22]

65. The situation is less clear, however, where the method of calculating the maximum average weekly working time used employs a fixed reference period, which therefore starts on an immovable date. In order to assess whether use of such a method is compatible with Directive 2003/88, I believe it is necessary to start from the following two considerations.

66. First, as I indicated in points 40 and 41 above, Directive 2003/88 gives Member States a degree of flexibility in implementing its provisions, and they therefore have a degree of discretion as regards the arrangements for implementing those provisions. That flexibility means that the Member States can, in the national provisions transposing that directive, take into account requirements associated with, inter alia, the protection of general interests, such as the protection of public-policy considerations, or specific features of particular activities that require a certain degree of flexibility in the organisation of working hours. That is, moreover, why Chapter 5 of Directive 2003/88 establishes options for derogating from, and exceptions to, certain provisions of that directive.

67. Admittedly, as is quite clear from recital 15 of Directive 2003/88, that flexibility encounters an absolute limit in the form of the requirement to comply with the primary objective of Directive 2003/88, and it cannot therefore give rise to situations which infringe the need to protect the safety and health of the workers which is safeguarded by that directive.

20 I would point out in this regard that, even though Article 22(1) of Directive 2003/88 gives a Member State the option not to apply Article 6, it is nevertheless explicitly required to comply with 'the general principles of the protection of the safety and health of workers'. See, also, judgment of 14 October 2010, *Fuß* (C-243/09, EU:C:2010:609, paragraph 34, final part).

21 See judgments of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 118), and of 14 October 2010, *Fuß* (C-243/09, EU:C:2010:609, paragraph 51). Thus, the Court, having regard for the need to attain that fundamental objective, has held that the Member States cannot unilaterally determine the scope of that provision by attaching conditions or restrictions to the implementation of the workers' right not to work an average of more than 48 hours per week (ibid., paragraphs 99 and 52 respectively) and acknowledged that Article 6(b) of Directive 2003/88 directly confers rights the effectiveness of which must be ensured in full within the national legal order (judgment of 14 October 2010, *Fuß* (C-243/09, EU:C:2010:609, paragraph 64 and the case-law cited)). See also points 35 to 39 of the present Opinion and the case-law cited therein.

22 See the example given in footnote 24 below.

68. Secondly, choosing a method of calculating the maximum average weekly working time that uses a 'fixed' reference period does not automatically entail an infringement of that requirement. The choice of a 'fixed' or 'rolling' reference period to be used in calculating the maximum average weekly working time is in fact only one of a number of factors — such as the weekly maximum number of hours worked or the length of the reference period — that are taken into consideration in the national provisions on the organisation of working time. Accordingly, a system for organising working time that uses a reference period calculated on a rolling basis does not necessarily always give workers greater protection than a system that uses a reference period calculated on a fixed basis, as a number of the examples given during the proceedings before the Court have shown. [23]

69. Admittedly, if the Member State chooses a system for organising working time that uses a 'fixed' reference period, specifically a long reference period under a derogation regime, there is a risk that situations may arise, such as the hypothetical situation described at the hearing, [24] in which compliance with the requirement to protect the safety and health of workers is not ensured. However, as can be seen from points 35 to 39 and 60 of the present Opinion, Member States have an obligation to ensure that such situations do not occur. They are indeed subject to an obligation of result to ensure the full effectiveness of the rule contained in Directive 2003/88 establishing a 48-hour ceiling on the average weekly working time and the rights that the rule confers on workers.

70. To my mind, it follows from the foregoing that, although a method of calculating the maximum weekly working time that uses a rolling reference period is the best way to ensure compliance with the requirement to protect safety and health and is, therefore, the first choice when transposing the relevant provisions of Directive 2003/88 into national law, especially in the case of a derogating regime under Article 17 of that directive, this does not mean that, in the context of the Member States' discretion, those States cannot establish that a fixed reference period may be used, provided that they ensure compliance with the requirement to protect the safety and health of workers.

71. In such a situation, I believe that compliance with that requirement is subject to a twofold condition.

72. First, when a Member State chooses to lay down a method for calculating the maximum weekly working time that uses a reference period on a fixed basis, it is particularly important for it to ensure that *effective preventive* instruments for the organisation of work and control and safeguarding instruments exist and are put in place that make it possible to prevent the occurrence of any situations in which the organisation of working hours infringes that requirement to protect the safety and health of workers. It falls to the Member State to choose the preventive mechanisms which it considers appropriate for that purpose. Those instruments must nevertheless ensure the effectiveness of the right to the maximum average weekly working time that Directive 2003/88 — and Article 31(2) of the Charter of Fundamental Rights — give to workers.

23 In that respect, the Commission, in its observations, correctly noted that, for example, a worker subject to a rule of national law that fixes the maximum weekly working time well below the 48-hour ceiling under Article 6(b) of Directive 2003/88 that must be calculated over a fixed reference period of three weeks would be better protected than a worker subject to the 48-hour weekly ceiling calculated on the basis of a rolling six-month reference period.

24 At the hearing, discussion among the parties taking part in the oral part of the procedure before the Court centred on an example of a hypothetical situation in which, over a six-month fixed calendar period (1 January to 30 June), a worker works 36 hours a week in the first three months and 60 hours a week in the last three months, giving an average of 48 hours a week over the six months and, in the following fixed calendar period (1 July to 31 December), the worker works 60 hours a week in the first three months and 36 hours a week in the last three months (once again with average working time of 48 hours a week over the six months). In such a case, over each of those two successive fixed calendar periods, the average weekly working time is indeed 48 hours a week. However, if one nevertheless takes into account the number of hours worked between 1 April and 30 September, it can be seen that the worker has worked 60 hours a week over six months. All of the parties agreed that such a situation would infringe the requirement to protect the safety and health of the workers hypothetically affected.

73. Secondly, the Member State must also ensure that, where those preventive mechanisms do not prove effective and, despite their existence, the requirement to protect the safety and health of workers is nevertheless infringed, workers have access, *ex post*, to effective opportunities for redress, both internally or through administrative procedures and judicially, by means of which they can promptly prevent the continuance of any situation entailing an infringement of that requirement.

74. In short, if a Member State chooses to lay down in its national legislation a method for calculating the maximum weekly working time that uses a reference period on a fixed basis, particularly where that period is long and relates to a derogating regime, that State must then ensure that there are *organisational, procedural* and *judicial* mechanisms capable of ensuring that the requirement to protect the safety and health of workers is *effectively* complied with in the organisation of working time and that no infringements of that requirement occur in the organisation of working time or, if they do nevertheless occur, that they are eliminated forthwith.

75. Where the Member State has chosen to use a reference period determined on a 'fixed' basis, it is ultimately for the national court, in the specific case pending before it, to assess whether or not such effective mechanisms exist and whether or not the twofold condition described above is satisfied so that the national legislation at issue before it can be found to be compatible with EU law and specifically with Directive 2003/88.

D. Consideration of the questions referred

76. In the light of the foregoing and of the interpretation that I am proposing to give to the concept of 'reference period' for calculating the maximum average weekly working time as that concept is used in Directive 2003/88, I believe that the referring court's questions should be answered to the effect that, within the context of the flexibility that the directive gives them, the Member States are free to choose a method of calculating the maximum average weekly working time that uses a reference period defined on a 'rolling' or on a 'fixed' basis.

77. However, should a Member State decide to use a reference period defined on a 'fixed' basis, it has a duty to ensure that organisational, procedural and judicial mechanisms have been put in place that are capable of actually ensuring that the requirement to protect the safety and health of workers is *effectively* complied with in the organisation of working time and that no infringements of that requirement occur or, if they do occur, that they can be eliminated efficiently and immediately.

78. It is for the referring court, which alone has jurisdiction to interpret national law, to determine whether the national rules satisfy those conditions.

79. However, in the assessment that it is required to undertake, that court may have regard to the guidance on interpretation provided by the Court of Justice. From that perspective, in order to provide the referring court with a reply that will be of as much use as possible in determining the case before it, the following few considerations may prove germane.

80. On the basis of the information provided during the written and oral procedure before the Court, there is in fact reason to doubt that the twofold condition entailed in complying with the requirement to protect the safety and health of workers is complied with in the present case. On the one hand, there appears to be no effective preventive control system capable of ensuring that, in the context of a derogating regime such as that in the legislation at issue before the referring court, no situations arise in which compliance with the requirement to protect the safety and health of the workers affected is not ensured. Indeed, it has been argued that, in contrast to the situation in the private sector, there is no independent body that can intervene directly to order an employer to put an end to infringements of that requirement and that it is, essentially, impossible to prevent such infringements from continuing.

81. On the other hand, it has been submitted that the systems of *ex post* administrative and judicial actions seeking to put an end to situations involving infringements of those necessary requirements are likewise ineffective. Indeed, it appears that administrative appeals to a higher authority generally go unanswered, that applications for interim measures are subject to very strict conditions and are therefore rarely granted, and that actions before the administrative courts take from one to four years to be heard, which means that the only form of protection actually available to workers is, essentially, possible *ex post* compensation.

82. It quite clearly falls to the referring court to assess whether appropriate organisational, procedural and judicial mechanisms have been put in place that are capable of ensuring actual and effective compliance with the requirement to protect the safety and health of workers. However, if there are no such safeguards, laying down a reference period defined on a 'fixed' basis, as the national legislation at issue does, appears to be incompatible with EU law.

IV. Conclusion

83. In the light of all of the foregoing considerations, I propose that the Court should reply as follows to the questions referred for a preliminary ruling by the Conseil d'État (Council of State, France):

Article 6(b), Article 16(b), Article 17(3) and the first paragraph of Article 19 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as meaning that the Member States are free to choose a method of calculating the maximum average weekly working time that uses a reference period defined on a 'rolling' or on a 'fixed' basis. However, where a Member State decides to use a reference period defined on a 'fixed' basis, it has a duty to ensure that organisational, procedural and judicial mechanisms have been put in place that are capable of ensuring actual and effective compliance with the requirement to protect the safety and health of workers in the organisation of working time and that no infringements of that requirement occur or, if they do occur, that they can be eliminated efficiently and immediately. It is for the referring court, which alone has jurisdiction to interpret national law, to determine whether the national rules satisfy those conditions.