THE NEW OBLIGATION FOR COMPANIES IN SPAIN: WORKING TIME REGISTRATION. INNOVATION OR REGRESSION?[1]

Una nueva obligación para las empresas en España: registro del tiempo de trabajo. ¿Innovación o regresión?

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DAILY REGISTRATION OF THE WORKING DAY 5 THE REGISTRATION OF THE WORKING DAY IN SITUATIONS OF HOUR FELIXIBILITY. 6. AN ADVANCE IN THE REGISTRATION OF THE WORKING DAY: NEW INSTRUCTIONS OF THE LABOR INSPECTION. 7. COLLECTIVE BARGANING. 8. CONCLUSIONS. BIBLIOGRAPHY.

ABSTRACT: The new Spanish regulation establishing compulsory hourly registration systems for employees in all types of companies and activities is generating intense debate about its practical usefulness and, above all, whether it goes against the new forms of employment and the flexibility the new world of work/employment world is demanding.

RESUMEN: La nueva regulación establecida en España estableciendo sistemas obligatorios de registros horarios para los empleados en todo tipo de empresas y actividades, está generando un debate intenso sobre su utilidad práctica y, sobre todo, si va en contra de las nuevas formas de empleo y la flexibilidad que están demandando el nuevo mundo del trabajo.

KEY WORDS: Working time registration, working time, business obligation, working flexibility and flexible working time.

PALABRAS CLAVE: Registro de jornada, tiempo de trabajo, obligación empresarial, horario flexible.

1. THE CONTROL OF THE DAY ON THE CONTEXT OF FLEXIBILIZATION OF THE WORKDAY: INTRODUCTION AND BACKGROUND

The labor market is undergoing truly transcendental changes, many of them aimed at the pursue of a greater productivity and competitiveness. In this sense, the development of flexibility policies in the workday has sought out in the new information society and in a service economy, a reaction against the culture of many organizations anchored in industrial models of the last century in which control, authority and hierarchy prevailed. The "presenteeism" and the hourly stiffness become in the present time reactive factors against the policies of work-life balance. Therefore, the need to address the interpretation and application of the rules according to the time in which they are projected results not only a legal requirement but also a sign of rationality.

The matter of time control has a certain tradition in the international arena. Two ILO Conventions, certainly old, collect the abovementioned obligation but refer to the laws of the member states. On the one hand, ILO Convention No. 1 on Hours of Work (Industry) of 1919, establishes in its art. 8 the company's obligation to "to keep a record in the form prescribed by law or regulation in each country of all additional hours worked in pursuance of Articles 3 and 6 of this Convention" and, on the other hand, the ILO Convention No. 30 on Hours of Work (Commerce and Offices) of 1930, which, in its art. 11.2, also requires "to keep a record in the form prescribed by the competent authority of all additional hours of work performed in pursuance of paragraph 2 of Article 7 and of the payments made in respect thereof." More recently, the Directive 2003/88/EC of the European Parliament and Council, of the 4th of November, concerning certain aspects of the organization of working time, also refers to the registration of hours for a specifc case. Precisely, it establishes in its art. 22 that "(…) a Member State shall have the option not to apply Article 6 (which prescribes that the average working time for each seven-day period, including overtime, does not exceed 48 hours), while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that: c) the employer keeps up-to-date records of all workers who carry out such work; d) the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours".

In the time of the complete, fixed and regular industrial days, the only interested party of the control of the working day was the company, to verify the existence of absenteeism of the personnel. In the present time, where there is usual coexistence between full-time and part-time working time, in any of the variable and irregular cases, the control of the working day is not only a matter of interest for the company, but also for the workers that are in need of knowing how much they've worked, and especially of the legal representation of the personnel to be able to control possible excesses[2].In line with that evolution, duties began to be demanded from the company in relation to overtime, in how registration was taking place and the duty to inform the legal representation of the workers[3].

If we go back to the original Worker's Statute (1980) (Estatuto de los Trabajadores, abbreviation ET) we will verify that the beforementioned faculty of control of the company was not accompanied by a registration obligation other than in the case of overtime; the article 37.5 ET established at that time that "working overtime will be recorded day by day and it will be totalized weekly, handing a copy of the weekly summary to the employee in the corresponding receipt".

Law 11/1994, of May 19, proved to be the one that changed decisively, as compensation for the greater flexibility of working hours introduced in it, the wording of article 35.5 ET to go on to say that "for the purpose of calculating overtime, the workday of each worker will registered day by day and will be totalized in the fixed period for payment of remuneration, handing a copy of the summary to the worker on the corresponding receipt". Note that overtime is no longer registered alone, but also "the working day of each worker", although - and here the question appears – "to the effects of the calculation of overtime".

It is precisely that lack of definition of the legal norm what led to the existence, as a result of the Law 11/1994, of two clearly opposite jurisprudential trends that we remind attending to each one to their respective arguments.

One of those jurisprudential trends maintained that, if in the company the workers were not doing any overtime, there was no obligation to keep track of the working day; according to this line of argumentation the modification run in article 35.5 ET by Law 11/1994 did not mean that the day of any worker should be registered day by day, regardless if the worker did or did not overtime, and that necessarily the company should hand a copy of the summary on the corresponding payroll, such record and summary, always for this line of argumentation, would not make sense when overtime is not performed, as

2 Appeal 842/1998.

3 As stated by Lousada Arochena, J.F., "Registro y control de la jornada de trabajo", Aranzadi Instituciones, BIB 2016/85595, p. 3.

it would mean imposing an obligation on the company of general registration that would exceed the interpretation of art. 35.5 ET[4].

The other jurisprudential trend argued on the contrary that it was a general obligation of the company, regardless of whether overtime was performed or not. This line of interpretation sustained that there has always been a need to pre-constitute the evidence regarding overtime, since the lack of registration made it practically impossible for the worker to fulfill the burden of proving worked overtime in trial. For this jurisprudential trend, the substantial change introduced in the wording of art. 35.5 ET by Law 11/94 was the establishment of the obligation to carry, for the purpose of calculating overtime, a daily record of the working day, which would be totalized in the fixed period for the payment of remuneration, with the obligation of handing a copy to the worker. Ultimately, given the difficulty of controlling its fulfillment, the obligation to register was considered the only method of control and evidence of overtime, because it would suffice to deny the existence of overtime to avoid the obligation to register, therefore it was considered that the Law 11/94 established an obligation to keep record of the work day (whether there was overtime or not), with the obligation to deliver to the worker along with the salary documents, the summary of worked hours. In summary, the new norm introduced flexibility but at the same time required a new regulation of the control mechanism[5].

It should be recalled that RDL 16/2013 incorporated in the article 12 ET, as a new obligation, the existence in the companies of a daily record of the working hours of the part-time workers, "the working day for the part-time workers will be recorded daily and will be totalized on a monthly basis, handing a copy to the worker, together with the receipt of the salary, the summary of all the worked hours in each month, both the ordinary and complementary hours". As a result, the company had to keep the monthly summaries of the records of the working days for a minimum period of four years. In case of non-compliance with the abovementioned obligation to keep registration, the contract will be presumed to be held full-time, unless proven in contrary to accrediting the partial nature of the services.

1.1 The mandatory registration of working hours and article 35.5. ET: the criteria of the Spanish National High Court

Resolving Bankia's well-known case, SAN 207/2015, of December 4, estimated the lawsuit and made double sentence to the company:

To establish a system of registration of the effective daily working hours of the workfor-

4 STSJ Cataluña of 24th of October 2002, Appeal 5241/2002.
5 STSJ Andalucía of 16th of March 2001.

ce, which allows to check the adequate fulfillment of the agreed schedules, both in the sector agreement and in the company agreements that were applicable.

To transfer to the legal representation of the workers the information on worked overtime, in a monthly calculation, in accordance with the provisions of article 35.5 ET and the Third Additional Provision of Royal Decree 1561/1995 and article 32.5 of the Sectorial Savings Agreement.

The SAN considered that the day-to-day registry, with the consequent delivery of the abstracts of the working day of each worker, was the constitutive assumption to control the excesses of the working day, since these summaries could not contain the daily worked overtime, that only concurred when the ordinary day in annual calculation was exceeded, for which the only checking method was precisely the registration of the working day, being inadmissible to deny the fulfillment of these obligations just because overtime was not being done, since, if said criteria were admitted, the purpose of art. 35.5. ET, which was to ensure documentary proof of overtime to workers, would be totally empty of content.

We reproduce below some of the arguments in favor of the registration of the working day wielded by the AN[6] (Audiencia Nacional, abbreviation AN):

The obligation to keep record of overtime was empty of content if the follow-up or control of the working day was not being made by the worker, since the concept of overtime would only arise when the ordinary working day was surpassed, thus, cannot be argued that the fulfillment of the legal obligation of the company was satisfied when the company registered said overtime, since the qualification as such could only be possible "ex post", that is, after certain amount of hours have been performed per day, per week, per month or per year.

It would always be necessary to know what working day is being provided in order to define at what point of compliance - by default or by excess – of such agreed ordinary working day it is, and consequently, whether or not part-time, the number of complementary hours or the limits of the ordinary working day has been exceeded in order to conceptualize excess as overtime.

It may well be that the workday was being exceeded but that would not imply the qualification of excess as overtime, given that the definition of this would be determined by the surpass of the weekly workday in annual calculation according to art. 34.1 ET, so the only way to know the surpass would be by the record of the effectively worked workday.

This AN doctrine had, logically, effects on the doctrine of appealing, reflecting in the

6 Sempere Navarro, A.V., "El registro empresarial de la jornada efectiva", Revista Aranzadi Doctrinal number 6/2017 part Tribuna (BIB 2017/2115), p. 5; Preciado Doménech, C.H., "El registro de la jornada ordinaria en la nueva doctrina del Tribunal Supremo", BIB 2017/12614, p. 1.

STSJ Castilla León, Valladolid, 3rd of February of 2016[7] in regards to overtime in jobs worked from home, arguing that the work time at home was exactly the same as the work time performed outside of it. Its control is responsibility of the company, who has the obligation to keep record of the workday of their employee, handing copy of the summary to the worker in the corresponding receipt.

At the same time the Labor and Social Security Inspectorate (Inspección de Trabajo y de la Seguridad, abbreviation ITSS), started in 2016, between its action and performance plans, a campaign with the objective to intensify the law enforcement control in certain sectors in regards to time at work in general, and to the performance of overtime in particular. For which the institution issued the Legal Instruction 3/2016 concerning "Monitoring working time and overtime". Said Instruction dealt with the establishment of specific rules about the need for a registration of the ordinary workday. According to this Instruction the absence of the daily workday registration was classified as a serious offense of the art. 7.5 LISOS[8].

1.2. A new twist from the Spanish Supreme Court in terms of registration of the workday: Court Sentence pf 23 of March 2017

The Court sentence of 23rd of March 2017[9] estimated the company's appeal and substantially accepted the thesis sponsored by Bankia: the art. 35.5 ET regulates the performance of overtime and the establishment of a record in which the worked hours are noted in a daily basis, but without imposing the need to establish a record of the effective daily workday, nor that it allows to control the adequate compliance of the agreed schedules, regardless of the existence of overtime. Such conclusion was reached with significant opposition from the Chamber, that had 5 votes. Solution considered by the doctrine contrary to the provisions of art. 20.3 ET that empowers the employer to take the measures it deems appropriate to monitor and control the fulfillment of the labor obligations by its employees[10]. In its Obiter Dictum, the Spanish Supreme Court (Tribunal Supremo, abbreviation TS) made a specific acknowledgement that de "lege ferenda" a legislative reform would be appropriate to clarify the obligation to keep an hourly record and facilitate proof of worked overtime to the worker, but confirmed that de "lege data" that obligation did not exist.

To reach this conclusion, the Spanish Supreme Court linked the provisions of the art. 35.5 ET with the provisions regarding the contract of part-time employment and several

7 Appeal 2229/2015.

8 Mercader Uguina, J.R., "Planes de la Inspección de Trabajo sobre el registro de la jornada ordinaria de trabajo: sus riesgos y sus dudas", Trabajo y Derecho, number 25, Januray, 2016, pp. 4 and 5.

9 RCUD 81/2016.

10 For all, Sempere Navarro, A.V., "El registro…, *cit,* pp. 9 and 10.

regulatory provisions (RD 1561/1995)[11], such as Jurisprudence of the Fourth Chamber (Sala Cuarta) about article 35.5 ET as well as the European regulatory provisions on working time management and data protection. The Court also took account of the connection with the precepts of the LISOS ("neither is typified as infringement the absence of record-keeping…and not informing the workers of the hours spent in special workdays or breaching the merely formal or documentary obligations constitutes, solely, a minor offense, in the assumptions provided in art.6, number 5 and 6 of the abovementioned Royal Legislative Decree.

The interpretative arguments used by the majority vote have deserved doctrinal criticism, considering them unconvincing, for not taking into the purposes of the art. 35.5 ET in regards to health and safety environment, work-life balance and gender equality; being them focused on an interpretation made exclusively from an unfocused contractual perspective. The Spanish Supreme Court also looked at certain own jurisprudential precedents over art 35.5 ET that made clear that the sustained interpretation didn't have any precedent in their own doctrine[12].

EU regulations were adopted as the basis for justification of the accepted solution; however, all reference of the regulation that was part of the EU Directive 2003/88 was omitted, which was regarding health and safety environment, leaving essential issues unattended, such as how companies were going to evaluate, prevent and avoid risks derived from the excesses of the working day if they did not have the obligation to keep record of it[13].

The Spanish Supreme Court also turned to data protection to justify the no obligation of record keeping of the working day when the CJEU (Court of Justice of the European Union), in several resolutions, had validated much stricter solutions than the one imposed by art. 35.5 ET (in the case of the Portuguese legislation), stating that Directive 95/46 is not opposed to a national regulation that forces the employer to provide to the national relevant authority for the supervision of the working conditions in regards to time registration in order to allow an immediate consultation, as long as this was a necessary requirement for the proper execution of the relevant authorities of surveillance missions of the working conditions, especially in regards to overtime. Moreover, it contrasts with the flexible criteria used by the Spanish Supreme Court in terms of data protection with the strict and restrictive criteria regarding time control in the workplace[14].

Therefore, the TS concluded that the obligation for the employer to keep a record was extended only to performed overtime[15]. However, the matter was left opened by the initia-

11 As stated by Lousada Arochena, J.F., "Registro y control…, *cit*, p.5.
12 See Sempere Navarro, A.V., "El registro…, *loc cit.*
13 See Sempere Navarro, A.V., "El registro…, *cit. p.5.*
14 See Sempere Navarro, A., "Registro empresarial…, *loc cit.*
15 See Sempere Navarro, A., "Registro empresarial…, *ibidem.*

tive executed by the AN which in its Order of 19th of January 2018[16] decided to raise three preliminary questions to the CJEU, at the request of several unions that under European regulations had to be declared the obligation to implement a system of records keeping of the working day[17].

According to the AN, out of the interpretation given by the TS of the art. 34 and 35 ET in regards to the lack of obligation to register the working day of a full-time worker, in practice it lacks a useful and objective proving method to accredit the hours worked above the ordinary working day; furthermore, the workers' representatives would also remain unable to check if the actual worked time by the employees exceeded or not the working day, and if weekly and daily breaks between days were respected; and finally, according to the AN criteria, neither an instrument would exist for the Labor and Social Security Inspectorate Institution to control whether or not workers exceeded the ordinary working day, or if they've given their consent to carry overtime.

In this context, the Instruction 1/2017, of the General Directorate of Labor Inspection and Social Security, complementary to the Instruction 3/2006, of March 21, on control intensification over working time and overtime[18], took the doctrine of the Spanish Supreme Court on the absence of a regulatory imposition on the company to keep a record of the ordinary working day, while having expressed that despite this, the control of working time – the working day – "always has been and still continues to be possible even more so because it is one of the basic considerations of the employment contract"; in this sense, "the mere absence of registration of the working day does not cease the control function entrusted to the Labor and Social Security Inspectorate". It's true that the control of the working day and the detection of noncompliance with the art. 34 and 35 LET remained an essential function for the Inspection, but the lack of a registration instrument complicated greatly their functions, more in a context in which technologies erased the classical limits in the matter of time and place of work. As stated in the Committee of the International Labor Conference that has evaluated the compliance with the rules on working time in 2018, the implementation of an effective registration of working time is one of the most important methods to control the compliance with the law in regards to time of work and the remuneration of overtime, and that is a big aid for the inspectors to ensure the compliance with the regulations of working time[19].

In any case, based on the preceding arguments, the Spanish National High Court held that internal law would not guarantee the effectiveness of compliance with the mandates

16 Number. Appeal: 252/2017.

17 See the Judiciaty website: file:///D:/DIGITALIZACIÓN%20ECONOMIA/AUTO%20AN%20repetido.pdf.

18 See C.E.F Laboral-Social website: http://www.laboral-social.com/sites/laboralsocial.

19 International Labour Conference Report 107ª Reunion, 2018: *General Survey concerning working-time instruments - Ensuring decent working time for the future*. International Labour Office, 2018.

regarding the organization of the working time provided for in arts.3, 5, 6 and 22 of the Directive 2003/88 EC, not even in the general nature of matters of health and safety environment by art. 4.1 of the Directive 1989/391, depriving the workers' representatives of the necessary sources of knowledge to be able to effectively exercise the powers that art. 11.3 of Directive 1989/391 entrusts them.

Pending the resolution of the questions referred by the AN, the conclusions of the General Attorney in such procedure, dated January 31, 2019, though not binding, they anticipated the future. Below we will reproduce a synthesis of these conclusions.

The GA in its conclusions of January 31, 2019[20] has proposed to the CJEU to declare that the Charter of Fundamental Rights of the European Union and Directive 2003/88 impose on companies the obligation to implement a system of computation of the effective working day to full-time workers who have not expressly committed, individually or collectively, to overtime and those who don't have the status of mobile, navy, merchant or railroad workers, and they oppose to a national regulation that does not establish that obligation.

Precisely, it bases its criteria on the following elements:

First: if a work time calculation system isn't in place, it's not possible to determine with objectivity and certainty the amount of work actually done and its temporary distribution, neither isn't possible to differentiate between ordinary and extra hours of work and, consequently, to check in a simple and reliable way if the limits introduced by Directive 2003/88 are respected and to what extent.

Second: the absence of a calculating work time system makes it much more difficult for the worker to obtain judicial defense of the rights conferred by the Directive 2003/88, since he is deprived of a first essential probatory evidence.

Starting from the position of the workers' weakness, if that system doesn't exist, it will be extremely difficult, in the case of the employer requiring the performance of a work activity that exceeds the limits of the schedule of work established in that Directive, to apply effective remedies against such offending behaviors. Consequently, the absence of such system reduces considerably the effectiveness of the rights guaranteed to the workers by the Directive 2003/88, which would remain, essentially, at the discretion of the employer.

In summary, from all of the above, the GA extracts that the obligation to control the daily working time plays an essential role in order to fulfill the other obligations established in Directive 2003/88, such as the limits of the duration of the working day, the daily rest, the limits of the duration of the work week, the weekly rest and those related to overtime. Such obligations are related not only to the right of the workers and their repre-

20 Case CC(C-55/18).

sentatives to control periodically the amount of work done for remuneration purposes, but above all to the protection of health and safety in the workplace. And added that "it's not decisive the argument that excludes the existence of a general obligation to introduce a mechanism that calculates the effective working time on the basis that the Union regulations do not expressly foresee a work time control system, while it does establish the obligation to register working time in special cases."

Specifying that in the case of "ordinary" workers not included in these specific categories, the Directive 2003/88 presupposes the existence of a work time recording system that can consist of a simple annotation in paper or electronically or in any other means that serve that purpose". It also rejects that the freedom of enterprise, which involves the right to choose the organizational models that are considered most appropriate for the development of a specific activity, could be an argument that can refute the need for control. Or that the more favorable transposition for workers of certain aspects may also have this effect.

2. THE CORPORATE OBLIGATION TO CONTROL THE DAILY WORKING DAY: THE RD 8/2019

Pending the hearing of the Court of Justice of the European Union, which finally passed the judgement of May 14, 2019, the Government approved the RD 8/2019 of March 8, on measures of urgent social protection and fight against job insecurity during the workday, in whose preamble justifies the urgency of this measure of mandatory registration of the working day, in the following form: the working time that exceeds the legal or conventionally established working day substantially affects the precariousness of the labor market by affecting two essential elements of the employment relationship, the working time, with relevant influence on the personal life of worker by making work-family conciliation difficult, and the salary. It also affects the Social Security contributions, reduced by not contributing the salary that would correspond to the work done. Although our employment system, in line with European regulations, has been provided with standards that allow some flexibility to adapt the needs of the company to those of the market and production (irregular distribution of the working day, shift work or overtime), this flexibility cannot be confused with the noncompliance of the rules on maximum working time and overtime. On the contrary, time flexibility justifies the effort in the fulfillment of these rules, especially those on compliance with the maximum working hours and registration

of the daily working day. One of the circumstances that have affected the control issues of the working day from the Labor and Social Security Inspectorate, as well as in the claiming difficulties from the workers affected by that time overreach and that, ultimately, has led to longer working days to those legally established or conventionally agreed, has been the absence in the ET of a clear obligation to the company on the registration of working the day. In this sense we need to consider the interpretation of the European Parliament and Council's Directive 2003/88 / EC of November 4, 2003 on certain aspects of work time management that has been maintained from the European institutions, specifically from the CJEU. As mentioned above, the conclusions of the General Attorney of January 31, 2019 in regard to the aforementioned Directive affirms that the European regulations "impose on companies the obligation to implement a system of computation of the effective working day to full-time workers who have not expressly committed, individually or collectively, to overtime and those who don't have the status of mobile, navy, merchant or railroad workers, and are opposed to a national regulation that does not establish that obligation". The establishment of a working day registration would ensure the compliance of Spanish regulations with the European system. Among other measures, the Royal Decree-Law 8/2019 modifies the Worker's Statute and the Law of Infractions and Sanctions of the Social Order. Both modifications are related to the registration of the working day and its mandatory nature. Specifically, modifies the article 34 of the Consolidated Text of the Worker's Statute to incorporate section 9º, which consists of the obligation to keep record of the working day in companies, whose effectiveness will come into effect within 2 months (next May 12). It doesn't appear to be a regulation in which the extraordinary and urgent need concurs, being incompatible with granting a period of vacatio of two months.

The RDL 8/2019, collecting the union claims and with the intention of solving the control problems of the work time regulations, establishes in its art. 10 that "…the company will guarantee the daily registration of the working day, which must include the specific start and end schedule of the working day of each worker…"; and should be available to the interested party, labor unions and Labor Inspection to control any possible abuses. This is a transcendental change that legally enshrines the company's obligation to guarantee the daily registration of the working day, with the time specification of its beginning and end. This change is being strongly criticized because it generates new issues, rather than provide solutions to the control issues of the working time regulations. This formula has a clear appearance in its terms but is simplistically and hardly reconcilable with the current characteristics of the system of production, the work organization conditioning and the growing influence of information technologies that has on it. It goes without saying that the obligation to record-keeping already existed for part-time jobs without having eradicated the important fraud that characterizes this modality of contracting. Others, the

minority, believe that time control is viable, without deeming necessary the extension of the regulatory framework, since the obligation is clear and the employer is allowed, either through collective bargaining or after consulting with the legal workers' representatives, to organize the registration of the working day in the way deem most convenient.

The main question that arises following the approval of RD 8/2019 is the one related to which is the exact scope of the obligation of daily control of the working day, thus forces to give some answers to four types of questions[21]: 1. The subjective scope, 2. The objective scope, 3. The temporal scope and 4. The modal scope.

Regarding the subjective scope, the obligation involves all the companies and all its workers since the new art. 34.9 ET does not distinguish it in this regard, no exceptions established, even though certain companies or certain workers will obviously have special difficulties in order to comply. But it cannot suppose the exemption from the company's legal obligations, nor in general for all its staff, not particularly for certain workers. In relation to the possible specialties resulted from registration of the working day, the art. 10 of RD 8/2019 establishes that "The Government, at the proposal of the head of the Ministry of Labor, Migration and Social Security, and after consulting the most representative trade unions and business organizations, may establish ... specialties in the obligations of registration of the working day, for those sectors, jobs and professional categories that are required by their peculiarities. "

An important issue in terms of the subjective scope is raised in relation to the possibility to admit the waiver of the right to demand from the employer the daily record of the working day by the worker; this does not seem possible since art. 34.9 ET is an imperative rule and in consequence is inalienable in accordance with art. 3.5 ET. We can't forget that the control of the working day is not, in the context of the legislation that favors the flexibility of the workday, both a power to the company as well a right to the worker to stop excesses to occur[22].

To clarify this issue, the Guide of the Ministry of Labor, Migration and Social Security, published on May 14, 2019, has indicated that the schedule record applies to all workers without distinction by category or professional group, to all sectors and to all companies, regardless their size or work organization, as long as they are included in the scope of Article 1 ET. Therefore, companies are obliged to record the daily working day also in respect to "mobile", commercial, temporary and remote workers or any other situations in which the labor benefit is not produced, total or partially, in the company's workplace[23].

21 Lousada Arochena, J.F., "Registro y control…, *cit.,* p. 10.
22 Lousada Arochena, J.F., "Registro y control…, *loc cit.*
23 Ministerio de Trabajo, Migraciones y Seguridad Social, Guía sobre Registro de la Jornada, 14th of May of 2019.

The only peculiarities or exceptions are the following:

— Labor relations of a special nature: its regulations will be considered attending specifically to both the form and the outreach in which the working day is regulated as well as the supplementary rules established in each case. In particular, the senior management staff contemplated in article 2.1.a) ET remains completely excluded from the application of the rule. On the contrary, are subject to the registration obligation the workers that, by not being strictly senior management personnel (middle managers, trust positions or special responsibilities) have agreed to a free availability regime of working time or a full time disposition is contemplated in their contractual obligations to properly exercise their professional activity. In general, under the premise that beneath these modalities are not hidden situations of abuse of law, the daily working day of these workers must be registered, without prejudicing the accreditation of the work time through the work schedule agreement, acknowledging that the remuneration obtained by the worker already compensates proportionally that greater demand of work. Hence, it would be advisable that the self-regulation capacity of collective workers through collective bargaining or company agreement, should keep record of this circumstance to avoid abusive or disproportionate situations[24].

There are workers that have a specific or a particular registration regime of the working day: a) Workers with part-time contract, whom already have an obligation to registration regulated in art. 12.4.c) ET. b) Workers who, as for today, have already specific registries regulated in the Royal Decree 1561/1995 of September 21 regarding special working days, and are those established in the Decree as mobile workers (certain road transportations), merchant marine workers and workers who perform cross-border interoperability services in rail transport[25].

As for the objective and temporary scope, the new order requires the registration of the daily working day, which requires to enter the time of entry and time of departure, as well as the possible breaks between the workday as long as these are not counted as work time. As for the temporal scope of the obligation, it consists of a daily registration, but perhaps it would have been more convenient to establish it to record from working day to working day, as a night time working day can comprise two days.

Regarding the modal scope, and given the absence of specific requirements in the legal norm in relation to the admitted mechanisms of daily registration, the company is free to establish the mechanism that is most suitable for them, whereby the registry can be managed by electronic means (as an example, magnetic card or similar) or by manual means (as

24 Ministerio de Trabajo, Migraciones y Seguridad Social, Guía sobre Registro de la Jornada, 14th of May of 2019.
25 Ministerio de Trabajo, Migraciones y Seguridad Social, Guía sobre Registro de la Jornada, 14th of May of 2019.

an example, signature in a paper sheet). Obviously, the used mechanism must guarantee both the reliability of the data collected therein as in the impossibility to vary them.

2.1. Registration of the Working Time and Working Day: Judgment of the Court of Justice of the European Union May 14, 2019

The obligation of Registration of the Working day not only derives from the regulations recently approved by the Spanish legislator, but also from the recent Judgment of the Court of Justice of the European Union of May 14, 2019 resolving a preliminary ruling filed by our Spanish National High Court in a CCOO (Workers Commission) collective dispute lawsuit against Deutsche Bank, to declare the obligation of this company to have a system of registration of the working day for the staff.

The European justice solves the issue by understanding that in order to guarantee the useful effect of the rights established in the Working Time Directive and the Fundamental Right to the limitation of the maximum duration of work time and rest times, established in the Bill of Fundamental Rights of the EU, the member states must impose on companies the obligation to implement a factual, reliable and accessible system that allows to calculate the daily worked hours performed by each employee. There are several issues that can be drawn from this ruling. The first one, the implementation of a working day registration system is part of the general obligation to establish an organization as well as the necessary means to protect the occupational health and safety environment (the minimum resting periods are part of the general prevention rights and duties); the second one, the Member States are the ones that must define the specific criteria for applying the registration system. To this effect, they may consider the peculiarities of the industry sectors and the specifications of certain companies such as their size. The European Court itself establishes the possibility for Member States to establish exceptions to this obligation based on the activities, or the working days that may not have a measured or established the duration previously, or when it can be determined by the workers themselves, and, in any case, always respecting the general principles of health and safety environment protection.

All the above leave us to conclude the following:

a)Even though or legislation already recognizes the registration obligation of the working day, it still hasn't established, as desired, an adaptation of this obligation to the different sectors, or the establishment, as contemplated in the court sentence, of some exceptions (beyond the cooperatives or the senior management) according to the specific characteristics of the performed working activities or the specifications of the working days.

b) The obligation to register the working day requires establishing with precision what is and what isn't the effective working time, that is, breaks and computable rests, commuting, presence time at work, standby duty, etc. To this effect, we must be observant to the specific regulations that could place particular questions (as an example, training in health and safety environment, as established in the Law of Prevention of Occupational Risks, must be performed during the working day); as agreed in the collective negotiation or in the agreements with the different worker's representatives (as an example, the recent Agreement of El Corte Ingles Group, that has established that breaks that last an hour or less are part of the effective working time and therefore will not be registered as such, following the criteria of the Labor Inspection and Social Security); or the particular jurisprudence (as in the case of the Spanish Supreme Court Judgement of 19 of March 2019, that has considered working time the time spent to play football matches organized by the company)[26].

3. THE COICHE OF THE HOUR REGISTRATION SYSTEM: LIMITS

Even though the new regulation does not specify which system we need to follow for the hour registration system, the Instruction 1/2017 of the Labor Inspection offered a quite reliable direction. The text claims that the model should be the one that the company "chooses freely", as long as it guarantees "the reliability and the invariability of the data". Hence, computer or electronic systems (magnetic cards, fingerprints, computer matching) or manual sign-in sheets can be used. If the procedure is limited to signing a sheet or inserting data in an app, there is the risk that the employee would inflate or manipulate the worked hours. It would be advisable to the employer to establish some sort of validation or verification of the worked schedule. In any case, before choosing, the company must take into consideration that the monitoring and geolocation programs are strictly under the scope of the fundamental rights of the workers. Recently the Judgement of the AN of 6 of February 2019[27], determined the nullity of the implementation of a geolocation program established by the company to delivery type workers whom had to provide their own mobile phone with internet connectivity to the company as well as to activate an app whereby it would know the location of the device and hence of the worker during the workday, providing personal data, such as their phone number and email address, without

26 *Sagardoy News*, number 0, July 2019.
27 Number of Appeal: 318/2018.

informing the worker beforehand of such system and its implications. It's of interest to bring up the judicial doctrine regarding the companies' limitations of geolocation to the employees, which has been admitting that employers could impose geolocation systems to the employees as it's covered by the legitimate exercise of the constitutional rights of private property in art. 33 CE and freedom of enterprise in art. 38 CE, subtracting the legal authorization for this purpose from the provisions of the section 3 of art. 20 of the ET ("The employer may adopt the measures that deems most appropriate for surveillance and control purposes in order to verify the compliance of the worker with his labor duties and obligations, keeping in it's implementation the proper consideration of the workers' dignity and considering, when applicable, the actual capacity of disabled workers"), while the implementation of these measures implies an interference in the fundamental rights of the workers, it has to surpass the judgement of proportionality, "the necessary equilibrium between the obligations originated from the contract for the worker and the scope of his constitutional freedom"[28]. Given the preeminent position of the fundamental rights in our legal system, this modulation will only take place "in the strictly necessary extent for the correct and adequate performance of the productive activity[29]. Which fosters the necessity to proceed to an appropriate weighting, that respects the correct constitutional definition and assessment of the fundamental right that is at stake and the labor obligations that can modulate it[30]. These limitations or modulations must be indispensably and strictly necessary to satisfy a business interest worthy of guardianship and protection, so that if other possibilities exist to satisfy said interest in a less aggressive manner to the right in question, the latter should be applied and not the more aggressive ones[31]. On another note, when dealing with personal data collection, the duties of information to the interest party must be fulfilled as imposed in the art. 11 of the LO 3/2018, of 6th of December, of the Personal Data Protection Law and digital rights. Such norm regulates in its art. 90 the issue raised here, which we have referenced earlier, that is the right to privacy against the utilization of geolocation systems in the work environment in the following form: "1 Employers can handle the data collected through geolocation systems to exercise the control functions of the employees or civil servants, respectively, in the art.20.3 ET and the regulations of public employees, as long as these functions are exercised within its legal framework and with the limits inherent in it. 2. Prior, the employers should inform explicitly, clearly and unambiguously to the employees or civil servants and, when applicable, their representatives, about the existence and characteristics of these devices. Equally they

28 STC 6/1988, de 21st of January.
29 STC 99/1994, RTC 1994, 99.
30 SSTC 170/1987, of 30th of October, RTC 1987, 170, STC 4/1996, of 16 of January, RTC 1996, 4, STC 106/1996, RTC 1996, 106; STC 186/1996, of 25th of November, RTC 1996, 186, y STC 1/1998, of 12th of January, RTC 1998, 1.
31 STC 98/2000, RTC 2000, 98.

should inform about the possible exercise of the rights of access, rectification, treatment limitation and suppression".

4. GOING AROUND WITH THE EFFECTIVE WORKING TIME AND THE DAILY REGISTRATION OF THE WORKING DAY

The business obligation contemplated in the new art. 34.9 ET is to guarantee the registration of the working day, with the sole precision that said register includes the specific start and end time of each worker. This is posing numerous questions, some of which we will try to leave them noted. If the purpose of the registration is to know each worker's overtime, the important thing will be that the effective working time is being registered[32], resulting extremely simplistic the wording of the new art. 34.9 ET that includes the registration of the specific start and end time of the working day; at least it should also include the intra-day breaks when they do not count as effective working time, as well as the times when the worker is not in the workplace but is available if needed, and should discount the times of mere presence in the workplace. Therefore, the first difficulty that the register faces in order to be correctly designed derives from the complexity of determining what is meant by effective working time in the multiple scenarios of the provision of services.

The expression used by art. 10 of RD 8/2019 that establishes that "it must include the concrete schedule of start and end of the working day of each worker" is completed with what is established in art. 34.5 ET which contains the rule for the computation of the worker's daily working day, pointing out that "the working time will be computed so that both at the beginning and at the end of the daily workday the worker is at his job position". This has led to consider in general that the working day starts when the employee is in his job position ready to start his work and that, therefore, the time spent commuting from the employee's home to and from the workplace is not part of it, nor from the parking lots to the workplace. When would be considered effective working time the displacements, for the purposes of daily registration? Exceptionally, it has been counted as working time the time invested by the worker in commuting before starting the working day and after finishing when "such trips are not from and to the worker's residence but are determined by an imposed duty from the company in relation to the needs of the service". This was stated

32 To deepen in the concept of efective working time, see Martín Rodríguez, O., "Las directrices de la Unión Europea sobre tiempo de trabajo, su interpretación por el Tribunal de Justicia y sus repercusiones en el sistema español", Revista Española de Derecho del Trabajo, number. 194, January 2017, p. 11.

in the Judgement of 18th of September 2000[33], the case of a worker – security guard – that had to travel at the start and at the end of each shift to a different town in order to leave the weapon, investing nearly 80 minutes every day to do so. The Judgement of 24 September 2009[34], was pronounced in similar terms, referred in this case of the time invested by the worker in travelling into the location indicated by the company to pick up the uniform. In these cases, it has been estimated that if the time used for this travels is added to the working day, it must be considered as overtime and paid as such.

In reference to the provisions of article 34.5 ET, a problem of computation of the daily working day would arise and, therefore, an additional complication for the registration's purpose when the activity of the worker makes it difficult to identify "the job position" in reference to art. 34.5 ET in which the computation of the working day is established. This the case of workers who carry out their work activity by travelling to different work centers, without being attached to any of them in a fixed way. In this regard, the SCJEU of September 10, 2015[35] resolved a preliminary ruling question raised by the Spanish National High Court regarding the qualification of the time that the workers of the Tyco Integrated Security company destined in a daily basis, at the start and end of the workday, to move from the workers' place of residence to the workplace of the first client and from the workplace of the last client to their place of residence. The trips that workers made during the day to go to the work centers of the clients that had to attend were not being questioned here, as they've been considered as working time. These employees work in the installation and maintenance of security devices in homes and commercial establishments and traditionally were assigned to the corresponding provincial work centers, counting then the start of the working day in said work center, where they picked up the company car and from there travel to start the provision of their services. The business decision to close the provincial work centers determined that, since then, the workers must receive in their mobiles phones the service orders, indicating which centers they must visit and the schedules in which they have to serve the customers. From that moment, the company began to count the working day from the moment the workers start their activity once they've reached the client's place.

The CJEU in regards to making a statement if working time is the time invested by the workers when travelling from their place of residence to the clients premises and vice versa, assessed if all the elements that make up the concept of working time included in Directive 2003/88 were met, which according to it, the working time is defined as any period during which the worker remains at work, available to the company and exercising

33 RJ 2000, 967.
34 RJ 2009, 4696.
35 TJCE 2015, 205, Matter CCOO/Tyco, C-266/14.

his functions. And it appeared that, indeed, said elements were met since: 1)The travels made by the workers to the client's workplaces assigned by their employer were the necessary instrument to execute technical services; 2) during the time spent on commuting, although it is true that workers had certain freedom that didn't not enjoy when carrying out their work for the client, they still were subjected to the company's instructions; and 3) every time the displacements are inherent to the condition of a worker who doesn't have a fixed or usual workplace, the workplace of these employees cannot be reduced to the place of physical activity in the client's premises. Certainly, the circumstances of the case were peculiar: firstly, because the company had considered, until the closure of the provincial work centers, as working time the time invested in travelling from those centers to the center of the first client and only changed the criteria when the company unilaterally decided to close said provincial centers, and, secondly, because it was appreciated that, at least in some cases, the time invested by the worker in such displacements was sometimes excessive - reaching up to three hours-. But, in any case, the conclusion of the CJEU was unquestionable: when "the workers lack a fixed or usual workplace, the time spent travelling between their place of residence to the work centers of the first and last client assigned by the employer, constitutes working time". This criterion must be considered for the registration of the daily working day of the workers who lack a fixed work center, for those who their working time should be counted as the time between their place of residence and the first and last client's work center.

The Judgement of 20 of June 2017[36]returned to the question of the calculation of the daily working day when solving the appeal filed at the Social Chamber of the Superior Court of Justice of Andalucía (Granada) in demand for collective conflict, in which it was stated that the time invested by nurses in the caregiving continuity of the nursing staff (called "times of relay" or "overlap") had to be considered effective working time and counted within its ordinary working day. The Court based that decision on art. 2 of Directive 2003/88 / EC which provides that for the purposes of this Directive "it shall be understood as: 1) 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; 2) Rest period: means any period which is not working time". The European jurisprudence has interpreted this regulation as: a) the concept of "working time" has to be understood as any period during which the worker remains at work, available to the employer and in the exercise of his activity or his functions, in accordance with national laws and / or practices, and this concept is conceived as opposed to the rest period, by mutually excluding both concepts[37] and b) the directive does not contemplate

36 R.º 170/2016, RJ 2017, 3112.

37 STJUE 03 de octubre de 2000, TJCE 2000, 234 , asunto *Simap*, apartado 47; 09 de septiembre de 2003, TJCE

an intermediate category between work periods and rest periods, and among the peculiar elements of the concept "work time" is not included the intensity of work performed by the worker or his performance, so the fact that the services - in this case the workers where on call - have certain periods of inactivity is irrelevant[38]. The Judgment of the Spanish Supreme Court showed, on the one hand, that in accordance with Spanish law it must be considered as effective working time the "overlap" times, while "it's an obvious professional activity [to transmit to the patient medical/health information], which results from an absolute need- is no longer of mere convenience - for the adequate treatment and safety of the admitted patients, and is carried out in the respective job position, before starting and ending the respective shift. "On the other hand, it's affirmed that the action taken also has the "most resounding support" in accordance with the European doctrine issued by the CJEU in relation to the Directive of working time that, as recalled by the TS, has "direct effectiveness" in the present case, for being - the defendant - a public Agency and being invoked the Directives as a consequence of its direct effect, although it is said that it would also have "to be a private person". But not all pronouncements issued by our courts in recent times have been favorable to that consideration. We are in the presence of a tortuous territory and enormously complex in its practice so that surely, statements will continue to be produced in this matter, in which the concurrent circumstances of each case will be determinant in the consideration or not as for "effective working times".

Recently, on March 19, 2019[39], the TS has ruled on the consideration as effective working time the events that salesmen have to attend outside their working day. In this judgment the Court defines what we must understand by working time and among other things, resolves if the activities scheduled outside of the workday should be considered as effective working time. To this effect, the court is based on both Spanish legislation (articles 34.1 and 34.5 of the Worker's Statute) and European regulations (Article 2.1 of Directive 2003/88 / EC), as well as in the collective agreement of the company itself. Article 31.B.1 b) of said agreement establishes the following:" Off-working day activities: the time that workers in this sector dedicate to specials commercial events outside of the working day will be voluntary and will be compensated in equal rest time within the four months following the event, while maintaining the commercial activity". Thus, we must bear in mind that in the specific case analyzed by the TS, a series of specialties concur regarding these activities carried outside of the working day: they are of voluntary nature; are compensated with rest time, and the compensatory rest must be enjoyed within four months after the event.

2003, 250 , Asunto *Jaeger*, apartado 48; y 1 de diciembre de 2005, TJCE 2005, 361 , asunto *Dellas*, apartado 42.

38 Asunto Dellas, apartados 42 y 47.

39 Number of Appeal: 3970/2016 Number of Rulling: 207/2019.

Even though the court does not mention this in its legal reasoning, it's true that this compensation with rest time of the time dedicated into participating in these commercial events carried out outside of the working day it's laid out in a similar manner to the one provided in the Worker's Statute in case of overtime, which we must remember, is considered effective working time. However, the Spanish Supreme Court considers that these activities carried out outside of the working day are indeed working time due to mainly its fit with the definition of working time given by the jurisprudence and the Directive 2003/88/EC. Indeed, Article 2.1 of Directive 2003/88 / EC defines working time as "any period during which the worker stays at work, available to the employer and in the exercise of his activity or his functions, in accordance with national laws and / or practices". Starting from this specific definition, working time has been qualified by the Court of Justice of the European Union as any time in which the worker is available to the employer, regardless of the intensity of activity performed during it. Despite the specificity of the case, this judicial ruling opens the door to the possible consideration as effective working time to a range of activities related to the job and carried out outside of the working day.

5. THE REGISTRATION OF THE WORKING DAY IN SITUATIONS OF HOUR FELIXIBILITY

As already explained, the obligation of daily registration of the working day will be equally enforceable in jobs that are not physically provided in the workplace. Also the employer will have to align the existence of a daily registration of the working day with the possible time flexibility ("Without prejudice to the time flexibility contemplated in this article") contemplated in the article 34.2 and 34.8 of the ET, as well as in the reduction of working days (including breastfeeding and family reasons of art. 37 ET). Greater registration difficulties are anticipated in such situations in which the same amount of hours are not worked every day or every week of the year, when stipulated in the collective agreement or in agreement between the company and the worker representatives, having to respect this irregular distribution not only the maximum legal limit of working hours (forty hours per week of effective work on an annual basis) but also the minimum periods of "daily and weekly rest" provided in the ET (art. 34.2 ET). In the absence of agreement, the company may distribute irregularly throughout the year a 10% of the working day, also respecting the daily and weekly breaks. In addition, the worker must know, with a minimum notice of five days, the day and time of the work that resulted from said irregular

distribution of the working day. This range of possibilities will have to be compatible with the mandatory registration of the daily working day, which would not be exempt of such circumstances.

Another scenario of time flexibility is the adaptation of the duration and distribution of the working day referred to in article 34.8 ET. Let's dive on this. LOIEMH introduced in article 34 of the ET a new section 8 according to which "the worker shall have the right to adapt the duration and distribution of the working day in order to exercise the right to reconciliation of working and family life in the terms established in collective bargaining or in the agreement settled with the employer respecting, as the case may be, the provisions of it". Subsequently, Law 3/2012, of July 6, introduced a second paragraph in that section according to which "to this purpose, it will be promoted the use of the continuous working day, the flexible schedule or other modes of organization of working time and breaks that allow greater compatibility between the right to conciliation of the personal, family and work life of workers and the improvement of productivity in the companies". Recently the RDL 6/2019 delves into this line to attribute greater content and a better regulation to this right of conciliation and, consequently, higher effectiveness. Such trend can be seen in the statement of the right itself when establishing that working people have the right to request adaptations of the duration and distribution of the working day, in the organization of working time and in the form of the provisions, including the provision of telecommuting, in order to exercise their right to reconciliation of family and working life. The innovation introduced to adapt the working day with the possible changes in the form of its provision, including the remote provision, will also involve particularities in the registration that will not be exempt of such situation. Let's see.

In a society increasingly endowed with technological resources, and in which the trends related to team management, time management and relationships between people are increasingly advocating for allowing workers and work teams, precisely under the protection of technological devices (especially those of remote connection), a great autonomy in the management of their work time, and greater flexibility on the place of the provision of their services. How would the legal obligation to register the daily working day be reconciled with the increasing proliferation of telecommuting jobs? The most enthusiastic of both technology and organization systems of the most modern human resources that defend the worker's autonomy and his capacity for self-management, based on the principles of responsibility, involvement and flexibility, would undoubtedly answer the previously asked question stating that the existence of a limiting control system, demotivates and even breaks the framework of trust, flexibility and autonomy that teleworking systems allow for the absence of any daily control, referring to evaluation and assessment systems of the worker's project and the results

achieved without using "claustrophobic" daily monitoring methods. Facing the previous thesis, it cannot be ignored that are increasing and are becoming more critical the voices that want to avoid that the above arguments (flexibility, autonomy, responsibility, involvement, motivation, modernity, technological advancement, among many others) produce a growing confusion between the space of work and the personal sphere. It's about preventing the working time from invading the essential rest time of the workers, and their family and personal atmosphere, since the ease of connectivity with work through technological resources as well as time management policies act like a real Trojan Horse that causes the dilution of the separation between working time and rest time in many cases, generating an important stress effect linked to the lack of a real disconnection space. At this point, we believe it's worth noting the Judgment of the TSJ of Castilla y León of February 3rd, 2016[40] the STSJ of Castilla y León of February 3, 2016[41], because it has been pioneer in clarifying the foundations of the business control, including everything related to teleworking in regards of the working day. As a previous matter it's worth bearing in mind that Article 13 ET by regulating the figure of remote work defines it as the one "carried out in a prevailing manner at the worker's home or at the place freely chosen by him, alternatively to the presence-based development in the company's workplace", indicating that "the remote workers will have the same rights as those who provide their services in the company's work center" as well as "the right to an adequate protection in terms of security and health environment" while the employer must establish the precise control guidelines. The aforementioned sentence expressly ratified the conviction of the company to pay overtime based on the absence of any control over the working day despite being telecommuting job. The company's arguments against the overtime claim were not allowed, claiming that since it's a provision of services with remote connection and from the place of residence of the worker, no control or registration was implemented to avoid interfering with the fundamental right to privacy and inviolability of the employee's home. On the contrary, it must be the company itself who must establish the control rules over employee, regardless if it's regular worker or a teleworker, so that the absence of these controls, and specifically those regarding the working day, act to the detriment of the company. The Court does neither welcome the business arguments that opt for the full freedom of organization and autonomy of the employee who works from his place of residence, make it impossible to generate extra hours, since the estimation of this argumentation would make it impossible to determine to the Labor Authority and the worker himself which is

40 AS 2016, 99.
41 AS 2016, 99.

effectively his working day, and consequently, its limit[42]. Undoubtedly, the arguments compiled in the TSJ Judgment of 3 February 2016[43] should make companies reflect on the need to equip themselves with concrete teleworking policies that regulate the connection procedures, control methods and the working day records, to prevent precisely that the lack of control systems could proliferate claims by workers, not only in relation to the excess of working hours but even for violating their rights linked to occupational health and safety, especially for excess connectivity and stress. More as a result of the necessity of the required daily working day registration, also in the case of teleworkers.

6. COLLECTIVE BARGANING

The settings of the working day registration have usually been an organizational faculty of the employer, preceded by a consultation with the legal representatives of the workers, when said representation was constituted. From the RD 8/2019 the sectorial collective agreements will have a leading role in specifying said registration framework according to the peculiarities of each economic activity. At the level of each company, or even of each work center, the specific obligations of daily working day registration may be agreed upon with the representation of workers-when existent-by collective agreement or company agreement. Inevitably, it will cause a transitional period until the different specialties of registration designed for the different levels and provisions labor services are outlined in the different sectoral collective agreements or if applicable in the company agreement. or the lack of regulation of this matter in the current sectoral collective agreements or the lack of legal representation of the workers in the company will exonerate it from guaranteeing the daily registration of the working day as of May 12, 2019. On that date a difficult transitional period began since each company must choose a working day registration system according to its peculiarities. Failure to comply with the registration obligation will be classified as a serious labor offense and it will be sanctioned with fines of 626 euros in its minimum degree and 6,250 euros, in its maximum degree. The RD 8/2019 also modifies section 5 of the article 7 of the consolidated text of the Law on Infractions and Sanctions in the Social Order, approved by the Royal Legislative Decree 5/2000, of August 4th, which is written in the following terms: "5. The transgression of the norms and

42 Miró Morros, D., "El control de la jornada y el teletrabajo", BIB 2016\3966., Actualidad Jurídica Aranzadi, number. 920, 2016, p. 8.
43 AS 2016, 99.

legal or agreed limits in terms of working hours, night work, overtime, complementary hours, breaks, vacations, permits, registration of working day and, in general, the work time referred to in articles 12, 23 and 34 to 38 of the Worker's Statute".

7. AN ADVANCE IN THE REGISTRATION OF THE WORKING DAY: NEW INSTRUCTIONS OF THE LABOR INSPECTION

In the following lines we will comment on the recent Technical Criteria of the Labor Inspection (ITSS, June 10, 2019) to which the inspection action will be accommodated to verify the business compliance with the obligation to register the daily working day. The ITSS (Labor Inspection and Social Security) does not require the registration of the breaks that are not effective working time, its consideration as such shall be established through collective bargaining. The obligation is limited to the registration of the performed hours. The way in which the registration of the working day is done will also be determined in collective bargaining, in accordance with the representation of the workers or, alternatively, by the decision of the employer. The registration system must be objective and guarantee the reliability, veracity and non-alteration of data, while respecting the regulations regarding data protection. Registration can be done by computer or by manual methods; f it is by computer the ITSS may require the printing of the records or their download in an accessible format for verification. If it is manual, the ITSS can request originals or copies. The ITSS will also verify that the organization and documentation of the registry has been preceded by a negotiation procedure or at least by a consult with the representation of the staff.

The registration of the working day must be accessible in order to be consulted when requested by the worker, their representatives or the ITSS; it must remain physically in the workplace and with immediate access. When it's in paper format it can be archived in a computerized media by scanning it and saving it with all the guarantees. It's availability for consultation does not imply the delivery of copies, unless it is established in the collective negotiation or in an express agreement. The registration must be made available to the ITSS at the exact moment when the inspection starts, otherwise the Inspector would be prevented from supervising the compliance with the obligation, which should preferably be carried out at the workplace, which subsequently will avoid the creation, manipulation or subsequent alteration. The ITSS may also request the register to be presented in hearing.

The hourly record has its specialties in certain jobs or circumstances in which the regu-

lations had already provided its particularities: part-time work, overtime, mobile workers, merchant marine workers, cross-border rail transport workers in transnational travels.

Although the obligation entered into force on May 12, 2019, the ITSS in the absence of registration, before initiating the sanctioning procedure, shall take into consideration that a negotiation between the company and workers has taken place for its implementation. Also, when the ITSS has certainty that the company complies with the regulations in terms of working time, may choose to enforce the fulfillment of the obligation instead of sanctioning the company. The sanctioning procedure would only be activated as a first step when there is suspicion of fraud.

Despite the publication of the Clarification Guide of the Ministry of Labor in the first place and after the criteria of the ITSS, many doubts remain, regarding various issues related to the registration, such as breaks, pauses and interruptions, which are not effective working time; as well as regarding teleworkers; workers with flexible shifts, called workers who have agreed on a regime of free availability of working time. Without losing sight that the daily registration of the working time is mandatory, the regulation development of this business obligation is increasingly essential in order to clarify doubtful issues and to have a regulation that establishes specialties for different sectors, jobs or professional categories that require it.

8. CONCLUSIONS

The reality of a modern business in a globalized economic environment, in which travel and the development of activities outside the company are constant and where the obtained results prevail over the service time, makes the return to the classic time control systems a dangerous regression that affects with special intensity, precisely, those sectors of activity where technology is more advanced. For all of the above, it would not hurt that these issues were resolved through dialogue and agreement between the companies and the representatives of the workers, because maximalisms can lead to sometimes surprising results. Therefore, it would be reasonable to trace the path of the collective bargaining to determine the real, practical and balanced scope of the new business obligation to register the ordinary working day.

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