



## WORKING SESSION

Naples, 14 October 2024

coordinated by judge *Beatrice Ramascanu*, Bucharest Court of Appeal

### Case no. 1 – Group 1

1. In December 2023, Mr. D., a retired judge, brought an action before the competent Court in Member State A against the Superior Council of Magistracy asking for financial compensation for 100 days of his untaken paid annual leave during 2018-2023.
2. In essence, he claimed that due to chronic vacancies in his court (from 15 judges foreseen, in practice, only 5 judges activate effectively, he was forced for many years to do extra work, to resolve the cases that could have been tried by the other judges, if all the posts in the court would had been occupied. The applicant states that he was forced not only to work long hours after normal working hours and during weekends, but it was objectively impossible to entirely benefit from the mandatory annual paid leave for the last 5 years facing such workload.
3. For example, out of 35 days of the legal annual leave he was able to take only 15 days yearly, from 2018 to 2023, the year of his retirement. Nevertheless, this impossibility to entirely benefit from the annual leave was never compensated as the specific legislation for the payment of judges' salaries in Member State A does not provide for such possibility as established by Labor Code for regular employees.
4. The defendant firstly stated that the claim for such compensation is inadmissible as the special national legislation applicable to judges does not provide for such pecuniary compensation for the untaken annual leave. Secondly, such a compensation asked for the period 2018-2021 is time barred as the domestic general rules provide for a period of 3 years for claiming any pecuniary compensation.
5. Thirdly, the general rule laid down in Administrative Code provides that employees in public sector must take their annual leave and that they do not have the right to payment instead of unused annual leave<sup>1</sup>. In the public

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<sup>1</sup> This provision from the section entitled '*Reduction of expenditure by public service administrations*' was adopted in the aftermath of the financial crisis, with a view to having a better control on the budget and financial savings in the public sector.

sector, this provision applies equally if the employment relationship is terminated due to reasons relating to change of workplace, resignation, termination or retirement.

6. As a judge, Mr. D. was perfectly aware of these rules. His claim violates the principle of *nemo turpitudinem suam allegare potest* as this situation was created by the applicant's misconduct and omission to obey the legal rules. It was predictable for him that in 2023 he is going to retire, so, it was up to him to take the entire annual leave before his moment.
7. In reply, **the applicant referred to the Directive 2003/88/EC concerning certain aspects of the organisation of working time and to Article 7 par. 2** establishing the right to an allowance in lieu of paid annual leave not taken and to **Article 31 par. 2 of the Charter of fundamental rights of European Union**. He referred also to the case law of the Court of Justice of the European Union of 27 February 2018 in Case C-64/16, Associação Sindical dos Juizes Portugueses dos Juizes Portugueses as the factual situation is similar in regard the budgetary restrictions.
8. The defendant, the Superior Council for Magistracy, contested all the applicant's submissions regarding EU law, stating that the Working Time Directive is not applicable in a case concerning judges having a different professional status than the regular workers.
9. **The domestic court rejected the claim as being inadmissible based on the defendant's arguments (see points 4, 5, 6)**. The national court referred also to the jurisprudence of the Supreme Court of Member State A stating that due to budgetary reasons it is not possible to monetise the untaken annual leave. The Supreme Court recognized the right of workers to receive such an allowance in lieu of leave only if they prove that 'exceptional and justified needs of service or force majeure' prevented the workers to effectively exercise the right to leave before the termination of the employment relationship. For example, in case of medical reasons, such as those following from incapacity to work, the right to an allowance for unused paid annual leave is permitted. Additionally, the applicant failed to demonstrate that it was impossible for him to take the entire annual leave concerned from 2018 until 2023 the year of his predictable retirement. In any case, any pecuniary claim is time barred.
10. **The applicant appealed against this solution**. He argued that the national provisions as interpreted by the Supreme Court not allowing such compensation due to the budgetary restrictions of public spending is not

compatible with the Working Time Directive and the Charter of Fundamental Rights of European Union. He asked the Court of appeal (deciding the case in the last instance) to refer the following questions to the CJEU, for a preliminary ruling:

11. *Should Article 7 of the Working Time Directive read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union be interpreted as precluding a national legislation as interpreted by the Supreme Court State A not allowing, in general, the monetisation of untaken leave for a public servant?*
12. *Should Article 19(1), second subparagraph, TEU, Article 7 of the Directive read in the light of Articles 31(2) and 47 of the Charter be interpreted, in circumstances such as those at issue in the main proceedings, as precluding a legislative omission to provide for compensation of the untaken annual leave for judges?*
13. *If the answer is in the affirmative, must Article 7 of the Directive and Article 31(2) of the Charter be interpreted as requiring the applicant to demonstrate that it was impossible for him to take the leave concerned in the course of the employment relationship?*
14. **The defendant opposed to the referral stating that the preliminary ruling is inadmissible**, as the EU law is not applicable in the present case. Being a pure internal situation, only the national legislation and the mandatory interpretation given by the Supreme Court is applicable, as correctly decided by the first instance court.
15. In case of a doubt as to the conformity of the national legislation with any fundamental rights, the national court must seize the Constitutional Court of Member State A, having exclusive jurisdiction for establishing the conformity (*or non-conformity*) of the national provisions with the Constitution of Member State A<sup>2</sup>.
16. Instead of referring to CJEU the **defendant requested the Court to stay the proceedings and to seize the Constitutional Court for a constitutional control**.
17. From a procedural perspective, the defendant stated that the referral to the Constitutional Court must be debated and decided prior to the appellant's request for a referral to CJEU. In any case, during the constitutional

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<sup>2</sup> In other cases, Constitutional Court of Member State A stated that in the field of fundamental rights, the national domestic system shall be applied by the national judge prior to other EU provisions.

proceedings, the Constitutional Court itself has the possibility to refer to CJEU, according to Article 267 TFEU, if it will consider that the EU law invoked by the applicant is applicable.

## **TASKS**

18. **Decide on the parties' requests from a procedural point of view<sup>3</sup>.**
19. **On the merits of the case**, consider the case-law of the CJEU resulting from the judgments of 20 July 2016, Maschek (C-341/15, EU:C:2016:576), and of 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften (C-684/16, EU:C:2018:874), indicating how the national law should be interpreted in order for it to be compatible with EU law.

### **Relevant legal framework and case-law**

*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*

#### **Recital 4**

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

#### **Article 7 Annual leave**

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

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

### ***Charter of Fundamental Rights of European Union***

#### **Article 31 - Fair and just working conditions**

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

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<sup>3</sup> Based on the legislation of Member State A, if the Constitutional Court is seized, the domestic proceeding will be stayed until case is decided by the Constitutional Court.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

### **Article 47 Right to an effective remedy and to a fair trial**

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

### **Article 52 - Scope and interpretation**

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

### **Judgment of 20 July 2016, Maschek, C-341/15, (EU:C:2016:576)**

*Article 7(2) 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 precluding national legislation such as that at issue in the main proceedings, which deprives the worker, whose employment relationship was terminated following his request for retirement, of an allowance in lieu of paid annual leave not taken and who has not been able to use up his rights to paid annual leave before the end of that employment relationship;*

– *as meaning that a worker is entitled, on retirement, to an allowance in lieu of paid annual leave not taken because he was prevented from working by sickness;*

– *as meaning that a worker whose employment relationship has ended and who, pursuant to an agreement with his employer, while continuing to receive his salary, was required not to report to his place of work during a specified period preceding his retirement, is not entitled to an allowance in lieu of paid annual*

leave not taken during this period, unless he was not able to use up that entitlement due to illness;

– as meaning that it is, on the one hand, for the Member States to decide whether to grant workers additional paid leave in addition to the minimum annual paid leave of four weeks provided for in Article 7 of Directive 2003/88. In that case, the Member States may grant to a worker who, because of illness, could not use up all of his additional paid annual leave before the end of his employment relationship, an entitlement to an allowance in lieu of that additional period. It is, on the other hand, for the Member States to determine the conditions for granting that entitlement.

**Judgement of 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften, C-684/16 (EU:C:2018:874)**

*Article 7 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 and of Article 31(2) of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation such as that at issue in the main proceedings, under which, in the event that the worker did not ask to exercise his right to paid annual leave during the reference period concerned, that worker loses, at the end of that period — automatically and without prior verification of whether the employer had in fact enabled him to exercise that right, in particular through the provision of sufficient information — the days of paid annual leave acquired under those provisions in respect of that period, and, accordingly, his right to an allowance in lieu of paid annual leave not taken in the event that the employment relationship is terminated. It is, in that regard, for the referring court to determine, taking into consideration the whole body of domestic law and applying the interpretative methods recognised by it, whether it can arrive at an interpretation of that right capable of ensuring the full effectiveness of EU law.*

2. *In the event that it is impossible to interpret national legislation such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights, it follows from the latter provision that a national court hearing a dispute between a worker and his former employer who is a private individual must disapply the national legislation and ensure that, should the employer not be able to show that it has exercised all due diligence in enabling the worker actually to take the paid annual*

*leave to which he is entitled under EU law, the worker cannot be deprived of his acquired rights to that paid annual leave or, correspondingly, and in the event of the termination of the employment relationship, to the allowance in lieu of leave not taken which must be paid, in that case, directly by the employer concerned.*

## Case no. 2 – Group 2

1. In December 2023, Mr. D., a retired judge, brought an action before the competent Court in Member State A against the Superior Council of Magistracy asking for financial compensation for 100 days of his untaken paid annual leave during 2018-2023.
2. In essence, he claimed that due to chronic vacancies in his court (from 15 judges foreseen, in practice, only 5 judges activate effectively), for many years, he was forced to do extra work resolving the cases that could have been tried by the other judges, if all the posts in the section had been occupied. The applicant stated that he had to work long hours after normal working hours and during weekends, which negatively affected his state of health, forcing him to ask for an early retirement in 2023, for medical reasons. For the last years, it was objectively impossible for him to entirely benefit from the mandatory annual paid leave facing such huge workload.
3. For example, out of 35 days of the legal annual leave he was able to take only 15 days yearly, from 2018 to 2023, the year of his medical retirement. Nevertheless, this impossibility to entirely benefit from the annual leave was never compensated as the specific legislation for the payment of judges' salaries in Member State A does not provide for such possibility as established by the common rules for public servants.
4. **The defendant firstly stated that the claim for such compensation is inadmissible** as the specific national legislation applicable to judges does not provide for such pecuniary compensation for the annual leave not taken by the applicant. Secondly, such a compensation asked for the period 2018-2021 is time barred as the domestic general rules provide for a period of 3 years for claiming any pecuniary compensation.
5. Thirdly, contrary to the applicant's position, the general rule laid down in Administrative Code provides that employees in public sector must take their annual leave and that they do not have the right to payment instead of unused annual leave<sup>4</sup>. In the public sector, this provision applies equally if the employment relationship is terminated due to reasons relating to change of workplace, resignation, termination or retirement.

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<sup>4</sup> This provision from the section entitled '*Reduction of expenditure by public service administrations*' was adopted in the aftermath of the financial crisis, with a view to having a better control on the budget and financial savings in the public sector.

6. As a judge Mr. D. was perfectly aware of these rules. It is impossible to retroactively establish the number of the past untaken days from 2018 and to monetise them. The claim infringes the principle of *nemo turpitudinem suam allegare potest* as this situation was created by the applicant's misconduct and omission to obey the legislation.
7. In reply, **the applicant referred to the Directive 2003/88/EC concerning certain aspects of the organisation of working time and to Article 7 establishing the right to an allowance in lieu of paid annual leave not taken and to Article 31 par. 2 of the Charter of fundamental rights of European Union.** He referred also to the case law of the Court of Justice of the European Union of 27 February 2018 in Case C-64/16, Associação Sindical dos Juizes Portugueses dos Juizes Portugueses as the factual situation is similar regarding budgetary restrictions.
8. The defendant, the Superior Council for Magistracy, contested all the applicant's submissions regarding EU law considering that the Directive is not applicable in a case concerning judges having a different professional status than regular workers.
9. **The Court rejected the claim as being inadmissible based on the defendant's arguments** (see points 4, 5, 6). The national court referred also to the jurisprudence of the Supreme Court of Member State A stating that due to budgetary reasons it is not possible to monetize the untaken annual leave. The Supreme Court recognized the right of workers to receive such an allowance in lieu of leave only if they prove that 'exceptional and justified needs of service or force majeure' prevented the workers to effectively exercise the right to leave before the termination of the employment relationship. Additionally, the applicant failed to demonstrate that the workload was the objective reason for this alleged impossibility of taking the entire annual leave concerned from 2018 until 2023. In any case, any pecuniary claim is time barred.
10. **The applicant appealed against this solution.** He argued that the national provisions as interpreted by the Supreme Court not allowing such compensation due to the budgetary restrictions of public spending is not compatible with the Working Time Directive and the Charter of Fundamental Rights of European Union. The appellant asked the Court of appeal (deciding the case as last instance) to refer the following questions to the CJEU for a preliminary ruling:
  11. *Should Article 7 of the Working Time Directive read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union be interpreted as precluding a national legislation as interpreted by the*

*Supreme Court State A not allowing, in general, the monetisation of untaken leave for a public servant?*

*12. Should Article 19(1), second subparagraph, TEU, Article 7 of the Directive read in the light of Articles 31(2) and 47 of the Charter be interpreted, in circumstances such as those at issue in the main proceedings, as precluding a legislative omission to provide for compensation of the untaken annual leave for judges?*

*13. If the answer to the above questions is in the affirmative, must Article 7 of the Directive and Article 31(2) of the Charter be interpreted as requiring the applicant to demonstrate that it was impossible for him to take the leave concerned in the course of the employment relationship?*

**14. The defendant opposed to the referral stating that the preliminary ruling is inadmissible, as the EU law is not applicable in the present case.** Being a pure internal situation, only the national legislation and the mandatory interpretation given by the Supreme Court is applicable as correctly decided by the first instance.

15. In case of a doubt as to the conformity of the national legislation with any fundamental rights, the national court must seize the Constitutional Court having exclusive jurisdiction for establishing the conformity of the national provisions with the Constitution of Member State A<sup>5</sup>.

**16. Instead of referring to CJEU, the defendant requested the Court to stay the proceedings and to seize the Constitutional Court for a constitutional control.**

17. From a procedural perspective, the defendant stated that the referral to the Constitutional Court must be debated and decided prior to the appellant's request for a referral to CJEU. During the constitutional proceedings, the Constitutional Court itself has the possibility to refer to CJEU according to Article 267 TFEU, if it will consider that the EU law invoked by the applicant is applicable.

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<sup>5</sup> In other cases, Constitutional Court of Member State A stated that in the field of fundamental rights, the national domestic system shall be applied by the national judge prior to other EU provisions.

## TASKS

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19. **On the merits of the case**, consider the case-law of the CJEU resulting from the judgments of 20 July 2016, Maschek (C-341/15, EU:C:2016:576), and of 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften (C-684/16, EU:C:2018:874), indicating how the national law should be interpreted in order for it to be compatible with EU law.

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#### **Recital 4**

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

#### **Article 7 Annual leave**

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

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

### *Charter of Fundamental Rights of European Union*

#### **Article 31 - Fair and just working conditions**

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

#### **Article 47 Right to an effective remedy and to a fair trial**

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<sup>6</sup>Based on the legislation of Member State A, if the Constitutional Court is seized, the domestic proceeding will be stayed until case is decided by the Constitutional Court.

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

## **Article 52 - Scope and interpretation**

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

### **Judgment of 20 July 2016, Maschek, C-341/15, (EU:C:2016:576)**

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- *as meaning that a worker is entitled, on retirement, to an allowance in lieu of paid annual leave not taken because he was prevented from working by sickness;*
- *as meaning that a worker whose employment relationship has ended and who, pursuant to an agreement with his employer, while continuing to receive his salary, was required not to report to his place of work during a specified period preceding his retirement, is not entitled to an allowance in lieu of paid annual leave not taken during this period, unless he was not able to use up that entitlement due to illness;*
- *as meaning that it is, on the one hand, for the Member States to decide whether to grant workers additional paid leave in addition to the minimum*

*annual paid leave of four weeks provided for in Article 7 of Directive 2003/88. In that case, the Member States may grant to a worker who, because of illness, could not use up all of his additional paid annual leave before the end of his employment relationship, an entitlement to an allowance in lieu of that additional period. It is, on the other hand, for the Member States to determine the conditions for granting that entitlement.*

**Judgement of 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften, C-684/16 (EU:C:2018:874)**

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2. *In the event that it is impossible to interpret national legislation such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights, it follows from the latter provision that a national court hearing a dispute between a worker and his former employer who is a private individual must disapply the national legislation and ensure that, should the employer not be able to show that it has exercised all due diligence in enabling the worker actually to take the paid annual leave to which he is entitled under EU law, the worker cannot be deprived of his acquired rights to that paid annual leave or, correspondingly, and in the event of the termination of the employment relationship, to the allowance in lieu of leave not taken which must be paid, in that case, directly by the employer concerned.*



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