Loi Travail: working time rules and new hierarchy of sources of labour law in France

by Diogo Silva

On the 19th November 2016 were published on the *Journal Officiel* three new *Décrets*, *Décret* n.º 2016-1551, *Décret* n.º 2016-1553 and *Décret* n.º 2016-1556, of 18th November 2016.

These *Décrets* were published for the fulfilment of some norms of the new *Code du Travail*, approved by the *Loi* n.º 2016-1088, of 8th August 2016 (also known as *Loi El Khomri*), in which the legislator clearly separated its intervention on three main focuses: 1) establishing norms of public order, therefore imperative; 2) norms related to the collective bargaining; 3) default rules, applied only in case of inexistent enterprise or branch agreements.

These *Décrets* give coherence between the regulatory rules and the *Code*, in order to fulfil some norms of the new *Code*.

Therefore, the first *Décret* mentioned is meant to apply the article n.º 8 of the Law that approved the new *Code*. This article rewrites the Title II of the third part of the *Code*, in charge of enacting the duration of work, repartition and management of working schedules.

So, the main mission of the act in analysis was changing the numeration and remissions on the regulatory articles in order to comply with the new formulation of the *Code du Travail*. Without prejudice of the systematic changes, the *Décret* also introduced new rules.

The main emphasis of the *Code* transformation was on employer-friendly working time flexibility, as noticeable in the possibility to increase the maximum daily working time up to twelve hours by enterprise convention or agreement – or, in lack of this instrument, by branch convention or agreement – in case of increased activity or reasons related to the organization of the enterprise and in the possibility to override by enterprise convention or agreement – or, in lack of this instrument, by branch convention or agreement – the weekly maximum of forty-four hours calculated in the period of reference of twelve consecutive weeks, now established in forty-six hours.

Fulfilling the mission that the *Code du Travail* has instructed (check Article 3121-24), the *Décret* institutes that the authorization by the administrative authority for the use of this last modality is in the same terms of the weekly maximum of forty-eight hours (without the period of reference). This means that the employer has to address the request to the labour inspector, with the legal opinion of the worker's commission.

Furthermore, the new Article R. 3121-3 establishes that the employer has to communicate to its workers the programme of overtime every month on a fixed data, respecting the period of anticipation established on article L. 3121-12 (fifteen days, by principle – under exceptional circumstances the period of anticipation is one month).

There has also been an alteration in terminology on what concerns the procedure of overruling maximum duration of working time, daily and weekly. Thus, the expression derogation ("*dérogation*") has been changed for surpass ("*dépassement*"). Consequently, the system of derogation of the maximum limits has been replaced by a system of authorization to surpass the maximum duration of working time.

This revision of terminology does not change the practical procedure in itself. However, in my view this demarcation from the language used in the European Working Time Directive might be hazardous, in the sense that it implicitly tends to normalize the utilization of the figure, which this last act predicted as exceptional.

Finally, this *Décret* also introduces a new obligation for the employers. The new article R. 3121-33 determines that the employer has to inform the labour inspector beforehand any collective interruptions of work and its means of recuperation. In case of a collective interruption due to an unpredicted event, the employer must inform the inspector immediately.

This *Décret* comes into force on the 1st January 2017.

On the matter of control of the working time, resting periods and holiday leave, the *Décret* n.º 2016-1553 modifies the regulatory norms to harmonize the regime with the new *Code*, changing not only the remission on the labour code but also on the *Code de la Securité Social* and on the *Code general des collectivités territoriales*.

The key change on this matter was the introduction of employer's obligation to have the documents available for the labour inspectors relative to the duration of work equivalent to the reference period in case of working time arrangements over a period exceeding the year (check article D. 3171-16).

This *Décret* also comes into force on the 1st January 2017.

The last *Décret* here in analysis is interrelated with the procedure of transmission of conventions or enterprise agreements in matters of working time, part-time working, intermittent working, vacations and banking time schemes to the permanent parity commissions of negotiation and interpretation (also known as CPPN).

The permanent parity commission of negotiation and interpretation must be created by convention or agreement to every branch of activity.

The new article D. 2232-1-2, implemented by this diploma, creates the obligation to the first party of the agreement to transmit it to the parity commission of negotiation and interpretation and inform the other parties of that transmission. However, when obeying to this obligation, the transmitting party must remove the names of the negotiators and parties. The parity commission must then acknowledge the receipt of the convention or enterprise agreement.

If the commission is not created, the professional organization of employers or the worker's union representative in the activity branch must transmit in one month period to the Ministry of Labour the address or postal code of the existing parity commission in the activity branch. The list of addresses of the parity commissions will be published on the website of the Labour Ministry.

Given its impacts on collective negotiation and its procedure, the entrance into force was immediate (for the lack of disposition otherwise, the entry into force is the day after the diploma's publication), to allow the collective negotiations to begin as soon as possible in compliance of these rules.

In light of these executive acts and the overall changes on the *Code du Travail*, it is possible to conclude that:

1) The augmentation on the relevance of enterprise agreements given by the imperative norms stemmed the emphasis of the supervisory role of the permanent parity commissions of negotiation and interpretation;

2) In general terms, the working time reform was meant to give more flexibility on the management of working time by the employers, in order to increase their competitiveness and stimulate the economic tissue (it should be mentioned that France's unemployment rate remains at the highest level ever – check the Eurostat's statistics here), which comes to meet companies demands on a fast pace changing market (check Eurofound – Working Time developments in the 21st century: work duration and its regulation in the EU, p. 63);

3) In this sense, the new task of the labour inspectors and the obligation to communicate the programme of overtime established by the Décret n.º 2016-1551 may constitute a measure to counterbalance the raise of the employer's management power and the possibility to extent the working hours.

The new set of rules implemented by the *Code du Travail* do not upset the thirty-five-hour workweek (for an overview on the working time provisions before the new *Code* check MARCELO ESTEVÃO /FILIPA SÁ – "The 35-hour workweek in France: Straightjacket or welfare improvement?", *Economic Policy*, 2008, n.º 9, vol. 23, pp. 417-463). However, in my understanding, the reform might contradict the French stagnation on average work hours and the current European trend on the reduction of average hours of work (as corroborated by the report from ILO – *Working time in the twenty-first century: Discussion report for the Tripartite Meeting of Experts on Working-time Arrangements 2011*, 17–21 October 2011/International Labour Office, Geneva, ILO, 2011, pp. 19-20).

Even though it is indubitable that the world economy has changed deeply in recent years and the volatile market necessities call for special measures on working time, *i.e.*, more flexible working times, it remains questionable whether these working time measures implemented by the *Code du Travail* will be able to fight the unemployment issue that overshadows France.

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