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ORGANISATION OF THE DEPARTMENTAL GENDARMERIE IN THE LIGHT OF THE EUROPEAN WORKING TIME DIRECTIVE, DECISION OF THE CONSEIL D'ETAT¹

1. "When it comes to working hours, I will also state quite clearly that my determination is complete. Be it the gendarmerie or the military in general, both of them are not concerned by the notorious directive. Things were made clear; they have been notified to those involved and they will be carried through to their term". When one knows that "real authority"² in defence matters is assumed by the Head of State despite the original constitutional equivocation linked to the drafting of Articles 15³ and 21⁴ of the Constitution, one measures the significance of this statement issued by the President of the Republic on 18 October 2017 to the domestic security forces, in order to exempt the military bodies from the enforcement of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time. For law students, this statement is ultimately not unfamiliar, them who know how unique the military state is⁵, and who learned, from Maurice Hauriou the principle of subordination of the armed force to the civil power, that states that «it is necessary that the *armed force is at the disposal of a civilian government, that it is subordinate and obedient to it, that he freely disposes of his employment*»⁶.

I) A political posture overtaken by legal considerations

2. Yet, the "European control"⁷ did happen with the decision of the Court of Justice of the European Union (CJEU) dated 15 July 2021: "It is a Trafalgar coup that the French army is undergoing"⁸. The French (and Spanish) Government became a party to the case, as the European judicial procedure allows, thus enabling the Court to rule on the questions of principle raised by the other States. Ultimately, it swept aside the displayed voluntarism of the Head of State to the extent that it is now possible to assert that the military of the Member States of the European Union are subject to Directive 2003/88/EC, but for under certain defined conditions. In line of this decision, the Council of State ruled, in the case under review, on the applicability of the directive to the *Gendarmerie Départementale*⁹. It is not trivial to note that

1 Conseil d'État, Assemblée, 17 décembre 2021, n° 437125 [en ligne], Publié au recueil Lebon. URL : https://www.legifrance.gouv.fr/ceta/id/CETATEXT000044516277?init=true&page=1&query=437125&searchField=ALL&tab_selection=all

2 GOHIN Olivier. Les fondements juridiques de la défense nationale. *Droit et Défense*, 1993/1, p. 7.

3 « Le Président de la République est le chef des armées. Il préside les conseils et les comités supérieurs de la défense nationale ».

4 Le Gouvernement « dispose (...) de la force armée ».

5 GRANGER Marc-Antoine, « L'état militaire dans la jurisprudence constitutionnelle », in D. CUMIN et Th. MESZAROS (dir.) *Annuaire 2021 du droit de la sécurité et de la défense*, 2021, p. 71.

6 HAURIOU Maurice. *Principes de droit public*. Librairie de la société du recueil Sirey, 1916, p. 442.

7 VIDELIN Jean-Christophe, note sous CJUE, 15 juillet 2021, aff. C-742/19, *B.K. c./ République de Slovénie*, *Droit administratif*, octobre 2021, p. 26.

8 VIDELIN Jean-Christophe. *Les militaires et la pointeuse* [online]. URL : <https://blog.leclubdesjuristes.com/les-militaires-et-la-pointeuse/>

9 LE CORRE Mireille, concl. sous CE, Ass., 17 déc. 2021, n° 437125, *RFDA*, 2022, p. 117 ; MAINGUY Daniel. Le temps de travail des gendarmes... et des militaires : fin du débat. *Recueil Dalloz*, 2022, p. 444.

the day before the Council of State's decision, ruling in its most formal session, and for the last time under the presidency of Mr Lasserre, the Government published a reply to the parliamentary question ending with these words: *"In accordance with the guidelines given by the President of the Republic, the Government is determined to respond to this CJEU judgment with the law"*¹⁰.

II) A Trafalgar blow by the Court of Justice of the European Union

3. This judicial position was put down by the CJEU as follows: *'Although it is for the Member States alone to define their essential security interests and to adopt appropriate measures to ensure their internal and external security, including decisions on the organisation of their armed forces, the mere fact that a national measure has been taken for the protection of national security cannot give rise to the inapplicability of EU law and exempts Member States from the respect for this law'*¹¹. Military personnel are therefore not excluded, as a matter of principle, from compliance with European rules on working time on the grounds that this would affect the way in which states' armed forces are organised.

4. While this position is not self-evident, it is not surprising. It is not self-evident as Article 4 of the Treaty on European Union states that the Union *"shall respect the essential functions of the State, in particular those designed to ensure its territorial integrity, to maintain law and order and to safeguard national security; in particular, national security remains the sole responsibility of each Member State."* It is not surprising if we recall the court decisions *ADEFROMIL v. France* and *Matelly v. France*¹² which both found France guilty of violating Article 11 of the Convention¹³ on freedom of association, and which led to the creation of national professional associations of military personnel¹⁴, despite the arguments of States based on the specificity of the status and employment of military personnel. Similarly, the European judge has already had to interpret Directive 2003/88 to determine the conformity of the provisions governing the working time of police officers (CJEU, 11 April 2019, aff. C-254-18, *Union of Executives of Internal Security*; *AJDA*, 2019, p. 838, M.-C. de Montecler) and the Council of State itself applied the Directive to professional firefighters (CE, 9 June 2000, No 438418, *SDIS de la Moselle*; *JCP A*, 2020, act. 369; *JCP A*, 2020, 2290, note X. Prétot). These personnel are certainly not military personnel, but the requirements for them in terms of availability and unforeseen events are not debatable.

III) The Nation's *ultima ratio* to 35 hours?

5. Nevertheless, the application of the European rule is not without nuance. The Court states that *"although the observance due by the European Union to the essential functions of the State does not mean that the organisation of the working time of military personnel should be entirely excluded from the scope of EU law, the fact remains that the application to military personnel of the rules of EU law relating to that arrangement is not such as to hinder the proper performance of those essential functions"*. The Court of Justice of the European Union adds that the rules of the Directive of 4 November 2003 *"cannot be interpreted in such a way as to prevent the armed forces from carrying out their tasks and to impair, consequently, the essential functions of the State, namely the preservation of its territorial integrity and the safeguarding of national security"*. It goes on and states that the impact of Article 4 of the Treaty is also likely to vary from one Member State to another. According to the CJEU, *"the specific features that each Member State confers on the functioning of its armed forces must be duly taken into account by EU law, that these specificities result, inter alia, in the specific international responsibilities assumed by that Member State, the conflicts or threats it faces, or the geopolitical context in which that State operates"*. Of all the European states, France is the country most massively engaged in external theatres of operation.

10 JO Sénat du 16 décembre 2021, p. 6903.

11 CJCE, Grande Chambre., 15 juillet 2021, aff. C-742/19, *B.K. c./ République de Slovaquie*.

12 CEDH, 2 oct. 2014, req. n° 32191/09 et n° 10609/10.

13 « 1. Toute personne a droit à la liberté de réunion pacifique et à la liberté d'association, y compris le droit de fonder avec d'autres des syndicats et de s'affilier à des syndicats pour la défense de ses intérêts.
2. L'exercice de ces droits ne peut faire l'objet d'autres restrictions que celles qui, prévues par la loi, constituent des mesures nécessaires, dans une société démocratique, à la sécurité nationale, à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale, ou à la protection des droits et libertés d'autrui. Le présent article n'interdit pas que des restrictions légitimes soient imposées à l'exercice de ces droits par les membres des forces armées, de la police ou de l'administration de l'État. »

14 GOHIN Olivier. L'association professionnelle dans les forces. In : CONAN Matthieu et THOMAS-TUAL Béatrice (dir.), *L'annuaire français de droit de la sécurité et de la défense*, Mare et Martin, 2016, p. 169 ; VIDELIN Jean-Christophe, Les associations professionnelles nationales de militaires, *JCP A*, 2015, 2346.

6. The European court, distinguishing between activities subject or not to the Directive, identifies four situations that are excluded from the scope of the Directive:

- when members of the armed forces '*are confronted with circumstances of exceptional gravity and magnitude*';
- where they have '*high qualifications or perform extremely sensitive tasks which can only be replaced by other members of the armed forces with great difficulty, by means of a rotation system which ensures both compliance with the maximum periods of work and rest periods provided for in Directive 2003/88 and the proper performance of the essential tasks assigned to them*';
- when military personnel are '*called upon to assist in operations involving a military engagement of the armed forces of a Member State, whether they are deployed permanently or occasionally, within or outside its borders*';
- during periods of initial and operational training.

IV) The 'Gendarme Départemental' and the time clock

7. It is on the basis of this "*ridge line*"¹⁵ drawn by the Court of Justice that the *Conseil d'État* was asked, by a Gendarmerie non-commissioned officer, to quash the refusal of the Minister of the Interior to transpose Article 6 of Directive 2003/88. This article sets a maximum working week of 48 hours to the '*Gendarmerie Départementale*'. The *Conseil d'État*, ruling in the Litigation Chamber, rejected this request "at the end of a three-step reasoning"¹⁶.

8. First of all, the administrative judge had to answer the question of a '*potential confrontation of the European law with the French Constitution*'¹⁷.

Indeed, on 21 April 2021, in its *French Data Network* judgment, the Litigation Chamber of the *Conseil d'État* had considered that the safeguarding of the fundamental interests of the Nation, the prevention of breaches of public order, in particular breaches of the security of persons and property, the fight against terrorism, as well as the search for the perpetrators of criminal offences '*cannot be regarded as benefiting, in Union law, from a protection equivalent to that guaranteed by the Constitution*'¹⁸. For the administrative judge, the French Constitution remains the supreme standard and, consequently, it is up to the latter to make sure that the enforcement of European law does not compromise, in practice, constitutional requirements that are not guaranteed in an equivalent manner by European law. This constitutional requirement is, in this case, the principle of the necessary free disposal of the armed force, enshrined in Decision No. 2014-432 QPC of 28 November 2014 on the exercise of electoral mandates by active military personnel: pursuant to Article 5, which makes the President of the Republic the head of the armed forces, and Articles 20 and 21 of the Constitution, which state that the Government has the armed force at its disposal and that the Prime Minister is responsible for national defence, "*the Government shall decide on the use of the armed force, under the authority of the President of the Republic*". In its Decision No. 2014-450 QPC of 27 February 2015 on the drafting of simple orders, the *Conseil d'État* specified that the principle of the free disposal of armed force "*implies that the exercise by the military of certain rights and freedoms granted to citizens should be prohibited or restricted*". In the present case, the question arises as to whether the application of the 2003 Directive compromises this principle, which implies that the availability of the armed forces to safeguard the fundamental interests of the Nation, first and foremost national independence and territorial integrity, must be guaranteed at all times and in all places. In implementing its reasoning, however, the *Conseil d'État* avoided a confrontation between the Constitution and EU law.

9. Second of all, the *Conseil d'État* examined whether the *Gendarmerie Départementale* fell within one of the four exclusions laid down by the Court of Justice. The result turned out negative: "*It does not appear from the documents in the file that the military personnel of the Gendarmerie Départementale, which constitutes a component of the armed forces, as a whole carry out activities falling within one of the exclusions from the scope of the directive of 4 November 2003 (...) the Ministers [of the Interior and the Armed Forces] also maintain that only a "very minority" of the workforce carries out such activities*".

10. Finally, the *Conseil d'État* examined whether the organisation of the *Gendarmerie Départementale* contradicted the 48-hour working week rule laid down in Article 6 of the Directive. The working time of a military officer of the *Gendarmerie Départementale* is divided into three parts: actual working time, rest time and on-call duty period. According to the *Conseil d'État*, on-call duty period does not refer to activity time and therefore it should not be taken into account when assessing compliance with the objective of Article 6 of the 2003 directive. In fact, on-call duty period is spent at the gendarmes' homes, allowing them to "*freely dispose of their time when they are not mobilised, in their social and family environment*". They are required to occupy barracks accommodation (C. déf., art. L. 4145-2), which are

15 VIDELIN Jean-Christophe, *op. cit.* note 7, p. 27.

16 Communiqué de presse du Conseil d'État.

17 *JCP A*, 2022, jurisp. 10.

18 CE, ass., 21 avr. 2021, n° 393099, *French Data Network et a.*, Leb., p. 62 ; *JCP A*, 2021, 2223.

granted free of charge in line with the principle of 'absolute necessity of service' (Code général de la propriété des personnes publiques, art. R. 2124-67), they are only deployed in a second stage, in case of operational necessity, so as to "limit the frequency of requests". As a result, the administrative judge stated that "in the context of the balance between the hardships and compensations specific to the military status, these periods of immediate on-call duty cannot be considered, since they are carried out at home, as constituting in their entirety working time". Moreover, the average weekly working time in the *Gendarmerie Départementale*, excluding on-call duty periods, is in practice about 40 hours and, but for exceptional circumstances, does not exceed 48 hours. The *Conseil d'Etat* therefore dismissed the applicant's argument, without having to examine whether the constitutional requirements of 'free use of armed force' might be compromised by the application of European law.

11. In short, the question of the working time of the military personnel of the *Gendarmerie* is paramount:

- Paramount for public security: shorter working hours implies less police coverage on public roads and thus greater risks for the safety of people and property. Prefect Guy Fougier, former secretary general of national defense and prefect of police asserted that "one of the major factors weakening the effectiveness of all the decisions taken for half a century (...) seems to lie in the reduction of the working hours"¹⁹ of police officers;
- Paramount from a political and budgetary point of view, for it is inconceivable that the recruitment efforts of the military personnel are offset by the reduction in the working time of the latter. Six weeks after the implementation of the measure relating to the eleven-hour daily physiological rest measure, the Director General of the National Gendarmerie drew up an unequivocal observation: "The first returns of the units indicate a deterioration in the service"²⁰ and the special rapporteur of the Finance Committee spoke of a "time bomb likely to call into question the expected beneficial effect of the increase in staff"²¹;
- paramount for the Institution from a social point a view: it was also not conceivable that too great a gap in the pace of work arose between civil society and the *Gendarmerie Nationale*, the crisis it went through in 2001 having shown that nothing would be more dangerous for the Gendarmerie than "the progressive loss of 'appetite' of the gendarme for his status"²². It is preferable not to forget that the very serious crisis of 1989 experienced by the *Gendarmerie Nationale* took its roots in the lack of staff resources and the increase in "working hours (...) gendarmes, some of whom perform a weekly shift of 70 hours, excluding on-call duty periods"²³ ;
- paramount given that, in the absence of a good timing and failing to exclude the armed forces from the scope of the directive, the transposition of this Directive to *Gendarmerie* was carried out under the constraint of contentious procedures; was it a good way to go about it ?
- Paramount, finally, because the movement to trivialize the military status continues and "slowly but surely, the military function is edging closer to the civilian service"²⁴.

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19 FOUGIER Guy. L'impossible réforme de la police. *Pouvoirs*, 2002, n° 102, p. 112.

20 Audition en date du 18 octobre 2016 faite au nom de la commission de la défense nationale et des forces armées sur le projet de loi de finances pour 2017, t. VIII, par le député Daniel BOISSERIE, 13 octobre 2016, p. 64.

21 DOMINATI Philippe, Note de présentation mission « sécurités » au projet de loi de finances pour 2017, 16 novembre 2016, p. 18.

22 WATIN-AUGOUARD Marc. La "militarité" de la gendarmerie. *Revue de la gendarmerie nationale*. n° 201, décembre 2001, p. 26.

23 WATIN-AUGOUARD Marc. La gendarmerie, l'histoire, la crise. *Regards sur l'actualité*, n° 157, janvier 1990, p. 29. V. également DIEU François. Autopsie d'un mouvement social atypique : la fronde des gendarmes de l'été 1989. Dix ans après ». *RICPTS*, octobre-décembre 1999, p. 414-430.

24 AUBY Jean-Bernard. Le mouvement de banalisation de la fonction militaire. *Droit administratif*, décembre 2014, p. 1-2.