Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 6 October 2020 [1]

Case C-580/19

RJ
v
Stadt Offenbach am Main

(Request for a preliminary ruling from the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany))

(Reference for a preliminary ruling – Protection of the safety and health of workers – Organisation of working time – Concepts of working time and rest period – Professional firefighters – Stand-by duty with no place being designated by the employer)

1. Under what circumstances may the time which a worker spends on stand-by be regarded as working time?

2. Is it permissible to take the concept of working time contained in Directive 2003/88/EC [2] so far as to include situations in which a worker, while not 'working', is in a situation such that he or she cannot rest effectively? And what are the characteristics of 'effective rest' that satisfy the objective of protecting the health and safety of workers which the directive pursues?

3. Might there be 'grey areas', in the sense that it would be possible for a worker to be neither on working time nor on a rest period?

4. Those are the questions underlying the present case, which, examined in parallel with Case C-344/19, offers the Court an opportunity to consider the legal characterisation of on-call time and stand-by time in the light of Directive 2003/88.

5. The Court has already given rulings on this subject a number of times. However, the specific features of the present case (no obligation on the worker to be physically present in any place designated by the employer, a short response time to a call and certain additional constraints imposed by the nature of the work) render it necessary to revisit the principles thus far established, in order to consider whether they might be developed further.

[1] Original language: Italian.

[2] 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 (OJ 2003 L 299, p. 9).

6. More specifically, it is necessary to ascertain whether periods of on-call duty, during which a worker must remain reachable at any time and may be required to take action in the space of twenty minutes, is to be regarded as working time or as a rest period within the meaning of Article 2 of Directive 2003/88.

7. Here, particular attention should be paid to the fact that the applicant, a firefighter, was required, if called, to reach, within that short response time, the boundary of the city in which he worked, dressed in his work clothes and with his operations vehicle.

I. Legal context

A. EU law

8. Recital 5 of Directive 2003/88 states:

'All workers should have adequate rest periods. The concept of "rest" must be expressed in units of time, i.e. in days, hours and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours.'

9. Article 2 of Directive 2003/88 provides:

'For the purposes of this directive, the following definitions shall apply:

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;

…

9. "adequate rest" means that workers have regular rest periods, the duration of which is expressed in units of time and which are sufficiently long and continuous to ensure that, as a result of fatigue or other irregular working patterns, they do not cause injury to themselves, to fellow workers or to others and that they do not damage their health, either in the short term or in the longer term.'

B. German law

10. The annex to the Verordnung über die Organisation, Mindeststärke und Ausrüstung der öffentlichen Feuerwehren (Regulation on the organisation, minimum strength and equipment of public fire services) of 17 December 2003 provides:

'The equipment of level 2, including the necessary personnel, is generally to be deployed at the place where action is to be taken within 20 minutes of the alert …'

11. In accordance with the Einsatzdienstverfügung der Feuerewehr Offenbach (Operational Service Order of the Offenbach am Main fire brigade), in the version of 18 June 2018, the public official who is on incident command duty (*Beamter vom Einsatzleitdienst*) must be available to go immediately to the place where action is to be taken, making use of his or her traffic regulations privileges and rights of priority.

12. In so far as concerns the obligations upon a public official on incident command duty, page 6 of the Operational Service Order specifies:

'While on incident command duty, a public official shall remain on call and at such place as will permit him or her to comply with the response time of 20 minutes. This rule shall be deemed to be complied with if the journey time, using traffic regulations privileges and rights of priority, from where he or she is to the Offenbach am Main city boundary is 20 minutes or less. That journey time shall apply in the case of average traffic density and normal road and weather conditions.'

II. The facts, the main proceedings and the questions referred

13. The applicant in the main proceedings, RJ, is a public official employed as a firefighter with the Offenbach am Main fire brigade.

14. In addition to his regular duties, the applicant, in accordance with the legislation applicable to the Offenbach am Main fire brigade, is regularly required, as group leader, to perform incident command duty ('stand-by duty').

15. While on such duty, RJ must always be reachable, must keep his uniform ready and to hand and must have the operations vehicle provided by the employer with him. He must answer any calls he receives informing him of incidents in relation to which he is required to take decisions. On occasion, he must go to the scene of the incident or to his place of employment. While on stand-by duty, the applicant must choose where he will be in such a way that, if he is required to take action, he is able to reach the Offenbach am Main city boundary within 20 minutes, in uniform and with his operations vehicle.

16. During the week, stand-by duty is from 17:00 to 07:00 hours the following day. At the weekend, it is from 17:00 on Friday to 07:00 on Monday. Weekend duty may follow a working week of 42 hours.

17. The applicant has performed stand-by duty at the weekend between 10 and 15 times on average annually. Between 1 January 2013 and 31 December 2015, he was on stand-by duty a total of 126 times, during which he was required to respond to alerts or to physically take action on 20 occasions.

18. RJ has requested that the time he has spent on stand-by duty be recognised as working time and that he be paid the corresponding remuneration. By decision of 6 August 2014, however, the employer rejected that request, taking the view that incident command duty cannot be regarded as working time.

19. On 31 July 2015, RJ brought an action before the referring court, arguing that periods of stand-by duty can be treated as working time even where the worker is not required to be physically present at a place designated by the employer but the employer sets a very short span of time within which the worker may have to go back to work. In the present case, RJ states that, in the event of an alert, in order for him to be able to comply with the 20-minute response time, he must leave home immediately, which means that he cannot pursue any activities that cannot be interrupted. In addition, if he leaves his home, he can only pursue activities which allow him to remain within close proximity of his vehicle. Consequently, while on stand-by duty, he is significantly restricted in the choice of activities he can pursue, in particular activities with his children.

20. In the employer's opinion, on the other hand, incident command duty cannot be regarded as working time, because RJ was not required to remain on stand-by at any place designated by the employer outside the sphere of the applicant's private life. The period of 20 minutes allowed him to reach the city boundary gives the applicant a sufficient geographical radius within which to move freely, in particular given the fact that he has an operations vehicle which is granted traffic regulations privileges when the alarm is used.

21. As a preliminary point, the referring court states that, according to the Court's case-law, first, activities carried out by the operational crews of a public fire service fall within the scope of Directive 2003/88 [3] and, second, questions relating to the remuneration of on-call duty do not, on the other hand, fall within the scope of Directive 2003/88. [4]

22. Nevertheless, the referring court is of the view that the issue of the classification of stand-by duty as working time within the meaning of Directive 2003/88 is decisive for the outcome of the case pending before it. In accordance with national law, RJ's employer is required to remunerate stand-by duty, as requested by the applicant, only in the event that the applicant carries out, in breach of the maximum weekly working time permitted under Directive 2003/88, activities which are to be classified as working time. Moreover, the applicant's request that stand-by duty be recognised as working time is not aimed at obtaining any different remuneration, but is aimed at his no longer being required to work in excess of the maximum working time permitted under EU law.

23. As regards the first question referred for a preliminary ruling, the referring court states that, to date, the Court of Justice's position has been to regard on-call duty as working time only where the worker is required to be physically present at a place designated by the employer.

24. It nevertheless emphasises that, in its judgment in *Matzak*, [5] the Court held that on-call duty performed by a worker at his own home should also be classified as working time, on the basis, first, of the requirement that the worker be physically present at a place determined by the employer (in this case, his own home) and, secondly, of the restriction of the worker's ability to pursue his personal and social interests which resulted from the requirement to reach the workplace within the space of eight minutes.

25. In the referring court's opinion, the Court's ruling in *Matzak* does not preclude periods of on-call duty such as those at issue in the present case – during which the employer does not require the worker to be present in any specific place but the worker is nevertheless subject to

3 See order of 14 July 2005, *Personalrat der Feuerwehr Hamburg* (C-52/04, EU:C:2005:467, paragraph 52).

4 See judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraph 24 and the case-law cited.

5 See judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82).

significant constraints on his whereabouts and on how he organises his own free time – from being classified as working time. That is the case for instance where – as in the case at hand – the employer allows the worker only a short span of time in which to return to work and thus sets a geographical range within which the worker must physically remain, consequently restricting the worker's freedom to choose where he or she will be and what leisure activities he or she will pursue.

26. According to the referring court, confirmation of that assertion may be found in the Advocate General's Opinion in *Matzak*, inasmuch as the Advocate General seems to have interpreted the situation that gave rise to the judgment in that case not in the sense that the firefighter in question was required to remain at his own home, but in the sense that he merely had to ensure that he would be able to reach the fire station within eight minutes.

27. The referring court also mentions paragraph 63 of the judgment in *Matzak* and paragraph 66 of the order in *Grigore*,[6] from which it appears that the quality of the time available to the worker is a relevant factor in determining whether a period of stand-by duty should be classified as working time.

28. It also points out that the Bundesarbeitsgericht (Federal Labour Court, Germany) has held that a period of stand-by duty constitutes working time if the worker is required to return to work within a period of 20 minutes, regardless of whether or not the employer has determined a specific place where the worker is required to be physically present during that period. The decisive factor is the restriction of the worker's freedom, in so far as concerns the possibility of his or her choosing his whereabouts and organising his or her own fee time, which results from the temporal constraint imposed by the employer.

29. According to the national court, it would be discriminatory to exclude stand-by duty from working time for the sole reason that the employer has not specified a particular place at which the worker must be physically present, even though, for the worker, the obligation to reach a certain place (in the present case, the Offenbach am Main city boundary) within 20 minutes, in uniform and with an operations vehicle, can have an effect on the organisation of his free time that is ultimately as restrictive as if the employer had designated a specific place where he must be. It also states that, by making the worker adhere to a short response time, the employer is indirectly also imposing on that worker the place where he must be physically present, thus significantly restricting his ability to conduct his personal life as he wishes.

30. The referring court also submits that, in so far as concerns the definition of working time, it should be borne in mind that, with the digitalisation of work and the possibility of teleworking, an employer's requiring a worker to remain in a specific place is likely to become less important in the definition of that concept.

31. With reference to the second question referred for a preliminary ruling, the national court states that the criterion applied by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) in order to determine whether stand-by duties constitute working time is whether experience shows that it is likely that there will be a call requiring the worker to return to work. In that context, the decisive factor is the frequency with which the worker must expect to be called while on duty and thus, if that time is interrupted only occasionally by a call to work, it does not constitute working time.

[6] See order of 4 March 2011, *Grigore* (C-258/10, not published, EU:C:2011:122).

32. Should the first question be answered in the affirmative, the referring court is unsure whether or not the frequency of calls to work can be a significant factor in the classification as working time of on-call duties which do not necessarily have to be performed at the place of work or at the worker's home, but which, because of their other characteristics, entail significant restrictions on how the worker organises his or her free time.

33. In those circumstances, the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 2 of Directive 2003/88/EC to be interpreted as meaning that periods of on-call duty during which a worker is under an obligation to reach the boundary of the city where his place of employment is located, in uniform and with an operations vehicle, within twenty minutes are to be regarded as working time, even if the employer has not specified any place at which the worker must be physically present, albeit the worker is significantly restricted in his choice of his whereabouts and his ability to pursue his personal and social interests?

(2) If the first question is answered in the affirmative, in a situation such as that described in the first question, is Article 2 of Directive 2003/88/EC to be interpreted as meaning that, in the definition of the concept of working time, account must also be taken of whether, and if so, with what frequency, a call to work is usually to be expected in the course of on-call duties performed elsewhere than at a place determined by the employer?'

III. Legal analysis

A. Preliminary remarks

1. Admissibility

34. Directive 2003/88, which is based on Article 153(2) TFEU, is limited to regulating certain aspects of the organisation of working time in order to protect the safety and health of workers and, in accordance with Article 153(5) TFEU, does not apply to the question of the remuneration of workers falling within its field of application, save in the special case envisaged by Article 7(1) of the directive[7] concerning paid annual leave. In principle, therefore, it does not apply to the remuneration of workers.

35. The fact that the subject of the main proceedings is a claim for the payment of remuneration for periods of stand-by duty as working time does not mean that the questions referred to the Court in this case should not be answered.

36. Indeed, it is apparent from the order for reference that the national court is seeking guidance on the interpretation of Article 2 of Directive 2003/88, which it considers necessary in order to be able to resolve the dispute in the main proceedings. The fact that that dispute ultimately concerns a question of remuneration is irrelevant, since it is for the national court and not the Court of Justice to resolve that question in the context of the main proceedings.[8]

[7] See, most recently, judgments of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraphs 23 and 24), and of 26 July 2017, *Hälvä and Others* (C-175/16, EU:C:2017:617, paragraph 25 and the case-law cited).

[8] See judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraph 26).

37. I therefore consider the questions referred by the national court for a preliminary ruling to be admissible.

B. The aim of the directive and the concepts of working time and on-call duty

38. The aim of Directive 2003/88 is to lay down minimum requirements intended to improve the protection of health and safety in the workplace, an aim which is to be attained, inter alia, by the approximation of national legislation on working time. [9]

39. That aim is a key element in the formation of social law in the European Union. After laying down, on the basis of Article 153 TFEU, the general principles for protecting the health and safety of workers in Council Directive 89/391/EEC of 12 June 1989, the legislature gave more formal expression to those guidelines in a series of specific directives. Among these is Directive 2003/88, which codified the preceding Council Directive 93/104/EC of 23 November 1993. [10]

40. In order to achieve those objectives, the provisions of Directive 2003/88 establish minimum periods of daily and weekly rest as well as an upper limit of 48 hours for the average working week, including overtime.

41. Those provisions implement Article 31 of the Charter of Fundamental Rights, which, after recognising, in paragraph 1, that 'every worker has the right to working conditions which respect his or her health, safety and dignity', provides, in paragraph 2, that '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'. Those rights are directly related to respect for human dignity, which is protected more broadly in Title I of the Charter. [11]

42. Within that systematic framework, the Court has held that the rules laid down in Directive 2003/88 are rules of EU social law of particular importance from which every worker must benefit as minimum requirements necessary to ensure protection of his or her safety and health, [12] and that such protection is not just in the worker's individual interests; it is also in the interests of the employer and in the general interest. [13]

43. An initial consequence that can, in my view, be drawn from the functional link between Directive 2003/88 and the fundamental social rights recognised in the Charter is that Directive 2003/88 must be interpreted, and its scope determined in such a way as to ensure that

[9] See, to that effect, judgments of 9 November 2017, *Maio Marques da Rosa* (C-306/16, EU:C:2017:844, paragraph 45), and of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:578, paragraph 23).

[10] The Court has consistently held in its case-law that, as Articles 1 to 8 of Directive 2003/88 are drafted in terms which are in essence identical to those of Articles 1 to 8 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 (OJ 2000 L 195, p. 41), the Court's interpretation of those articles is transposable to the abovementioned articles of Directive 2003/88; see, inter alia, judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraph 32), and order of 4 March 2011, *Grigore* (C-258/10, not published, EU:C:2011:122, paragraph 39 and the case-law cited).

[11] See also, to that effect, the Opinion of Advocate General Tanchev in *King* (C-214/16, EU:C:2017:439, point 36).

[12] See judgments of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:578, paragraph 24), and of 1 December 2005, *Dellas and Others* (C-14/04, EU:C:2005:728, paragraph 49 and the case-law cited), and order of 4 March 2011, *Grigore* (C-258/10, not published, EU:C:2011:122, paragraph 41).

[13] See the Opinion of Advocate General Bot in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:338, point 52).

individuals may fully and effectively enjoy the individual rights which the directive confers on workers and that any impediment that might in fact restrict or undermine the enjoyment of those rights is eliminated.[14]

44. To that end, in interpreting and implementing Directive 2003/88, it must be borne in mind that, as the Court has emphasised on a number of occasions, the worker must be regarded as the weaker party in the employment relationship, and it is therefore necessary to prevent the employer from being in a position to impose on the worker a restriction of his or her rights.[15]

45. Thus, the objective of worker protection has served as the Court's guiding light in its interpretation of Directive 2003/88.

46. A clear and significant illustration of the teleological interpretation adopted by the Court is to be found in its reading of the definitions of 'working time' and 'rest period', a reading which has had a disruptive effect on the regulatory equilibrium in a number of Member States.[16]

47. In its definition of the concept of *working time*, which it employs for the purposes of the application of the safeguards it establishes, the directive refers to 'any period during which the worker is *working, at the employer's disposal and carrying out his activity or duties*[17] …'. Inversely, *rest period* means 'any period which is not working time' (Article 2(1) and (2)).

48. As the Court has made clear on a number of occasions, the concepts of 'working time' and 'rest period', within the meaning of Directive 2003/88, constitute concepts of EU law which must be defined in accordance with objective characteristics, by reference to the scheme and purpose of that directive, which is intended to improve workers' living and working conditions.[18] They therefore 'may not be interpreted in accordance with the requirements of the various legislations of the Member States … Only such an autonomous interpretation is capable of securing for that directive full efficacy and uniform application of those concepts in all the Member States … [t]he fact that the definition of the concept of working time refers to "national law and/or practice" does not mean that the Member States may unilaterally determine the scope of that concept. Thus, those States may not make subject to any condition the right of employees to have working periods and corresponding rest periods duly taken into account since that right stems directly from the provisions of that directive. Any other interpretation would frustrate the objective of Directive 93/104[19] of harmonising the protection of the safety and health of workers by means of minimum requirements.'[20]

49. Thus, the Court takes a decidedly binary approach: a worker's time is either working time or a rest period.

[14] See my Opinion in *Federación de Servicios de Comisiones obreras (CCOO)* (C-55/18, EU:C:2019:87, point 39).

[15] See judgment of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 80 and the case-law cited). See also judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraph 41).

[16] See, to that effect, in the legal literature, Leccese, V., 'Directive 2003/88/EC concerning certain aspects of the organisation of working time', in Ales, E., Bell, M., Deinert, O., and Robin-Olivier, S. (eds.), *International and European Labour Law. Article-by-Article Commentary*, Nomos Verlagsgesellschaft, Baden-Baden, 2018, pp. 1285-1332, in particular p. 1291.

[17] My emphasis.

[18] See judgments of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraph 62), and of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:578, paragraph 27).

[19] The objective of Directive 93/104 was, as I have mentioned above, the same as that of Directive 2003/88, to which the Court's interpretation of the provisions of the earlier directive therefore remains applicable.

[20] See judgment of 9 September 2003, *Jaeger* (C-151/02, EU:C:2003:437, paragraphs 58 and 59).

50. The concepts of 'working time' and of 'rest period' 'are mutually exclusive'.[21] As EU law currently stands, 'the stand-by time spent by a worker in the course of his activities carried out for his employer must be classified either as "working time" or "rest period"'.[22]

51. In the legal literature, it has been said that 'this binary system has the advantage of simplicity, but is not without its drawbacks'.[23] Indeed, it has been noted, inter alia, that during a period of stand-by duty, even if the worker is not carrying out any work, his or her freedom of movement, the quality of his or her rest and his or her ability to attend to his or her own interests are diminished, even if not entirely excluded. If periods of stand-by duty are classified as rest periods, it could be that the worker is systematically on stand-by between two periods of work.

52. There has been broad debate on the matter in the legal literature discussing the possibility of identifying a *tertium genus* that is neither working time nor a rest period.[24]

53. As things currently stand, while the needs which prompted the proposals to overcome the existing rigid dichotomy are understandable,[25] I think that dichotomy can only be overcome by means of EU legislation.

54. I would observe that, as regards the possible introduction of a 'grey area' between working time and rest period,[26] I foresee certain risks in how that would be applied in practice in all countries, and therefore a risk to legal certainty.

55. In any event, I think it very difficult to overcome the existing dichotomy by means of interpretation, given that the text of the legislation is clear and unequivocal: any period of time that is not working time is a rest period.[27]

21 See judgments of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraphs 55), of 3 October 2000, *Simap* (C-303/98, EU:C:2000:528, paragraph 47), and of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:578, paragraph 26).

22 See judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraph 55).

23 Kéfer, F. and Clesse, J., 'Le temps de garde inactif, entre le temps de travail et le temps de repos', in *Revue de la Faculté de droit de l'Université Liège*, 2006, p. 161.

24 See, for all, Supiot, A., 'Alla ricerca della concordanza dei tempi (le disavventure europee del "tempo di lavoro")', in *Lav. dir.*, 1997, p. 15 et seq. In Italian legal literature, see Ichino, P., 'L'orario di lavoro e i riposi. Artt. 2107-2109', in Schlesinger P. (ed.), *Il Codice Civile. Commentario*, Milan, 1987, p. 27. More recently, see Ray, J.-E., 'Les astreintes, un temps du troisième type', in *Dr. soc.* (F), 1999, p. 250, and Barthelemy, J., 'Temps de travail et de repos: l'apport du droit communautaire', in *Dr. soc.* (F), 2001, p. 78.

25 See Mitrus, L., 'Potential implications of the Matzak judgement (quality of rest time, right to disconnect)', in *European Labour Law Journal*, 2019, p. 393, according to which 'the binary relationship between "working time" and "rest period" does not always meet the requirements of the current labour market'.

26 All the parties attending the hearing expressed their opposition to the introduction of a *tertium genus* that is neither working time nor a rest period.

27 The only lever, unrelated to the aims of Directive 2003/88, which national legislatures may use to introduce further flexibility into the concept of working time, in the sense of compensation for the restrictions imposed on a worker during a period of stand-by duty, is that of remuneration. The Court has, in fact, reaffirmed the principle that national legislation is free to provide for differentiated remuneration to compensate situations in which a worker is on stand-by duty: see judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraph 52), which states that 'Article 2 of Directive 2003/88 must be interpreted as not requiring Member States to determine the remuneration of periods of stand-by time such as those at issue in the main proceedings according to the classification of those periods as "working time" or "rest period"'; see also order of 4 March 2011, *Grigore* (C-258/10, not published, EU:C:2011:122, paragraph 84), which states 'Directive 2003/88 must be interpreted as meaning that the employer's obligation to pay salaries and benefits which may be treated as salary in respect of the period during which the forest ranger is required to carry out wardenship duties in the section of forest under his control does not fall within the scope of that directive, but under that of the relevant provisions of the national law.'

56. Turning now to the criteria which characterise the concept of working time, as contemplated by Article 2 of Directive 2003/88, these have been effectively summarised as follows: (i) a spatial criterion (being at the place of work), (ii) an authority criterion (being at the disposal of the employer) and (iii) a professional criterion (carrying out one's activity or duties). [28]

57. As we shall see, the Court has found itself constrained to depart from a literal interpretation of this provision of the directive and take a teleological approach to its interpretation. [29]

58. In judgments concerning on-call duty, the Court has in fact followed a consistent line, in order to provide a solid framework for interpreting the concepts of working time and rest period, so that time spent by workers in that specific situation may be ascribed to either one or the other concept.

59. Since its first ruling on the matter, [30] the Court has drawn a distinction between two situations: (i) on-call duty where physical presence at the place of work is required (on-call duty at the place of work) and (ii) on-call duty where the worker must be contactable at all times without, however, having to be present at the workplace (periods of stand-by duty).

60. The first situation does not pose any particular problems of interpretation, since it is now settled that workers who are obliged to be present and available at the workplace with a view to providing their professional services are to be regarded as carrying out their duties and, thus, on working time, [31] even during periods in which they are not actually working.

61. The second situation, which is also the case here, is far more complicated from an interpretative viewpoint.

62. As regards stand-by duty, the Court has asserted different principles, tailored to the specific questions that have been referred for a preliminary ruling, all of which, however, fit coherently with the teleological standpoint I have described.

63. The starting point was the judgment in *Simap*, which concerned doctors in primary care teams on call at a health centre, who had to be present at their place of work some of the time, while for the rest of the time they merely had to be 'contactable'.

64. As regards the second set of circumstances, although the doctors were at the disposal of their employer, inasmuch as they had to remain contactable, they could manage their time with fewer constraints and pursue their own interests. This time therefore fell into the category of 'rest period', except for any time actually spent providing services upon being called.

65. The case of *Matzak* [32] may be distinguished from *Simap* by reference to the fact that the worker there was not *at the place of work* in order to answer calls *immediately*, but was *at a place determined by the employer* [33] (in this case, the worker's own home) and under an obligation to respond to calls *within eight minutes*.

[28] See the Opinion of Advocate General Bot in *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:391, point 31) and the commentary referred to in footnote 12 thereto.

[29] See, to that effect, paragraph 40 of the Commission's written observations.

[30] See judgment of 3 October 2000, *Simap* (C-303/98, EU:C:2000:528, paragraphs 48 to 50).

[31] See judgment of 3 October 2000, *Simap* (C-303/98, EU:C:2000:528, paragraph 48).

[32] The case concerned the stand-by duties of a volunteer firefighter who, while on stand-by, was obliged to remain at his own home and respond to calls and reach the fire station within eight minutes, already dressed for duty, failing which he was exposed to disciplinary measures.

[33] My emphasis.

66. In essence, the Court found that stand-by duties such as those of Mr Matzak had to be regarded as falling entirely within working time, since, although he did not have to be at his place of work, he was subject to geographical constraints (remaining contactable at a place determined by his employer) and temporal constraints (the obligation to return to his place of work within a very short space of time, once called by the employer) which very significantly restricted his freedom to pursue his own personal and social interests during rest periods.

67. Remaining in a 'place determined by the employer' was regarded by the Court as equivalent to remaining 'at the place of work' when combined with the fact that calls had to be answered in such a short space of time as to be almost 'immediately'.

68. As it had already done in relation to on-call duties performed at the workplace,[34] from the presence of two components of the concept of working time, the Court inferred the third: being present at a place determined by the employer and being available to carry out work also imply actual performance of work but only where the time allowed to respond to calls is particularly short.

69. It may therefore be inferred from the case-law of the Court that three conditions must be met in order for time spent on stand-by to be regarded as working time: (i) the worker must be present at a place determined by the employer, (ii) the worker must be at the employer's disposal in order to respond to calls, and (iii) the time allowed to react to calls must be particularly short.

70. What is now being asked of the Court is to consider whether, guided by a teleological interpretation of Directive 2003/88, such as I have referred to several times, these requirements must always be present in order for periods of stand-by duty to be classified as working time and whether these requirements must be assessed with specific reference to the constraints upon the worker, with a view to determining whether they are such as to stand in the way of his or her actually pursuing his or her own interests during rest periods.

C. The questions referred: the constraints imposed by the employer and effective rest

71. By the two questions which it has referred for a preliminary ruling, the national court asks, in essence, whether Article 2(1) and (2) of Directive 2003/88 must be interpreted as meaning that the on-call duties imposed on a worker in the circumstances of the present case must be classified as 'working time' or, on the contrary, as a 'rest period' in accordance with the definitions given in that directive.

72. The particular circumstances described by the referring court which caused its uncertainty as to whether a case such as that before it fell within one of the situations thus far analysed by the Court are (a) the fact that the worker had to be reachable by telephone and in a position to reach the boundary of the city where he worked within 20 minutes, (b) the fact that, if called on to take action, the worker was required to reach the place in question within that space of time dressed in work clothes, (c) the fact that, while on stand-by, the worker had at his disposal an operations vehicle, to be used for the intervention, that had been granted traffic regulations privileges, (d) the infrequency with which the worker was called or required to take action when on call (20 times in the course of a total of 126 on-call duties performed between 2013 and 2015).

[34] Where, from the presence of two of the components of the concept of working time contained in Article 2 of Directive 2003/88 (the spatial component, that is to say, presence at the place of work, and the authority component, that is, being at the disposal of the employer), the Court inferred the third (the professional component, that is to say, carrying out one's activity or duties).

73. In the light of what I have said thus far, the matters which need to be assessed are (i) the place where the worker has to remain while on stand-by duty, (ii) the time allowed to react to calls, (iii) the characteristics of his intervention (the requirement to wear work clothes and the availability of the operations vehicle), and (iv) the frequency with which the worker is called on to take action.

74. As regards the first matter, the place where the worker has to remain while on stand-by duty, it is apparent from the case file that the worker was under no legal obligation to remain at his place of work or in any other place determined by the employer: he was in fact free to spend his time where he wished, the only constraint imposed on him being that he must be in a position to reach the Offenbach am Main city boundary within a response time of 20 minutes.

75. The second matter, the response time, which is 20 minutes, seems to be the most complicated, in that it cannot be regarded either as requiring an almost 'immediate' reaction or as being fully suited to allowing the worker to plan a period of rest while waiting for calls.

76. In the light of those first two matters, following the approach taken by the Court in its case-law, as described in point 69 of this Opinion, periods of stand-by duty in a case such as that in the main proceedings should not be treated as working time. While the second condition, that the worker must be at the employer's disposal in order to respond to calls, is certainly met, the first condition, that the worker must be present in a place determined by the employer, is not met. The third condition, that the time allowed to react to calls must be particularly short, remains to be verified, inasmuch as the response time, although longer than the response time in *Matzak*, is nevertheless quite short.

77. The third matter, the requirement to wear a uniform when responding and the availability of an operations vehicle, and the fourth matter, the likely frequency with which the worker will be called on to take action while on stand-by, make it necessary, in the opinion of the referring court, to reflect further on how the time spent by the worker on stand-by should actually be classified. As we have seen, the referring court has expressed doubts as to whether, in the light of all of the circumstances of the case, the fact that the worker is not required to remain at a place determined by the employer while on stand-by is sufficient to prevent the time thus spent from being classified as working time.

78. As regards the third matter, the characteristics of the intervention, it is apparent from the documents before the Court that, during periods of stand-by duty, the worker must not only be reachable and choose his whereabouts in such a way that he can reach the Offenbach am Main city boundary within 20 minutes, but he is also required by the employer to be in work clothes when responding and to have with him the operations vehicle put at his disposal. Those last two circumstances, which affect the response time, are constraints imposed by the employer, rather than objective circumstances outside the scope of the employer's authority (by contrast with the particular geographical location of the place of work in Case C-344/19).

79. The requirement to be in uniform when responding entails a reduction in the response time that depends on the complexity of that technical clothing and the time needed to put it on, which it is for the national court to assess specifically.

80. The fact that an operations vehicle is available for use in reaching the place where action is to be taken in the event of a call could, on the other hand, increase the amount of time actually available to the worker if the national court establishes what appears to emerge from the documents before the Court, which is that the operations vehicle has been granted certain rights

of priority and privileges exempting it from certain rules of the traffic regulations, depending on the urgency of the action that is required. This would in fact enable the worker to reach the place where action is required more quickly than if he was able to use only private transport or normal public transport.

81. Lastly, the fourth matter, the likely frequency with which the worker will have to answer calls or take action while on stand-by, also seems to me to be at least partly within the discretionary authority of the employer who, in the organisation of the undertaking, may forecast the need for intervention. It is apparent from the case file that, between 2013 and 2015, the worker had to answer on average 6.67 calls a year while on stand-by duty. Such frequency of requests to intervene is not, it seems to me, such as to cause the worker to expect, as a rule, to be contacted or to have to take action while on stand-by duty. Again, this is a matter in respect of which it will be for the national court to make findings of fact and the relevant assessments.

82. The principles expressed by the Court to date may, in my view, be confirmed in the outcome of the present case: the decisive factors in the classification of periods of stand-by duty as working time are the constraints that are imposed by the employer which prevent the worker from enjoying proper rest periods. [35]

83. The last element that the Court might now wish to add, again as part of a teleological interpretation of the concepts contained in Directive 2003/88, is that the circumstance that the worker is at a place designated by the employer need not be present in order for periods of stand-by duty to be classified as working time, but rather, the circumstance that the worker is at the employer's disposal and must take action and actually do his or her work within a very short space of time may be sufficient. That is in addition to the fact that, in some situations, the decisive factors may be supplemented, in the context of an overall assessment which it is for the national courts to make, by certain secondary criteria that might assist in the resolution of borderline cases.

84. As we have seen with the recent judgment in *Matzak*, the Court has given a flexible interpretation to the wording used in the directive according to which the worker's 'working' is a necessary element of working time, taking that to mean not only at the place of work but also at any other place designated by the employer.

85. In the situation where the worker is not at the workplace, even in some of the earlier cases examined by the Court, it is the fact of being subject to constraints imposed by the employer, and in particular the time allowed to react to a call, that plays a decisive role, rather than the fact of being at a place designated by the employer or in close proximity to the place of work.

86. In both *Grigore* and *Tyco*, the question of whether the worker was at a specific place designated by the employer or in the vicinity of the place of work was held to be neutral in relation to the classification of periods of stand-by duty.

[35] See also, to that effect, Leccese, V., *Il diritto del lavoro europeo: l'orario di lavoro. Un focus sulla giurisprudenza della Corte di giustizia*, 2016, p. 7, as far as apparent not published but available at:

http://giustizia.lazio.it/appello.it/form_conv_didattico/Leccese%20-%20Diritto%20lavoro%20europeo%20e%20orario%20lavoroLECCESE.pdf: 'certainly, the cornerstone of the reasoning is a teleological assessment of whether the rest which the worker is allowed is *adequate* in respect of the directive's objectives.'

87. In *Grigore*, taking the view that the provision of staff accommodation close to the place of work was not a decisive factor in the classification of periods of stand-by duty as work or rest, the Court nevertheless left it to the national court to make the relevant assessment on the basis of the following criterion: a period of stand-by duty can be regarded as working time if it is established that there are 'obligations which make it impossible for the workers concerned to choose where they stay during stand-by periods'. Such obligations, if established, 'must be regarded as coming within the ambit of the workers' performance of their duties'. [36]

88. In *Tyco*, [37] on the other hand, the Court confirmed that, in a case such as the one which was the subject of the main proceedings, the time which workers who had no fixed place of work spent travelling from home to the customers designated by their employer had to be regarded as working time, since the workers in question, while having a certain degree of freedom during those journeys, were nevertheless required to act in accordance with the employer's specific instructions.

89. My reading of the Court's earlier case-law, from the teleological interpretative standpoint to which I have referred above, thus leads me to think that the decisive factor in the classification of periods of stand-by duty is the extent of the constraints which result from the worker's being subject to his or her employer's instructions and, in particular, the time allowed to react to a call from the employer.

90. The time allowed to react to a call is a decisive factor because it influences directly, objectively and unequivocally the worker's freedom to pursue his or her own interests and, in essence, to rest: a response time of just a few minutes does not allow the worker to plan, even provisionally, his or her rest periods.

91. On the other hand, a reasonable response time does allow the worker to pursue other activities during periods of stand-by duty, while remaining aware that he or she may be called back to work.

92. The response time also, in my view, has an influence on where the worker must be while on stand-by duty. [38] Obviously, if the response time is very short, the worker will have to remain on stand-by within a given geographical radius which is, in essence, determined by the employer. [39] The employer, even if he or she does not require the worker to be at a designated place, would as a matter of fact be imposing a considerable constraint on the worker's freedom of movement if he or she allows the worker only a very short space of time in which to respond to a call.

93. I therefore consider that it is not the place where the worker is during periods of stand-by duty that plays a decisive role in the classification of that time as rest period or working time so much as the constraint on the worker's freedom of movement which results from the length of time allowed to respond to a call.

[36] See order of 4 March 2011, *Grigore* (C-258/10, not published, EU:C:2011:122, paragraph 68).

[37] See judgment of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:578).

[38] A requirement to respond to a call within a particularly short space of time 'restricts the worker's freedom to manage his own time. It implies both geographical and temporal limitations to the worker's activities': see Mitrus, L., 'Potential implications of the Matzak judgment (quality of rest time, right to disconnect)' in *European Labour Law Journal*, 2019, p. 391.

[39] Frankart, A. and Glorieux, M., 'Temps de garde: regards rétrospectifs et prospectifs à la lumière des développements européens' in *La loi sur le travail – 40 ans d'application de la loi du 16 mars 1971 (under the scientific coordination of Gilson, S. and Dear, L.)*, Anthémis, Limal, 2011, p. 331.

94. Indeed, I do not see a great difference, in terms of the constraints on the worker, between the situation where he or she is required to remain at home during periods of stand-by duty and the situation where he or she is under no such obligation but is required to respond to a call within a particularly short space of time.

95. As I have said, it is, in my view, the extent of the constraints which result from the worker's being subject to his or her employer's instructions that therefore plays a decisive role in the classification of periods of stand-by duty as working time or rest period. The constraints which result from that subordination may vary significantly, but, first and foremost, the time allowed to respond to a call should be regarded as decisive.

96. The designation of a place where periods of stand-by duty must be spent may play a role, as an indication of the abovementioned extent to which a worker is subject to his or her employer's instructions, but only as part of an overall assessment.

97. Analysing the situation from the employer's point of view, the possibility of reaching the worker by portable electronic means (mobile phone, tablet, laptop), which make it possible to contact the worker at any time, makes it less justifiable and less understandable for the employer to require the worker to be physically present while on stand-by duty at a place designated by the employer. What is of primary importance to the employer is the *space of time* within which the worker must be able to reach the place assigned to him or her by the employer from wherever it is the worker may be.

98. Having identified the decisive factor in the classification of periods of on-call duty as working time or rest period, it is necessary to provide national courts with some additional criteria that may be applied when the principal constraint, the time allowed to react to a call, is not so inordinately short as to prevent the worker from resting effectively.

99. When the time allowed to react to a call is inordinately short, being no more than a few minutes, I think that that is sufficient for periods of stand-by duty to be classified as working time even in the absence of other findings in relation to the considerations I have set out: the worker's freedom of movement is, in such a case, so constrained that his or her physical location must also be regarded as restricted by the employer's instructions.

100. On the other hand, if, as in the present case, the time allowed to react to a call is short, but not such as to almost entirely preclude the worker's freedom to choose where he or she spends periods of stand-by duty, it may be helpful to apply additional criteria, to be considered as a whole, and take into account the overall effect that all of the conditions for implementing the stand-by scheme may have on the worker's rest period: do the constraints imposed, taken together, restrict the worker's ability to attend to personal and family interests and his or her freedom to leave his or her place of work, or are they such as to very nearly prevent him or her from doing so? Of course, it is natural that periods of stand-by duty should result in certain constraints and restrictions of the worker's freedom; the objective pursued by EU law is to prevent such restrictions from being so invasive as to prevent workers from resting effectively.

101. That is the sense in which I think attention should be drawn to the effectiveness of the worker's rest. I would, on the other hand, be more cautious about using the 'quality of the time' that the worker may enjoy when on stand-by duty as a criterion, although it has been

authoritatively suggested.[40] Indeed, I think that criterion could prove to be excessively subjective and thus lend itself to varying interpretations on the part of national courts, partly on account of the differing sensibilities in the various countries, and that would not benefit legal certainty.

102. In their written observations and at the hearing, the parties[41] suggested a number of criteria, consisting in constraints which could determine whether periods of stand-by duty are classified as working time or a rest period: whether or not there is an obligation to respond to a call from the employer; any discretion the worker has in dealing with that call (whether the worker can take action remotely, whether he or she can be replaced by another worker); whether sanctions are stipulated for failing to take action or for responding to a call late; the urgency of the action that is required, the level of the worker's responsibility, specific characteristics of the profession, the distance that must be covered between the place where the worker is and the place where he or she must take up his or her duties, geographical constraints that might slow down the journey to the place of work, the need to wear work clothes, the availability of a service vehicle.

103. In addition to these is the criterion of the extent to which a call to work is reasonably to be expected, which is the subject of the second question referred for a preliminary ruling in the present case and which seems to refer to the effect of the frequency with which action must be taken on the nature of the rest period during the period of stand-by duty.

104. In my view, the Court should confine itself to laying down general, objective criteria and not go too far into the details of particular situations, leaving it to the national courts to assess all of the factual circumstances.

105. I therefore think it appropriate for the Court to confine itself to providing certain additional criteria that may be applied in borderline cases, as I have mentioned, all of which should nevertheless relate to the exercise of the employer's authority – and to the corresponding subordinate status of the worker, the weaker party in the relationship – rather than pertain to objective situations beyond the employer's control.

106. I would therefore exclude from the assessment circumstances such as the distance to be covered in order to reach the place where the work is to be carried out (unless it is other than the usual place and thus not the place specifically intended by the employer) as well as geographical constraints, which, as I have said, are also independent of the employer's authority.

107. Nor would I attach particular importance to the level of responsibility or to the specific tasks performed: stand-by duty is a work pattern within the discretion of the employer's authority. For the worker, responding to a call is an employment obligation which he or she must perform with normal diligence. I therefore think that the actual work has to be carried out by the worker for the undertaking with the same commitment and thus regardless of the position held or the level of responsibility. It would, in fact, be difficult to make an objective assessment of the undertaking's interests: what might appear to be of little importance to some might be highly important to others. The same reasoning applies to the criterion of the urgency with which action must be taken and to the nature and importance of the interests served by the action taken.

108. Admittedly, the degree of psychological pressure on the worker may vary according to the level of responsibility. However, in my view, this is too subjective a matter to be called into play for the purposes of classification.

[40] See the Opinion of Advocate General Sharpston in *Matzak* (C-518/15, EU:C:2017:619, point 57).

[41] At the joint hearing with Case C-344/19.

109. A different approach should, in my opinion, be taken to certain criteria that relate to matters within the employer's authority: any discretion the worker has in dealing with a call, for example, could be used as an additional criterion where it consists in flexibility in the response time, where it consists in the possibility of taking action remotely without going to the workplace, or where the worker can be certain that he or she can be replaced by another worker already at the workplace or able to get there more easily.

110. The same applies to the consequences prescribed for taking action late or for failing to take action when called during a period of stand-by duty.

111. As I have said, the response to a call while on stand-by consists in the worker's carrying out his work. The employer may, however, prescribe consequences of varying degrees of severity for incomplete performance. If no sanctions are expressly stipulated for non-performance or late performance, that could come into play in the classification of periods of stand-by duty, as could the scale of any sanctions that are stipulated.

112. Even circumstances of apparently minor importance, such as, in the present case, the need to wear technical work clothing or the availability of a service vehicle for travel to the place where work is to be carried out, could come into play in the classification of periods of stand-by duty, in particular in the assessment of whether or not the time allowed to respond to a call from the employer is adequate.

113. As I discussed in points 77 to 79 of this Opinion, if the worker has only a relatively short space of time in which to respond to a call to work when on stand-by and the employer requires him or her in that time to put on special clothing that takes a particularly long time to put on, that could influence the assessment of whether the response time is adequate.

114. On the other hand, where the employer makes a service vehicle available for travel to the place where action is to be taken following a call, one that, on account of the importance of the interests served by the intervention, does not have to follow all the rules of the traffic regulations, that could influence the assessment of whether the response time is adequate, inasmuch as it would make things easier, and thus result in a response time – one that might otherwise appear insufficient to allow for effective rest – being considered appropriate.

115. Another circumstance, again within the authority of the employer, that I think could, in borderline cases, influence the classification of periods of stand-by duty is the scheduling and duration of stand-by duties. If stand-by duties are frequently scheduled at night or on public holidays, or are particularly long in duration, they will be more onerous for the worker than if they were scheduled during the day or during the working week.

116. Lastly, as regards the likely frequency with which action must be taken, which, as I have said, is the specific subject of the second question referred for a preliminary ruling in the present case, that is, in my view, one of the circumstances that may be assessed in borderline cases, albeit with no automatic conclusion being drawn: infrequent intervention does not mean that a period of stand-by duty can be classified as a rest period, just as frequent intervention does not mean that it can be regarded as working time.

117. The factor that can come into play in an overall assessment is whether, and if so, to what extent, the worker must usually expect to be called while on stand-by. [42]

118. That circumstance is, as I have said, at least partly within the discretionary authority of the employer who, in the organisation of the undertaking, may forecast the need for intervention.

119. If action is frequently required during periods of stand-by duty, the demands on the worker will become so significant that he or she will lose the ability to organise his or her free time during those periods almost entirely, and if those demands are combined with a very short response time, the effectiveness of the worker's rest may be seriously jeopardised.

120. It will be the task of the national courts to examine the circumstances of the cases before them on the basis of the criteria I have described, take an approach aimed at considering the overall effect that all of the conditions for implementing the on-call scheme may have on the effectiveness of the worker's rest, and then classify the time spent on stand-by duty as working time or a rest period. The national courts must specifically evaluate whether the time thus spent is, as it generally is, a rest period or, on account of particularly stringent constraints imposed by the employer, so altered in nature as to become working time.

IV. Conclusion

121. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the national court for a preliminary ruling as follows:

(1) Article 2 of Directive 2003/88 must be interpreted as meaning that the decisive factor in the classification of time spent on on-call duty as working time or a rest period is the extent of the constraints which result from the worker's being subject to his or her employer's instructions and, in particular, the time allowed to react to a call from the employer.

If the time allowed to react to a call is short, but not so short as to almost entirely preclude the worker's freedom to choose where he or she spends periods of stand-by duty, it may be helpful to consider additional factors, evaluate them as a whole, and consider the overall effect that all of the conditions for implementing the stand-by scheme may have on the worker's rest period.

Such factors must relate to the exercise of the employer's authority – and to the corresponding subordinate status of the worker, the weaker party in the relationship – and may not pertain to objective situations beyond the employer's control.

Those factors might, by way of example, consist in the discretion the worker has in dealing with calls, the consequences prescribed for taking action late or for failing to take action when called, the need to wear technical work clothing, the availability of a service vehicle for travel to the place where work is to be carried out, the scheduling and duration of stand-by duties or the likely frequency with which action must be taken.

In the circumstances of the present case, periods of stand-by duty performed by a firefighter who is under an obligation to be able to reach within 20 minutes – a response time that is not inordinately short, but not, it appears, such as to ensure that the worker can rest effectively – in work clothes and with the operations vehicle, the boundary of the city where his place of employment is located, even though the employer has not imposed any precise constraints as

[42] As the Finnish Government submitted in its written observations (at paragraph 22).

to the stand-by location, could be classified as 'working time' if the findings of fact, which it is for the national court to make, establish that there are factors which, taken together with the response time, are such that the effective rest of the worker cannot be guaranteed.

(2) The definition of 'working time' in Article 2 of Directive 2003/88 must be interpreted as meaning that consideration should be given – merely as an additional criterion, with no automatic conclusion being drawn – to whether, and if so, with what frequency it is likely that the worker will be called upon to work during a period of on-call duty. If action is frequently required during periods of stand-by duty, the demands on the worker may become so significant that he or she will almost entirely lose the ability to plan his or her free time during those periods, and if those demands are combined with a very short time to respond to the call, the effectiveness of the worker's rest may be jeopardised.