Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 2 September 2021 [1]

Case C-262/20

VB

v

Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' kam Ministerstvo na vatreshnite raboti

(Request for a preliminary ruling from the Rayonen sad Lukovit (District Court, Lukovit, Bulgaria))

(Request for a preliminary ruling – Social policy – Organisation of working time – Directive 2003/88/EC – Limit on the length of night work – Public and private sector workers – Equal treatment)

1. Is it necessary for the Member States, in order to ensure that the health and safety of workers is fully and effectively protected – objectives pursued by Directive 2003/88/EC [2] – to make it compulsory for the normal length of night work for firefighters to be shorter than the normal length of day work? Is national legislation that provides for a maximum length of night work of 7 hours only for workers in the private sector compatible with the provisions of the Charter of Fundamental Rights ('the Charter')? Lastly, is it necessary for the Member States to expressly lay down the normal length of night work for public-sector workers?

2. These are, in essence, the questions raised by the request for a preliminary ruling of the Rayonen sad Lukovit (District Court, Lukovit, Bulgaria), which is the subject of the present case. They present an opportunity for the Court of Justice, in the light of Directive 2003/88 and specific provisions of the Charter (in particular Articles 20 and 31 thereof), to elaborate on the subject of limits on night work, particularly with regard to the rules in force in the Member States for the private and public sectors.

3. In this Opinion I will explain the reasons why I consider that Directive 2003/88 grants Member States considerable discretion with regard to the rules on night work, without prejudice to the minimum requirements imposed by that directive, the objective of which is to ensure that the health and safety of workers is fully and effectively protected.

[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) ('Directive 2003/88').

I. Legal framework

A. European Union law

4. Article 6(1) of the Treaty on European Union states that the Charter 'shall have the same legal value as the Treaties'.

5. Article 20 of the Charter provides:

'Everyone is equal before the law.'

6. Article 31, entitled 'Fair and just working conditions', provides:

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

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

7. According to recitals 7, 8 and 10 to Directive 2003/88:

'(7) Research has shown that the human body is more sensitive at night to environmental disturbances and also to certain burdensome forms of work organisation and that long periods of night work can be detrimental to the health of workers and can endanger safety at the workplace.

(8) There is a need to limit the duration of periods of night work, including overtime, and to provide for employers who regularly use night workers to bring this information to the attention of the competent authorities if they so request.

…

(10) The situation of night and shift workers requires that the level of safety and health protection should be adapted to the nature of their work and that the organisation and functioning of protection and prevention services and resources should be efficient.'

8. Article 8 of Directive 2003/88, entitled 'Length of night work', reads as follows:

'Member States shall take the measures necessary to ensure that:

(a) normal hours of work for night workers do not exceed an average of eight hours in any 24-hour period;

(b) night workers whose work involves special hazards or heavy physical or mental strain do not work more than eight hours in any period of 24 hours during which they perform night work.

For the purposes of point (b), work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the specific effects and hazards of night work.'

9. Article 12 of Directive 2003/88, entitled 'Safety and health protection', provides that:

'Member States shall take the measures necessary to ensure that:

(a) night workers and shift workers have safety and health protection appropriate to the nature of their work;

(b) appropriate protection and prevention services or facilities with regard to the safety and health of night workers and shift workers are equivalent to those applicable to other workers and are available at all times.'

B. National law

10. Under Article 140 of the Kodeks na truda (Labour Code):

'(1) The normal length of weekly night work in a 5-day working week shall not exceed 35 hours. The normal length of night work in a 5-day working week shall not exceed 7 hours.

(2) Night work is work performed between 22.00 and 6.00, and, for staff under the age of 16, from 20.00 to 6.00.

…'

11. Article 142 of the Zakon za Ministerstvoto na vatreshnite raboti (Law on the Ministry of the Interior, DV No 53 of 27 June 2014; 'the ZMVR') provides:

'(1) The staff of the Ministry of the Interior are:

1. civil servants – police officers, firefighters and civil protection officers;

2. civil servants;

3. persons with an employment relationship.

…

(5) The status of persons with an employment relationship shall be governed by the provisions of the Labour Code and by this law.'

12. Article 187 of the ZMVR provides:

'(1) The normal working hours for civil servants of the Ministry of the Interior shall be 8 hours a day and 40 hours a week for a 5-day working week.

…

(3) The working time of civil servants shall be calculated in working days on a daily basis, whereas it shall be calculated over a 3-month period for those who work shifts of 8, 12 or 24 hours. … In the case of shift work, night work may be performed from 22.00 to 6.00.; however, the average working hours shall not exceed 8 hours in any 24-hour period.

…

(9) The procedures for the organisation, allocation and reporting of working time, compensation for work outside the normal working hours, and timetabling on-call duty, rest periods and breaks of civil servants shall be determined by ordinance of the Minister for the Interior.'

13. Article 188(2) of the ZMVR is worded as follows:

'Civil servants working between 22.00 and 6.00 shall benefit from the special protection provided by the Labour Code.'

14. The ordinances issued by the Minister for the Interior on the basis of Article 187(9) of the ZMVR set out the details for the organisation and allocation of working time, compensation for work outside the normal working hours and the arrangements for rest periods and breaks for civil servants of the Ministry of the Interior.

15. Thus, Article 31(2) of Ordinance (Naredba) No 8121z-407 of 11 August 2014 (DV No 69 of 19 August 2014; 'the 2014 Ordinance') provided for the conversion of hours of night work into hours of day work by applying a multiplying factor. Thus, the hours worked between 22.00 and 6.00 were to be multiplied by a factor of 0.143 and the resulting figure was to be added to the total number of hours worked in that period.

16. That ordinance was repealed by Ordinance (Naredba) No 8121h-592 of 25 May 2015 (DV No 40 of 2 June 2015) and subsequently by Ordinance (Naredba) No 8121h-776 of 29 July 2016 (DV No 60 of 2 August 2016), which no longer provides for the system of calculating night hours laid down in Article 31(2) of the 2014 Ordinance.

17. For workers outside the Ministry of the Interior, Article 9(2) of the Naredba za strukturata i organizatsiata na rabotnata zaplata (Ordinance on the structure and organisation of wages (DV No 9 of 26 January 2007)) reads as follows:

'According to the calculation methods for the aggregation of working time, night hours shall be converted to day hours by a factor equal to the ratio between the normal length of day work and of night work established for the daily accounting of working time at the corresponding workplace.'

II. The facts giving rise to the dispute, the procedure in the main proceedings and the questions referred

18. VB works at the Ministry of the Interior General Directorate of Fire Safety and Civil Protection ('the Directorate') as a 'shift foreman' at the District Office of the Town of Lukovit (Bulgaria).

19. In the period concerned – from 3 October 2016 to 3 October 2019 – VB completed periods of on-call duty of 24 hours' duration, which were aggregated and accounted for every 3 months. All overtime worked outside normal working hours in each quarter was accounted for and paid to VB for the respective period.

20. Up to 25 May 2015, owing to the national provisions in force at the time (the 2014 Ordinance), night hours worked by VB were multiplied by a factor of 0.143 and the resulting figure was added to the total number of hours worked in the accounting period, such that 7 hours' night work was accounted for as 8 hours' work.

21. That rule was discontinued in the subsequent ordinance adopted in 2015. Therefore, as of 25 May 2015, and thus, during the period concerned, the Directorate ceased to apply the rule for converting hours of night work to hours of day work for the purpose of accounting for work performed.

22. VB brought an action before the Rayonen sad Lukovit (District Court, Lukovit), the court of first instance in the national system and the referring court in the present case, by which he requested that the Directorate be ordered to pay him BGN 1 683.74 as remuneration for unpaid overtime worked, plus statutory late payment interest.

23. He asserts that he worked a total of 1 784 hours' night work in the period from 3 October 2016 to 3 October 2019, which the Directorate should have converted to hours of day work by a factor of 1.143.

24. In his opinion, the Directorate should, for that purpose, have applied Article 9(2) of the Ordinance on the structure and organisation of wages,[3] which states that, when working time is aggregated and accounted for, night hours are converted to day hours by a factor that equals the ratio between the normal length of day work and of night work for the corresponding workplace.

25. In those circumstances, the referring court decided to stay the main proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) For the purposes of effective protection under Article 12(a) of Directive 2003/88/EC, should the normal length of night work of police officers and firefighters be shorter than the normal length of day work?

(2) For the purposes of the principle of equality set out in Articles 20 and 31 of the Charter of Fundamental Rights of the European Union, must the normal length of night work laid down in national law for workers in the private sector (7 hours) also apply to public-sector workers, including police officers and firefighters?

(3) Can the objective of limiting the duration of periods of night work mentioned in recital 8 of Directive 2003/88 be effectively attained only if the normal length of night work, including for public-sector workers, is expressly laid down in national law?'

III. Legal analysis

A. Application of the urgent preliminary ruling procedure

26. The application for an urgent preliminary ruling procedure was made by the referring court owing to the large number of similar cases pending before the Bulgarian courts and the varying solutions applied by those courts.

[3] The scope of which does not include civil servants of the Ministry of the Interior.

27. However, since this case does not concern one of the areas covered by Title V of Part Three of the TFEU, concerning the area of freedom, security and justice, Article 107(1) of the Rules of Procedure cannot be applied in this case.

B. Admissibility of the questions

28. 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 does not apply, within the meaning of Article 153(5) TFEU, to aspects relating to the pay of workers, save in the special case envisaged by Article 7(1) of that directive concerning paid annual leave. In principle, therefore, it does not apply to the remuneration of workers. [4]

29. In the main proceedings, the matter at issue is the determination of the number of hours of overtime worked by the applicant at night so as to determine his remuneration and pay him for the unpaid hours.

30. In the view of the referring court, the resolution of the dispute in the main proceedings depends on the Court's interpretation of the concept of 'length of night work' provided for in Articles 8 and 12 of Directive 2003/88, in the context of the protection of the safety and health of workers.

31. As the Commission correctly observed, the main objective of the questions referred to the Court is to determine whether the rules applicable to staff of the Ministry of the Interior concerning the normal length of night work should be interpreted in the light of the provisions of the Labour Code laid down for workers in the private sector, which stipulate that the normal length of night work is 7 hours (this would mean converting the night work into day work, which would have an impact on the applicant's remuneration). Consequently, there is a link between the questions referred for a preliminary ruling and the subject matter of the dispute.

32. The fact that the dispute thus concerns a question of remuneration is irrelevant, since it is for the referring court and not for the Court of Justice to resolve that question in the context of the main proceedings. [5]

33. Taking into account the presumption of relevance of the questions referred for a preliminary ruling, I therefore consider that the questions referred to the Court in the present request for a preliminary ruling require an answer on the substance.

C. Purpose of the directive and discretion of the Member States

34. 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. [6]

4 See judgment of 30 April 2020, *Készenléti Rendőrség* (C-211/19, EU:C:2020:344, paragraph 23).

5 See judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraphs 25 and 26).

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

35. In order to achieve the abovementioned aims, the provisions of Directive 2003/88 establish minimum periods of daily and weekly rest, an upper limit of 48 hours for the average working week (including overtime), and a maximum length of night work.

36. Those provisions implement Article 31 of the Charter, 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'. That right is directly related to respect for human dignity, which is protected more broadly in Title I of the Charter. [7]

37. Within that systematic framework, the Court has held that the rules laid down in Directive 2003/88 constitute rules of EU social law of particular importance from which every worker must benefit as minimum requirements necessary to ensure the protection of his or her safety and health. [8]

38. Among these protections, the provision of a maximum limit for the length of night work [9] is not only in the worker's individual interest, but also in the interest of his or her employer and in the general interest. [10] In particular, recitals 7 and 10 of Directive 2003/88 underline the potentially harmful consequences of night work and the need to limit its duration in order to ensure a higher level of protection for the safety and health of workers.

39. The Court has stated that, in order to ensure that the rights conferred on workers by Directive 2003/88 are fully effective, Member States are under an obligation to guarantee that each of the minimum requirements laid down by the directive is observed. In fact, that is the only interpretation which accords with the objective of that directive, which is to secure effective protection of the safety and health of workers by allowing them effectively to enjoy the rights that it confers on them. [11]

40. The requirements laid down in Directive 2003/88, as described above, impose obligations on Member States to achieve certain results in order to ensure the effectiveness of the rights conferred on workers by that directive.

41. However, it is apparent from Directive 2003/88, in particular recital 15, that it provides Member States with a degree of flexibility in the implementation of the provisions of that directive. [12]

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

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

9 See judgment of 9 March 2021, *Stadt Offenbach am Main (A firefighter's period of stand-by time)* (C-580/19, EU:C:2021:183, paragraphs 24 and 25).

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

11 See, to that effect, judgment of 7 September 2006, *Commission* v *United Kingdom* (C-484/04, EU:C:2006:526, paragraph 40 and the case-law cited).

12 See judgment of 9 November 2017, *Maio Marques da Rosa* (C-306/16, EU:C:2017:844, paragraph 46).

42. It thus emerges that the Member States have some discretion as to how they implement those minimum requirements, although they are nevertheless obliged, as is explicitly clear from the same recital of Directive 2003/88, to ensure that the principles of the protection of the safety and health of workers are upheld. [13]

D. The questions referred for a preliminary ruling

1. General observations

43. It is clear from the request for a preliminary ruling that there is an ongoing debate in that Member State involving different levels of jurisdiction over the rules applicable to the night work of civil servants of the Ministry of the Interior and, in particular, firefighters, the category to which the applicant in the main proceedings belongs.

44. The relevant facts for the legal analysis, which it seems to me can be inferred from the case file, are as follows.

45. The applicant in the main proceedings is a member of the fire brigade, which seems to me to be included under the civil servants – police officers, firefighters and civil protection officers of the Ministry of the Interior pursuant to Article 142 of the ZMVR.

46. In Bulgaria, the Labour Code lays down general rules for night work, while a special law applies for civil servants of the Ministry of the Interior (the ZMVR).

47. The ZMVR governs the status of staff of the Ministry of the Interior, who are: police officers and officers of the fire and civil protection service, civil servants and persons with an employment relationship. The status of persons with an employment relationship is governed by the Labour Code and the ZMVR (Article 142).

48. The rules on working time (including night work) for civil servants (which I believe includes the category of firefighters to which the applicant in the main proceedings belongs) are expressly laid down in Article 187 of the ZMVR, which refers to specific ordinances of the Ministry of the Interior as regards the detailed rules.

49. The referring court points out that, under Article 187(1) of the ZMVR, the normal length of working time of staff of the Ministry is 8 hours a day. That special legislation, which applies to civil servants of the Ministry of Interior, does not include any express provision laying down the normal length of night work; it simply stipulates the period regarded as night-time – namely between the hours of 22.00 and 6.00, which is the same as in the Labour Code.

50. However, the referring court observes that Article 188(2) of the ZMVR expressly refers to the protection provided by the Labour Code, which refers to night work that is shorter, that is, up to 7 hours.

[13] See judgments of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402, paragraphs 36 and 37 and the case-law cited); of 9 March 2021, *Stadt Offenbach am Main (A firefighter's period of stand-by time)* (C-580/19, EU:C:2021:183, paragraph 26); of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)* (C-344/19, EU:C:2021:182, paragraph 25); and of 17 March 2021, *Academia de Studii Economice din București* (C-585/19, EU:C:2021:210, paragraph 49). As confirmation of the broad discretion of the Member States in the absence of any indication stemming from the wording and context of the provisions of Directive 2003/88, subject to respect for the objectives of that directive, see judgment of 11 April 2019, *Syndicat des cadres de la sécurité intérieure* (C-254/18, EU:C:2019:318, paragraph 31). That case concerned the reference period used to calculate the weekly working time.

51. The referring court further notes that the wording of Article 187(3) of the ZMVR does not provide for the normal length of night work to be 8 hours; it merely stipulates that for shift work, as in the present case, night work is permitted between 22.00 and 6.00 and the number of working hours must not on average exceed 8 hours in a period of 24 hours.

52. Therefore, the referring court concludes that the normal length of night work performed by civil servants of the Ministry of the Interior must be 7 hours, so that the latter are not treated less favourably than private-sector workers.

53. The referring court states that this interpretation of national law was rejected by the appeal court (Okrazhen sad Lovech (Regional Court, Lovech, Bulgaria)), which, it is understood, is the national court of last instance in a case such as that in the main proceedings.

54. The fundamental view of the appeal court, as expressed in its judgments on identical claims brought by police officers and firefighters, is based on two principal arguments.

55. The first consideration is that the absence of a provision in the lower-ranking legal rules adopted following the repeal of the 2014 Ordinance providing for hours of night work to be converted to hours of day work by a ratio of 7:8 represents a decision on the part of the legislature, not a legislative lacuna, and that the ambivalence of that legal solution might give reason to the legislature to dispense with or amend it in future, but is no argument for the application of the law *mutatis mutandis*.

56. The second argument is that Article 188(2) of the ZMVR is not directly applicable, as it refers to the special protection under the Labour Code.

57. As the relevant Bulgarian case-law, according to the referring court, is therefore contradictory, interpretation proceedings have been initiated in the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria) on the application of the Minister for Justice; however, that court has not yet delivered a ruling.

58. The reference for a preliminary ruling, while passing the admissibility test as mentioned above, does not permit a full understanding of the state of the abovementioned debate so as to determine whether the applicable national law, as interpreted by the national courts, is fully compatible with EU law.

59. I would add, moreover, that the analysis of the case file leads me to believe that this case is primarily concerned with a legal question that falls within the scope of domestic law, since, as I will explain, EU law does not clearly impose one or the other of the different solutions proposed by the various courts of the Member State.

60. In the following points, I will confine myself to proposing an answer to the questions referred for a preliminary ruling on the basis of what can be inferred from the case file, given that the referring court's submission is incomplete in some respects.

2. The first question referred for a preliminary ruling

61. With its first question, the referring court asks whether Article 12(a) of Directive 2003/88 requires the normal length of night work of police officers and firefighters to be shorter than the normal length of day work.

62. As previously mentioned, the purpose of Directive 2003/88 is defined in Article 1(1) – it lays down minimum safety and health requirements for the organisation of working time.

63. With regard to night work in particular, recital 7 of the directive takes account of the risks inherent in this period of activity, according to which 'research has shown that the human body is more sensitive at night to environmental disturbances and also to certain burdensome forms of work organisation and that long periods of night work can be detrimental to the health of workers and can endanger safety at the workplace'.

64. Therefore, Article 12(a) of the directive requires Member States to take the necessary measures to ensure that night workers and shift workers have safety and health protection appropriate to the nature of their work.

65. The minimum requirements for the length of night work are laid down in Article 8 of Directive 2003/88, which requires Member States to ensure that normal hours of work for night workers do not exceed an average of 8 hours in any 24-hour period.

66. However, Directive 2003/88 gives no indication of the ratio between the length of night work and day work. Therefore, Article 8 of the directive would not preclude a national provision establishing the same length of day and night work, provided that the limit of 8 hours in any 24-hour period was not exceeded (point (a)).

67. As regards, in particular, police officers and firefighters, where these categories of workers can reasonably be considered [14] to be 'night workers whose work involves special hazards or heavy physical or mental strain', Article 8(b) of Directive 2003/88 specifies that they must not work 'more than eight hours in any period of 24 hours during which they perform night work'. Even for these workers, therefore, the directive does not establish any ratio between the maximum length of night and day work.

68. As regards the obligation laid down in Article 12(a) of the directive, since the provision does not specify any details, it must be concluded that the directive leaves the Member States significant discretion in deciding on the appropriate measures to be implemented. [15]

69. Clearly that discretion must be exercised in such a way as to ensure the effectiveness of the directive and attain its objectives regarding protection. Given the more taxing nature of night work compared with day work, a reduction in the average or maximum length of night work compared with day work could undoubtedly be an appropriate solution for Member States to protect the safety and health of workers.

70. However, as the Commission contends, I consider a reduction in the length of night work relative to day work to be just one of the possible solutions for complying with the requirements of Article 12(a). Granting additional rest periods or free time, for example, could also contribute to the protection of the health and safety of workers.

[14] Even though the second paragraph of Article 8 of Directive 2003/88 provides that such workers are to be defined 'by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the specific effects and hazards of night work'.

[15] The Court has consistently held that the directive allows Member States considerable discretion in implementing its provisions. See, to that effect, judgments of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 35); of 9 November 2017, *Maio Marques da Rosa* (C-306/16, EU:C:2017:844, paragraphs 39 and 48); and of 11 April 2019, *Syndicat des cadres de la sécurité intérieure* (C-254/18, EU:C:2019:318, paragraphs 23 and 35).

71. I am of the opinion, therefore, that, in the absence of a specific obligation under Directive 2003/88, and owing to the minimum level of harmonisation provided by the directive, its aims and the discretion given to Member States, it is not possible to infer, from the general obligation imposed by Article 12(a) of the directive, a specific requirement for Member States to set a limit on the normal length of night work that is shorter than that of day work.

3. The second question referred for a preliminary ruling

72. By its second question, the national court asks the Court of Justice whether the principle of equality enshrined in Articles 20 and 31 of the Charter requires the normal length of night work laid down in national law for workers in the private sector (7 hours) to apply also to public-sector workers, including police officers and firefighters.

73. As the Commission correctly pointed out, Article 31 of the Charter does not address the principle of equality, but guarantees the right to 'fair and just working conditions'.

74. I therefore agree with the Commission's suggestion to reword the second question for a preliminary ruling as follows: 'Does Article 20 of the Charter, which enshrines the principle of equality, and Article 31 of the Charter, mean that the normal working time at night of 7 hours also applies to public-sector workers, including police officers and firefighters?'

75. The question to be answered thus concerns the compatibility with EU law of national legislation which, as interpreted by the national courts, treats the normal length of night work differently for the private sector and for a specific category of public-sector workers (civil servants of the Ministry of the Interior – in the present case, firefighters).

76. First, it should be recalled that, according to the case-law of the Court, the fundamental rights guaranteed in the legal order of the European Union are intended to be applied in all situations governed by EU law.[16]

77. It is necessary, therefore, to assess first whether the national legislation in force in the Member State represents implementation of EU law (for the purposes of Article 51 of the Charter).

78. Directive 2003/88 does not provide measures to harmonise the length of night work, but simply sets out, in Article 8, the minimum requirements limiting the length of such work: the normal hours of work for night workers must not exceed an average of 8 hours in any 24-hour period. The EU legislature therefore sets an 'average' limit on the 'normal' hours of work for night workers.

79. Only if the work involves 'special hazards or heavy physical or mental strain' does the limit stipulated in Article 8(b) become a 'maximum' limit: workers must not work 'more than eight hours in any period of 24 hours'.

80. By contrast, Article 140(1) of the Bulgarian Labour Code states that 'the normal length of night work in a 5-day working week shall not exceed 7 hours'. That provision, as the referring court pointed out, applies to workers in the private sector.

[16] See judgment of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraphs 52 and 53).

81. Can we conclude from this that the national legislation introduces a more favourable regime than the one envisaged in the directive?

82. As is clear from the case-law of the Court, in particular in the *TSN* judgment, [17] the minimum requirements laid down by the directive cannot prevent a Member State from adopting more stringent protective measures than those which form the subject matter of action by the EU legislature, provided that those measures do not undermine the coherence of that action.

83. By limiting the normal length of night work to 7 hours, the Labour Code implements the obligation laid down in Article 8 of the directive, taking into account the latitude granted on the basis of the minimum requirements stipulated in that provision. The Charter is thus applied in accordance with Article 51 thereof. [18]

84. As correctly argued by the Commission in my view, the present case differs from that in the judgment in *TSN* [19] since, in the *TSN* case, it was possible to distinguish between the annual leave entitlements resulting from the application of Article 7 of the directive (as transposed by the relevant national legislation) and the additional rights conferred by the company's collective agreement, so as to be able to establish clearly which rule stems from the application of EU law and which one falls under national law. This is not possible in the present case, given that – while establishing a more favourable regime than the maximum length stipulated in Article 8 of the directive – Article 140(1) of the Labour Code introduces the minimum requirement laid down in the directive, without it being possible to determine exactly what derives from the minimum requirements of the directive and what goes beyond them.

85. However, as we will see, this does not prevent the rule implementing the obligation laid down in Article 8 of Directive 2003/88 in respect of private sector workers being derogated from for other categories of workers. The fact that Article 140 of the Labour Code implements the minimum requirement laid down by the directive does not mean that the Member State is deprived of the power to exercise its discretion by setting a different limit on the length of night work for other workers, owing to the objective characteristics of the function performed, without prejudice to compliance with the minimum requirements laid down in Directive 2003/88.

86. The principles set out in Articles 20 and 31 of the Charter must be read together, and serve as criteria for establishing whether the national legislation ensures fair and just working conditions for all workers.

87. The principle of equal treatment is a general principle of EU law, enshrined in Article 20 of the Charter, of which the principle of non-discrimination laid down in Article 21(1) of the Charter is a special manifestation. That principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way by the Union legislature. [20]

[17] See judgment of 19 November 2019, *TSN and AKT* (C-609/17 and C-610/17, EU:C:2019:981, paragraphs 48 and 49).

[18] Observations of the European Commission, paragraph 50.

[19] This is a well-known case involving a collective agreement that exceeds the minimum requirements laid down in the directive on paid leave (4 weeks), but prohibits leave from being carried over when the person concerned has been granted sick leave. On that occasion, the Court concluded that 'where the Member States grant, or permit their social partners to grant, rights to paid annual leave which exceed the minimum period of 4 weeks laid down in Article 7(1) of that directive, such rights, or the conditions for a possible carrying over of those rights in the event of illness which has occurred during the leave, fall within the exercise of the powers retained by the Member States, without being governed by that directive or falling within its scope'.

[20] See judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (C-550/07 P, EU:C:2010:512, paragraphs 54 and 55).

88. A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, where it relates to a legally permitted aim pursued by the legislation in question, and is proportionate to the aim pursued by the treatment in question. [21]

89. The comparability of situations must then be assessed not in a general and abstract manner, but in a specific and concrete manner having regard to all the elements which characterise them, in the light, in particular, of the subject matter and purpose of the national legislation which makes the distinction at issue, as well as, where appropriate, in the light of the principles and objectives pertaining to the field to which that national legislation relates. [22]

90. In the present case, it is difficult to analyse the comparability of the situations, since the referring court proposes a comparison between abstract categories – such as civil servants and private-sector workers – without providing any information on the working conditions applicable to night workers under the two regimes which would allow a detailed analysis.

91. The interpretation of the provisions of national law, as understood from the case file, does not preclude other interpretations that are compatible with EU law.

92. In fact, there is, as I understand it, primary legislation (the Labour Code and the ZMVR) that governs the organisation of work in the private and public sectors on two partially different bases. The ZMVR delegates the detailed aspects of the rules to secondary legislation (ordinances).

93. The reference of one law to the other law, which in the view of the referring court appears decisive, is extremely broad and is not conducive to an unambiguous interpretation: Article 188(2) of the ZMVR states that civil servants performing night work 'shall benefit from the special protection provided by the Labour Code'. In my opinion, however, that provision does not in itself allow the provisions of the Labour Code on workers with an employment relationship to be considered applicable to all workers having the status of civil servant, whatever their role.

94. There are various reasons for this: first, the general nature of the reference; second, its inclusion in a measure containing provisions that may be interpreted in different ways. For example, Article 187(1) sets the normal hours of work for civil servants of the Ministry as 8 hours per day, without distinguishing between day and night work, specifying in paragraph 3 that, in the case of night work, 'the average working hours shall not exceed 8 hours in any 24-hour period'.

95. Meanwhile, Article 187(9) leaves the details of the organisation and allocation of working time, compensation for work outside the normal working hours, and the arrangements for rest periods and breaks of civil servants of the Ministry of the Interior to ordinances of the Minister for the Interior.

[21] See judgments of 17 October 2013, *Schaible* (C-101/12, EU:C:2013:661, paragraph 77), and of 29 October 2020, *Veselības ministrija* (C-243/19, EU:C:2020:872, paragraph 37).

[22] See judgment of 26 June 2018, *MB (Change of gender and retirement pension)* (C-451/16, EU:C:2018:492, paragraph 42 and the case-law cited). See, to that effect, judgment of 26 January 2021, *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie* (C-16/19, EU:C:2021:64, paragraph 43).

96. Article 187(9) seems to confirm the willingness of the Member State's legislature to exercise its discretion, within the limits permitted by Directive 2003/88, in the matter of working time for that particular category of workers comprising civil servants of the Ministry of the Interior, including firefighters, leaving to secondary legislation the detailed rules that take into account the actual roles performed and the specific work arrangements.

97. The picture that emerges, which is fragmented and ambiguous, thus seems to concern issues of national law which can be resolved only by the national court.

98. I do not think it can be ruled out that some of the interpretations put forward may, in principle, be incompatible with EU law: if it is only a question of pay (using a factor to convert the 7 hours of night work into a higher number of hours of day work), it falls outside the scope of Directive 2003/88 and, in general, the applicable provisions of EU law on working time.

99. If, on the other hand, it is a question of protecting workers in order to prevent excessive hours of night work from affecting their health, all the interpretations are compatible with EU law, which, as we have seen, merely imposes a maximum of 8 hours of work in a 24-hour period if the work is carried out between 22.00 and 6.00.

100. If it is a question of equal treatment and equality among workers, as mentioned earlier, the comparison must be specific and concrete, based not on the worker's generic status (civil servant or worker with an employment relationship), but on the practical work arrangements and the reasons for the different treatment, taking into account the relevant public interests to be reconciled with the need to protect the worker.

101. Such a comparison – as shown in the answer to the first question referred for a preliminary ruling – must consider the entire body of rules on the organisation of work, since the length of night work is only one of the criteria for assessing the effective protection of workers' health. [23] Without prejudice to the upper limit laid down in Article 8 of Directive 2003/88, the granting of additional rest periods or free time, for example, could also contribute to the protection of the health and safety of workers.

102. Furthermore, the legal basis of the directive is Article 153 TFEU, the objective of which, as stated in recital 2 of the directive, is to support and complement the activities of the Member States with a view to improving the working environment to protect workers' health and safety. Consequently, other criteria, such as the length of rest periods or the number of days of annual leave, can also help to ensure a certain level of protection. This shows that a comparison of working time cannot be the only relevant factor in ensuring that the aims pursued by the directive are achieved.

103. As to the comparability of the situations, the national court does not indicate whether, among the staff working as firefighters or police officers in Bulgaria, there are persons with an employment relationship hired on the basis of the Labour Code who perform the same tasks as civil servants of the Ministry of the Interior.

[23] On the need to consider all the relevant circumstances, such as the nature of the work and its conditions in order to assess the impact of a specific provision of Directive 2003/88 on the safety and health of workers, see judgment of 11 April 2019, *Syndicat des cadres de la sécurité intérieure* (C-254/18, EU:C:2019:318, paragraph 39). That case concerned the reference period used to calculate the weekly working time.

104. Moreover, the flexibility granted by the directive to the Member States allows them, in the national provisions transposing that directive, to take into account requirements associated with the protection of general interests, such as the protection of public-policy considerations, or specific features of particular activities that require a certain degree of flexibility in the organisation of working hours. [24]

105. It is a question of balancing the operational continuity of certain professions, such as police officers and firefighters, with the efficacy of their work at night, precisely due to the higher risk carried by those professions.

106. This balancing of interests is expressed in Article 2(2) of Directive 89/391, [25] which excludes certain activities from the scope of that directive and, indirectly, from that of Directive 2003/88. The criterion used is based not on the workers' membership of the sectors of the public service referred to in that provision, but only on the specific nature of certain particular tasks performed by workers in the sectors of health and safety and public order. That nature justifies an exception to the rule on the protection of the safety and health of workers, on account of the absolute necessity to ensure effective protection of the community. [26]

107. In cases where those situations do seem comparable, it would still be for the referring court, which alone has jurisdiction to assess the facts, to determine whether the purpose in question can justify the difference in treatment and whether the measure giving rise to the difference in treatment does not go beyond what is necessary to achieve that purpose. [27] As previously mentioned, a difference in treatment is justified if it is based on an objective and reasonable criterion, that is, where it relates to a legally permitted aim pursued by the legislation in question, and is proportionate to the aim pursued by the treatment in question. [28]

108. Absence of an objective justification for the legislature's decision to treat different categories of comparable workers differently in the matter of night work could lead to a conflict with EU law and, possibly, to the obligation for the national court to disapply the national legal provision on which the difference in treatment is based.

109. In other words, the principle of interpretation in conformity with EU law would allow the national court to take the whole body of domestic law into consideration and apply the interpretative methods recognised by domestic law, with a view to ensuring that EU law is fully effective and to achieving an outcome consistent with the objective pursued by it. [29]

110. Therefore, I am of the opinion that Article 20 of the Charter, which enshrines the principle of equality, and Article 31 of the Charter, which enshrines the right to fair and just working conditions, do not require the normal length of night work of 7 hours provided for in a Member State for private-sector workers to apply equally to public-sector workers, including police officers and firefighters. It is within the discretion of the Member State to set a different length, subject to

[24] See judgment of 11 April 2019, *Syndicat des cadres de la sécurité intérieure* (C-254/18, EU:C:2019:318, paragraph 39).

[25] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

[26] See judgment of 12 January 2006, *Commission* v *Spain* (C-132/04, not published, EU:C:2006:18, paragraph 24).

[27] See judgment of 5 June 2018, *Montero Mateos* (C-677/16, EU:C:2018:393, paragraph 52).

[28] See judgment of 9 March 2017, *Milkova* (C-406/15, EU:C:2017:198, paragraph 55), and of 29 October 2020, *Veselības ministrija* (C-243/19, EU:C:2020:872, paragraph 37).

[29] See judgments of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 117), and of 8 May 2019, *Praxair MRC* (C-486/18, EU:C:2019:379, paragraph 37 and the case-law cited).

the maximum limits laid down in Article 8 of Directive 2003/88, provided there is an objective justification for the legislature's decision to provide for different treatment as regards night work for different categories of workers who are comparable in a specific and concrete manner.

4. The third question referred

111. By its third question, the referring court asks whether the attainment of the objective referred to in recital 8 of Directive 2003/88, namely to limit the duration of periods of night work, requires national legislation to stipulate the normal length of night work, including for public-sector workers.

112. It should be noted, as the Commission has pointed out, that the recitals are not binding in themselves. In the present case, the recital seeks to clarify the content of Article 8 of the directive, which sets the maximum length of night work at 8 hours in any 24-hour period.

113. Therefore, I support the Commission's suggestion to reword the third question for a preliminary ruling as follows: 'Does Article 8 of the directive, read in conjunction with recital 8, require national legislation to lay down explicitly the normal length of night work, including for public-sector workers?'

114. Article 8 of the directive requires Member States not to exceed a fixed length of night work, namely 8 hours in any 24-hour period. However, it does not require Member States to lay down the normal length of night work. In this respect, the words 'there is a need to limit the duration of periods of night work' in recital 8 of the directive should be interpreted as meaning that the directive should indicate the maximum length of night work.

115. The directive thus leaves it to the Member States to decide whether to lay down a normal length of night work, and whether to apply it to certain workers or to all workers, depending on the nature of the activity in question. Member States have the option of deciding on that length on the basis of a preliminary study of its impact on health and safety, in accordance with the minimum requirements of EU law. From this perspective, Directive 2003/88 only requires the minimum requirements laid down in Article 8 of the directive for the length of night work to be met.

116. Moreover, as previously mentioned, the directive allows the Member States a broad margin of discretion precisely to take into account the specific needs of the various sectors. There are significant differences between sectors that require 24-hour operation (in other words, without interruption), or at least throughout or at times during the night, and sectors that do not require such continuous operation.

117. In this respect, Article 187 of the ZMVR thus seems consistent with the minimum requirements of Directive 2003/88.

118. Therefore, in my view, Article 8 of the directive, read in conjunction with recital 8, does not require the normal length of night work, including for public-sector workers, to be expressly laid down in national law.

IV. Conclusion

119. In the light of the foregoing considerations, I propose that the Court answer the request for a preliminary ruling from the Rayonen sad Lukovit (District Court, Lukovit, Bulgaria) as follows:

(1) 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 merely states the maximum length of night work and Article 12(a) in particular does not require Member States to set a shorter length of night work than for day work. Member States are free to take the measures they consider most appropriate for the directive to be effective.

(2) Article 20 of the Charter of Fundamental Rights, which enshrines the principle of equality, and Article 31 of the Charter, which enshrines the right to fair and just working conditions, do not require the normal length of night work of 7 hours provided for in a Member State for private-sector workers to apply equally to public-sector workers, including police officers and firefighters. It is within the discretion of the Member State to set a different length, subject to the maximum limits laid down in Article 8 of Directive 2003/88, provided there is an objective justification for the legislature's decision to provide for different treatment as regards night work for different categories of workers who are comparable in a specific and concrete manner.

(3) Article 8 of the Directive 2003/88, read in conjunction with recital 8, does not require national legislation to lay down expressly the normal length of night work for public-sector workers. Member States are free to take the most appropriate measures to ensure that the provisions of the directive are effective.