Study exploring the social, economic and legal context and trends of telework and the right to disconnect, in the context of digitalisation and the future of work, during and beyond the COVID-19 pandemic

Annex 2 Analysis of case law

LOGO

EUROPEAN COMMISSION

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1. The CJEU on standby time – introduction

The Working Time Directive (WTD) provides a definition of working time as "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" (WTD, Article 2). Rest time is any period which is not working time. The CJEU has confirmed this binary approach in its decisions, according to which working time and rest time are mutually exclusive [1]. Thus, a worker's standby periods must be classified either as 'working time' or as a 'rest period' for the purpose of applying Directive 2003/88, as the latter does not provide for any intermediate category. Case law from the EU Court of Justice on standby time provides important criteria to clarify this aspect.

In the decisions on standby time that follow, attention is devoted both to cases involving standby time at the employer's premises and outside them, with the aim of taking into account that the place of work does not play the main role when determining whether or not standby time is considered working time or rest time for the purpose of applying the WTD in a specific case.

1.1. Standby time within the employer's premises

1.1.1. Judgement of the Court of 3 October 2000, Case C-303/98, Sindicato de Médicos de Asistencia Pública (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana

In this case, the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Valencia Autonomous Community) referred several questions concerning working time to the Court for a preliminary ruling. One of the main issues regarded the interpretation of the WTD[2].

The request for a preliminary ruling was raised in proceedings between the Sindicato de Médicos de Sanidad de Asistencia Pública (Union of Doctors in the Public Health Service, hereinafter 'SIMAP) and the Conselleria de Sanidad y Consumo de la Generalidad Valenciana (Ministry of Health of the Valencia Region). The Union of Doctors brought a collective action against the Ministry of Health of Valencia, on behalf of medical staff providing primary care at health centres in the region. Among other issues, one crucial point brought before to the Court of Justice concerned whether time spent on call by doctors in primary care teams (which either required them to be present in the health centre, or merely contactable) should be regarded as working time or as overtime within the meaning of the WTD (paragraphs 46 and 51[3]). According to the CJEU, the characteristic features of working time are present in the case of time spent on call by doctors in primary care teams, in cases where their presence at the health centre is required. Therefore, the time spent on call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate as overtime, within the meaning of the directive if they are required to be present at the health centre. On the contrary, if they must merely be

[1] For a summary of CJEU case law: Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time, C/2017/2601, p. 16 ff.

[2] The WTD at that time was Directive 93/104.

[3] According to paragraph 51, Judgement of 9 September 2003, case C-151/02 *Landeshauptstadt Kiel v. Norbert Jäger*, ECLI:EU:C:2003:437: "…overtime falls within the concept of working time for the purposes of the directive, which draws no distinction according to whether or not such time is spent within normal hours of work".

contactable at all times when on call, only time linked to the actual provision of primary care services must be regarded as working time.

In the case such doctors are **obliged to be present and available** at the workplace, with a view to providing their professional services, they are carrying out their duties in that instance (paragraph 48). A different interpretation would have seriously undermined the objective of the WTD to ensure the safety and health of workers by granting them minimum periods of rest and adequate breaks.

1.1.2. Judgement of 9 September 2003, case C-151/02 Landeshauptstadt Kiel v Norbert Jaeger, ECLI:EU:C:2003:437

The *Landesarbeitsgericht* (Higher Labour Court) of Schleswig-Holstein referred a case to the Court for a preliminary ruling which involved the interpretation of the WTD[4], and which concerned certain aspects of the organisation of working time. The questions posed to the CJEU were raised in proceedings between *Landeshauptstadt Kiel* (hereinafter 'the City of Kiel') and Mr Jaeger, concerning the definition of the concepts of 'working time' and 'rest period' within the meaning of the WTD, in the context of the on-call service (*'Bereitschaftsdienst'*) provided by doctors in hospitals.

Mr Jaeger was a doctor in the surgical department of a hospital in the city of Kiel, who was asked to perform on-call duties. During periods of on-call duty, Mr Jaeger remained at the clinic, and was called upon to carry out his professional duties as the need arose. He was allocated a room in the hospital with a bed, where he could sleep when his services were not required. The average time during which Mr Jaeger was called upon to carry out professional tasks did not exceed 49% of the time spent on call.

Among other issues, the national court requested the CJEU's interpretation of whether periods of on-call duty must be deemed in their entirety to constitute working time, even if the person concerned does not actually perform professional tasks throughout, but is instead permitted to sleep during such periods.

In the SIMAP case, the Court held that time spent on call by doctors in primary healthcare teams, during which they were required to be physically present in the health centre, was to be regarded in its entirety as working time within the meaning of Directive 93/104, **irrespective of the work actually performed by the persons concerned**. According to the CJEU, this reasoning should also apply to on-call duty performed under the same regime by a doctor such as Mr Jaeger, who is not part of a primary healthcare team, in the hospital where he is employed. Indeed, in the SIMAP case it was not specified that doctors performing on-call duty at the hospital must remain alert and active for the whole duration of such a period.

Thus, the Jaeger case should be interpreted as meaning that on-call duty performed by a doctor where he is required to be **physically present** in the hospital must be regarded in its entirety as constituting working time for the purposes of the WTD. This is true even where the person concerned is permitted to rest at their place of work during stretches of their on-call duty period when their services are not required. An employee's periods of inactivity in the context of such on-call duty therefore cannot be classified as rest periods (paragraph 71).

[4] The WTD in effect at that time was Directive 93/104.

1.2. Standby time at a place determined by the employer

1.2.1. Judgement of the Court (Tenth Chamber) of 9 September 2021, XR v Dopravní podnik hl. m. Prahy, akciová společnost, case C-107/19

XR was employed as a company firefighter at DPP from November 2005 to December 2008. During this period, he was subject to a regime of shift work consisting of a day shift from 6.45 to 19.00 and a night shift from 18.45 to 7.00. His daily working times included two food and rest breaks of 30 minutes each.

During these breaks, XR could visit the factory canteen, situated 200 metres from his workstation. However, he was still required to be available to his employer in the event of an emergency. Specifically, he was equipped with a transmitter to alert him, when necessary, that the service vehicle was coming to pick him up, within two minutes, in front of the factory canteen. XR's breaks were not counted as working time, and were not remunerated. However, if a call-out occurred during a break, that period was counted as working time and was therefore remunerated as such. Consequently, uninterrupted breaks were not remunerated.

XR challenged this method of calculating his remuneration at the level of the national courts. When considering these circumstances, the Obvodní soud pro Prahu 9 (District Court, Prague 9) decided to stay proceedings and ask the Court of Justice for a preliminary ruling on the interpretation of the definition of working time according to the WTD, under the conditions mentioned above.

The CJEU highlighted the following:

- during his breaks, XR was not replaced at his workstation and was equipped with a receiver enabling him to be alerted if his breaks needed to be interrupted for an emergency call-out. It therefore follows that the applicant in the main proceedings was subject, during his breaks, to a standby system, remaining available to his employer in order to ensure that work can be provided, at the employer's request (paragraph 27).[5]
- While XR was not required to remain at his workplace, he was, however, required to be at the disposal of his employer.
- On average, the worker was rarely called upon for a call-out during the standby period; however, this is insufficient to define such a period as a rest period. Indeed, in order to understand whether the periods during which the worker remained at disposal of the employer are to be considered working time or rest time, it is crucial to have regard for the impact – which is objective and very significant – that the constraints imposed on the worker have on the latter's opportunities to pursue his or her personal and social interests.
- The unforeseeable nature of the possible interruptions to a break is likely to have an additional restrictive effect on the worker's ability to manage that time freely. The resulting uncertainty is liable to place that worker on permanent alert (paragraph 41).

[5] See, to this effect, the judgement of 9 March 2021, *Radiotelevizija Slovenija* (Period of standby time in a remote location), C 344/19, EU:C:2021:182, paragraph 2.

In this case, the CJEU held that the constraints imposed on the worker affect (objectively and very significantly) his opportunities to freely manage that time during which his professional services are not required and to pursue his own interests[6] (paragraph 34). Indeed, the period of standby time during which the worker was required to return to work within a time limit of only a few minutes must, in principle, be considered 'working time', since such time constraints**, in practice, strongly dissuaded the worker from planning any kind of recreational activity, even of a short duration** (paragraph 35).[7]
Nevertheless, the Court highlighted, as usual, that an evaluation of the impact of such a time limit during which the worker must react must be conducted following a concrete assessment by the national court. The CJEU held that only the national court can assess, in the light of all relevant circumstances, whether the constraint to which XR was subject during his breaks (resulting from the need to respond, when necessary, to a call-out within two minutes), was such as to limit objectively and very significantly the opportunities that the worker had to manage his time freely in order to devote himself to the activities of his choice (paragraphs 36 and 37).

1.3. Standby time outside the employer's premises

1.3.1. Judgement of 21 February 2018 in case C-518/15, Ville de Nivelles v Rudy Matzak, ECLI:EU:C:2018:82

This request by the Cour du travail de Bruxelles (Higher Labour Court of Brussels) for a preliminary ruling concerns the interpretation of the WTD in relation to certain aspects of the organisation of working time, and was made with regard to proceedings between the ville de Nivelles (town of Nivelles), Belgium and Mr Rudy Matzak, concerning the remuneration of services performed for the fire service in Nivelles.

Various issues were considered in this case, including whether standby time was to be interpreted as working time or rest time within the scope of the WTD.

Mr Matzak joined the fire service of the town of Nivelles, attaining the status of volunteer firefighter. During his standby time, he was required not only to be contactable, but was also obliged both to respond to calls from his employer within 8 minutes. He was also required to be physically present at a place determined by the employer (Mr Matzak's home, and not his place of work).

According to the CJEU's jurisprudence:

- the intensity of the employee's work and his output are not among the elements characterising the concept of 'working time' within the meaning of the WTD;[8]
- a worker's physical presence and availability at a place of work during a standby period, with a view to providing professional services, must be regarded as the carrying out of his duties, even if the activity actually performed varies according to the circumstances.[9] (paragraph 57)

In this case, the worker's physical presence is required at a specified place in order to ensure he is able to provide appropriate services immediately in case of need. Such an obligation makes it impossible for the worker concerned to choose the place where they spend their

[6] Ibid, paragraph 37.
[7] Ibid, paragraph 48.
[8] Judgement of 1 December 2005, Dellas and Others, C-14/04, EU:C:2005:728, paragraph 43.
[9] See, to this effect, the judgement of 3 October 2000, SIMAP, C-303/98, EU:C:2000:528, paragraph 48.

standby period, and must thus be regarded as falling within the ambit of the performance of their duties (paragraph 59).[10]

The situation would be different in the case of a worker performing standby duty according to a standby system that required them to be permanently accessible, but without requiring her/his presence at the place of work or other specified location. While, in such a case, s/he is at the disposal of her/his employer (since it must be possible to contact her/him), workers in such a situation would be able to manage their time with fewer constraints and thus pursue their own interests. In such circumstances, only time linked to the actual provision of services would be regarded as 'working time,' within the meaning of the WTD.[11]

In the case of Mr Matzak, the obligation to remain physically present at a place determined by his employer, and the **geographical and temporal constraints** resulting from the requirement to reach his place of work within 8 minutes, are such as to objectively limit the opportunities enjoyed by a worker in these circumstances to devote themselves to personal and social interests. Under such circumstances, standby time must therefore be regarded as "working time" according to the meaning of the WTD.

1.3.2. Judgement of the Court (Grand Chamber) of 9 March 2021, D.J. v Radiotelevizija Slovenija, case C-344/19, ECLI:EU:C:2021:182

In the Case *DJ v. Radiotelevizija Slovenija,* DJ was a specialist technician working at two transmission centres in Slovenia. The nature of this work required him to remain within the vicinity of these centres in order to be able to respond to calls received from his employer within a required time period. Furthermore, this need to remain close to the transmission centres was due also to occasional difficulties he had experienced in accessing the centres. Furthermore, the considerable distance between the two centres and DJ's home – together with the aforementioned difficulties in reaching the centres – would have made it impossible for DJ to respond to calls within the necessary time limit if he remained at his home.

DJ's employer therefore provided him with accommodation at the transmission centres, although he was not required to be present at the centres during standby time. However, the possibilities for pursuing leisure activities in the immediate vicinity of the transmission centres were very limited. DJ was required to be contactable at all times and, if necessary, to be able to attend the transmission centre concerned within a time limit of one hour. DJ brought a claim before the national courts for salary covering the time spent on standby, arguing that it constituted working time. After his action was dismissed both at first and second instance, DJ appealed to the Supreme Court of Slovenia, which requested a preliminary ruling from the CJEU, with the aim of clarifying the interpretation of the WTD.

To assess whether or not standby time constitutes 'working time', the CJEU considered all of the relevant and specific circumstances of the case. In particular, the CJEU found that the time constraints imposed on the worker to return to his professional activities were relevant. In this case, these constraints resulted from the worker's obligation to reach the place of work within one hour.

[10] See, to this effect, the judgement of 9 September 2003, Jaeger, C-151/02, EU:C:2003:437, paragraph 63, and the order of 4 March 2011, Grigore, C-258/10, not published, EU:C:2011:122, paragraph 53 and the case law cited.
[11] See, to this effect, the judgement of 9 September 2003, Jaeger, C-151/02, EU:C:2003:437, paragraph 65, and the case law cited.

The Court highlighted that the worker's place residence (i.e. its distance from her/his workplace), as well as further circumstances independent of his employers location (e.g. the limited nature of opportunities to pursue leisure activities in the area) are not relevant in assessing the nature of working time or rest time.

Such criteria can play a role only as part of an overall assessment of the facts of the case, which include the consequences of any time constraints imposed and, if appropriate, the average frequency of activity during that period, as well as the impacts on a worker's ability to manage her/his personal time. What must be considered, in particular, is whether the constraints imposed on a worker during such a period are such as to **affect, objectively and very significantly, the employee's ability to manage during this period both the time during which his or her professional services are not required, and the time that he or she is able to devote to their own interests**. The limited nature of opportunities to pursue leisure activities within the immediate vicinity of the place concerned is not relevant for the purposes of such an assessment.

In this case, the CJEU highlighted that where a worker's services comprise periods of standby time that continue without a break over long periods, or which occur at very frequent intervals, such that they impose a recurrent psychological burden (even of a low intensity) on the worker, it may in practice become very difficult for the worker to withdraw fully from his or her working environment for a sufficient number of consecutive hours to permit them to neutralise the effects of work on their safety or health.

It therefore follows that, having regard to their obligation to protect workers against psychosocial risks that may arise in the working environment, **employers cannot establish periods of standby time that are so long or so frequent that they constitute a risk to the safety or health of workers, irrespective of those periods being classified as 'rest periods'.** It is for the Member States to define, in their national law, the detailed arrangements for the application of such an obligation (paragraph 65).

As general criteria, it is therefore possible to highlight that:

- All the relevant circumstances of the specific case must be taken into consideration. However, the fact that the employer's home is located far away from the place that she/he must reach to respond to calls is not relevant, because it does not depend on the employer;
- If the time constraints affect, objectively and very significantly, the a worker's opportunities to freely manage the time during which his or her professional services are not required and to pursue his or her own interests, standby time is to be considered working time. In the Matzak case,[12] for example, in which the employee had to respond to calls within 8 minutes, standby time was considered working time.
- Employers cannot establish periods of standby time that are so long or so frequent that they constitute a risk to the safety or health of workers, irrespective of those periods being classified as 'rest periods'.

[12] CJEU, Judgement of 21 February 2018 in case C-518/15, *Ville de Nivelles v. Rudy Matzak*, ECLI:EU:C:2018:82

1.3.3. Judgement of the Court (Grand Chamber) of 9 March 2021, Stadt Offenbach am Main (Période d'astreinte d'un pompier), case C-580/19, ECLI:EU:C:2021:183

This CJEU case concerns the interpretation of the WTD in the case of on-call services. Just as in several cases regarding standby time, proceedings at national level related to the salary claimed for a service (in this case, provided by RJ to the city of Offenbach am Main) consisting of standby time according to a standby system. The main issue before the CJEU concerns whether the time defined as standby time in the national proceedings is to be considered working time or rest time under the WTD. Obviously, this interpretation has a direct effect on remuneration.

In the case *RJ v. Stadt Offenbach am Main,* RJ was a firefighter on incident command duty at the Offenbach am Main fire service. During the so-called 'BvE' service (incident command service 'Beamter vom Einsatzleitdienst') in which he had to be available to go immediately to the incident scene using his or her traffic regulations privileges and rights of priority and that he carried out in addition to his regular service hours, RJ had to be reachable at any time, and had to have his service uniform with him, as well as a service vehicle. He had to respond to calls under the following conditions:

- He would be informed of events that occurred and which required decisions on his part, and eventually to attend either the scene of the incident or his workplace;
- During the so-called 'BvE' service, he was required to reach the boundary of the town in which he worked within 20 minutes of the call (making use of his privileges and rights of priority under traffic regulations) and, as mentioned above, he was required to be dressed in his uniform and be in his operations vehicle.

The CJEU highlighted that, in the context of this case, the term 'standby' covers, generically, "all of the periods during which the worker remains available for his or her employer, in order to ensure that work is provided, at the employer's request; whereas the expression 'standby time according to a standby system' covers those periods of standby time during which the employee is not required to remain at his or her workplace" (paragraph 2).

To understand whether the period of standby time according to a standby system must also be classified, in its entirety, as 'working time' within the meaning of the WTD (even if a worker is not required to remain at his or her workplace), it is crucial to consider the impact that the constraints imposed on the worker have on the worker's opportunities to pursue his or her personal and social interests (paragraph 37). It is therefore necessary to look at the **level of intensity of the constraints imposed on the worker during the period of standby time, and whether such constraints allow him or her to manage his or her own time, and to pursue his or her own interests.**

In particular, it is necessary to consider the time limit by which the worker must return to his or her professional activities during the period of standby time, starting from the moment at which the employer requests it. This must be coupled, where appropriate, with the average frequency of the activities that the worker is actually called upon to undertake over the course of that period.[13]

In a case where the frequency of such activities appears to be an appropriate criterion to take into consideration, it is important to consider whether the worker is, on average, called upon to act on numerous occasions during a period of standby time. In such a case, he or she has less

[13] Radiotelevizija Slovenija, paragraph 46; RJ v. Stadt Offenbach am Main, paragraph 45.

scope to freely manage his or her time during those periods of inactivity, given that they are frequently interrupted (paragraph 51). In the present case, it was not apparent from the information at the disposal of the CJEU that the average frequency of interruptions during such periods was high. Furthermore, the potentially significant nature of the distance separating RJ's home from the city limits of Offenbach am Main, his habitual place of his work, is not, as such, relevant (paragraph 54).

Therefore, a period of standby time according to a standby system, during which a worker must be able to reach the city boundary of his or her workplace within a response time of 20 minutes, in uniform with a service vehicle, constitutes, in its entirety, 'working time.' The Court went on to state, however, that it is for the referring national court (and not the CJEU) to assess, in the light of all the circumstances of the case, whether, during his periods of standby time according to a standby system, RJ is subject to constraints of such intensity as to constrain, objectively and very significantly, his ability to freely manage the time during which his professional services are not required, and to devote such time to his own interests (paragraph 55).

One crucial aspect of this decision relates to the need for the employer to comply with the dispositions of the Framework Directive. In particular, according to the CJEU, the classification of a period of standby time as a 'rest period' for the purposes of applying Directive 2003/88 is without prejudice to the duty of employers to comply with their specific obligations under Articles 5 and 6 of Directive 89/391 to protect the safety and health of their workers. It follows that **employers cannot establish standby periods that are so long or so frequent that they constitute a risk to the safety or health of workers, irrespective of those periods being classified as 'rest periods'** within the meaning of Article 2(2) of Directive 2003/88. It is for the Member States to define, in their national law, the detailed arrangements for the application of this obligation (paragraph 60).

Therefore, the general criteria to be taken into account are as follows:

- An overall assessment should be made of all the circumstances of a case;
- The average frequency of interventions during a standby period may be relevant. However, \ since such a criterion can only be assessed after a certain period of time, it is thus not relevant in determining the intensity of the constraints (Mitrus, 2022, p. 7).
- Consideration should be given to time constraints that objectively and very significantly limit a worker's ability to freely manage her/his time.
- Employers cannot establish standby periods that are so long or so frequent that they constitute a risk to the safety or health of workers, irrespective of those periods being classified as 'rest periods'.

1.3.4. Judgement of the Court (Fifth Chamber) of 11 November 2021, MG v. Dublin City Council, case C-214/20

As in the previous cases, a request for a preliminary ruling brought to the CJEU in this case concerned the interpretation of the WTD. The request was made in relation to proceedings between MG and Dublin City Council (Ireland) concerning the calculation of the hours worked by MG for the council during periods of standby time according to a standby system. The referring national court noted that the interpretation of the concept of 'working time' was decisive for the resolution of the main proceedings. While it was ultimately for the referring court to examine whether the period of standby time according to a standby system at issue in the

main proceedings might be classified as 'working time' or a 'rest period,' guidance was required from the Court as to the criteria to be taken into account in that examination.

This case concerns MG, a part-time firefighter employed by Dublin City Council, who was required to participate in 75% of the brigade's interventions. He had the option of abstaining from the remaining 25% of interventions. In the event of an emergency call, MG's duties were: (1) to participate in an intervention, within 5 minutes of the call; and (2) in any event, to observe a maximum turn-out time of 10 minutes (i.e., to reach his assigned fire station within 10 minutes). During the period of standby time, MG was permitted to carry out another professional activity (taxi driver), which could not exceed 48 hours per week on average.

According to the jurisprudence of the CJEU, the concept of 'working time' within the meaning of the WTD covers periods of standby time, including those according to a standby system, in cases where the constraints imposed on the worker are such as to affect, objectively and very significantly, the latter's opportunities to manage the time during which his or her professional services are not required, and to pursue his or her own interests (paragraph 38).[14]

In the present case, the CJEU held that the constraints placed on the worker did not reach such a level of intensity that they did not allow him to manage his own time, or to pursue his own interests without major constraints. Therefore, only the time spent actually carrying out work during the standby period constitutes 'working time' for the purposes of applying the WTD[15] (paragraph 39).

In this case, the lack of obligation to respond to 100 per cent of the brigade's interventions, together with the permission to carry out another professional activity not exceeding 48 hours per week on average, are relevant elements to be considered. Indeed, such circumstances show that during periods of standby time, the worker could carry out another professional activity according to his own interests. In this specific case, since the worker was expressly **allowed to perform other paid activities and not to respond to all the calls**, the CJEU recognised the standby time as rest time. Indeed, according to the Court, the constraints imposed upon him in such circumstances did not significantly limit his opportunities to freely manage his free time. However, according to the CJEU, this conclusion applies only while the average frequency of the emergency calls and the average duration of interventions does not prevent the effective pursuit of a professional activity capable of being combined with the post of retained firefighter. These circumstances, as the CJEU highlights, must be assessed by the referring national court alone.

Furthermore, the CJEU highlighted as a crucial element that the classification of a period of standby time as a 'rest period' for the purposes of applying Directive 2003/88 is without prejudice to the duty of employers to comply with their specific obligations under Articles 5 and 6 of Directive 89/391 to protect the safety and health of their workers. It follows that **employers cannot establish standby periods that are so long or so frequent that they constitute a risk to the safety or health of workers, irrespective of those periods being classified as 'rest periods'** within the meaning of Article 2(2) of Directive 2003/88. It is for the Member States to define, in their national law, the detailed arrangements for the application of this obligation (paragraph 47).

[14] Judgement of 9 March 2021, Stadt Offenbach am Main, C-580/19, EU:C:2021:183, paragraph 38.
[15] Judgement of 9 March 2021, Stadt Offenbach am Main (A firefighter's period of standby time), C-580/19, EU:C:2021:183, paragraph 39, and the case law cited.

2. Recording of working time

2.1.1. Judgement of the Court (Grand Chamber) of 14 May 2019, Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE, Case C-55/18

This request for a preliminary ruling concerns the interpretation of Article 31(2) of the CFREU, the WTD and the Health and Safety Framework Directive. It was made in proceedings between the Federación de Servicios de Comisiones Obreras (CCOO) and Deutsche Bank SAE, and concerned the lack of a system for recording the time worked each day by the workers employed by Deutsche Bank.

CCOO, Spain's largest trade union federation, brought a group action against Deutsche Bank before the National High Court of Spain, in order to obtain recognition of the bank's obligation (under the Workers' Statute and Royal Decree 1561/1995) to set up a system for recording the time worked each day by its members of staff. This obligation needed be recognised in order to make it possible to verify compliance with: (i) the stipulated working times; and (ii) the obligation to provide union representatives with information about overtime worked each month. However, Deutsche Bank, which did not comply with a request from the Employment and Social Security Inspectorate to set up a system for recording the time worked each day, submitted that Spanish law did not lay down such an obligation for general application.

In Spain, the obligation to keep a record of working time is laid down by Article 35 of the Spanish Workers' Statute, which concerns overtime hours. Article 34 of this Statute, meanwhile, concerned 'normal' working time (i.e. the working time not exceeding maximum working time), and did not lay down a duty to record.

As a preliminary matter, the CJEU recalled Article 31(2) of the CFREU, recognising the right of every worker to a limitation on maximum working hours, and to daily and weekly rest periods. Such a right is a "rule of EU social law of particular importance", and is also expressly enshrined in the CFREU, which has the same legal weight as the Treaties, according to Article 6(1) of the TEU[16] (paragraph 30).

With regard to ensuring respect for the fundamental right enshrined in Article 31 of the CFREU, the decision highlights that "the provisions of Directive 2003/88 may not be interpreted restrictively at the expense of the rights that workers derive from it"[17] (paragraph 32). The WTD requires that Member States take the measures necessary to ensure that every worker is entitled to the limitations it imposes on working time. The WTD does not establish what specific arrangements must be adopted by Member States to ensure the implementation of limitations on working time; rather, Member States are free "to adopt those arrangements, by taking the 'measures necessary' to that effect" (paragraph 41).[18]

A key passage of the decision highlights that the introduction of an objective, reliable and accessible system enabling the measurement of each worker's daily working time falls within the **general obligation on Member States and employers,** based on Articles 4(1) and 6(1) of Directive 89/391, to provide the organisation and means necessary for the **protection of the**

[16] See, to this effect, the judgements of 5 October 2004, Pfeiffer and Others, C-397/01 to C-403/01, EU:C:2004:584, paragraph 100, and of 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften, C-684/16, EU:C:2018:874, paragraph 20.
[17] See, by analogy, the judgement of 6 November 2018, Bauer and Willmeroth, C-569/16 and C-570/16, EU:C:2018:871, paragraph 38, and the case-law cited.
[18] See, to this effect, the judgement of 26 June 2001, BECTU, C-173/99, EU:C:2001:356, paragraph 55.

safety and health of workers. Such a system is also necessary to enable worker representatives to exercise their right (and duty), laid down in Article 11(3) of Directive 89/391, to ask the employer to take appropriate measures and to submit proposals for such measures (paragraph 62).

Nevertheless, it is for the Member States, in the exercise of their discretion in that regard, to determine the specific arrangements used to implement such a system – in particular, the form that such a system must take – having regard, as necessary, to the particular characteristics of each sector of activity concerned, or to the specific characteristics of certain undertakings including, among others, their size, and without prejudice to Article 17(1) of Directive 2003/88[19] (paragraph 63).

The essential objective of the WTD is to ensure the effective protection of the living and working conditions of workers, and the better protection of their safety and health, Member States must "ensure that the effectiveness of those rights is guaranteed in full" (paragraph 42).[20] As the CJEU has already established through its jurisprudence, "the effective protection of the safety and health of workers should not be subordinated to purely economic considerations" (paragraph 66).

In addition, a system for recording working time must be adopted as an **effective tool to rebalance the weaker position of the worker** compared with their employer within the employment relationship. The worker's weaker position may dissuade her/him from claiming her/his rights *vis-à-vis* her/his employer because this might expose her/him to measures taken by the employer that are "likely to affect the employment relationship in a manner detrimental to that worker" (paragraph 45).

3. Equality before the law

3.1.1. Judgement of the Court (Second Chamber) of 24 February 2022, VB v Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto', Case C-262/20

This request for a preliminary ruling concerns the interpretation of Article 12(a) of the WTD and of Articles 20 and 31 of the Charter of Fundamental Rights of the European Union (CRFEU). Article 12(a) establishes that Member States must take the measures necessary to ensure that night workers and shift workers have safety and health protection appropriate to the nature of their work.

The principle of equal treatment, enshrined in Articles 20 and 21 of the CFREU, is a general principle of the EU. A difference in treatment is **justified if it is based on an objective and reasonable criterion** – that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and is proportionate to the aim pursued by the treatment.[21] Similarly,

[19] Article 17(1) of Directive 2003/88 "permits Member States, while having due regard for the general principles of the protection of the safety and health of workers, to derogate, inter alia, from Articles 3 to 6 of that directive, when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves" (paragraph 63 Judgement of the Court (Grand Chamber) of 14 May 2019, Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE, Case C-55/18).

[20] See, to this effect, the judgements of 1 December 2005, Dellas and Others, C-14/04, EU:C:2005:728, paragraph 53; of 7 September 2006, Commission v United Kingdom, C-484/04, EU:C:2006:526, paragraphs 39 and 40; and of 14 October 2010, Fuß, C-243/09, EU:C:2010:609, paragraph 64.

[21] Judgement of 9 March 2017, Milkova, C-406/15, EU:C:2017:198, paragraph 55, and further case-law cited in the decision.

Article 31 ensures fair and just working conditions, stipulating that every worker has the right to working conditions that respect their health, safety and dignity, and has the right to a limitation on maximum working hours, to daily and weekly rest periods, and to an annual period of paid leave.

This case concerns an employee ("VB") of the Bulgarian public fire brigade, who was considered to be entitled to a benefit concerning hours of night work. Such benefits were put in place for public sector workers by an Ordinance of 2007, which was later repealed by an Ordinance of 2014. VB argued that according to the 2007 Ordinance, the Directorate-General for which VB worked was obliged to convert hours of night work into hours of day work in such a way that seven hours of night work would be equivalent to eight hours of day work.

The Directorate-General refused to recognise such a benefit when calculating remuneration for overtime in relation to night work that VB had completed during a particular period; VB therefore brought proceedings before the national court to order the Directorate-General to pay this amount to him. The national court referred the case to the CJEU for a preliminary ruling to obtain an interpretation of the relevant EU law.

Among others issues, the CJEU was asked to interpret the matter of equality in the differential counting of working time: in other words, whether the normal seven-hour duration of night work set in a Member State's legislation for private sector workers should also apply to public sector workers (including police and firefighters), taking into consideration the purposes of the principle of equality set out in Articles 20 and 31 CFREU.

In this case, the national law applied by the Ministry of the Interior provided that the ratio between the normal length of day work and the normal length of night work is equal to 1, with no equivalency conversion being required. However, the CJEU did not consider this to be an argument that appeared to correspond with a legally permitted aim capable of justifying the difference in treatment at issue in the main proceedings. From the request for a preliminary ruling requested by the national court, it also emerged that the lack of application of the 2007 and 2014 Ordinances (i.e. the mechanism for converting hours of night work into hours of day work at issue in the main proceedings) was based on both legal and economic grounds. It was also argued that the renewal of such a conversion mechanism would have required considerable additional financial resources for the employer.

However, according to the CJEU, these reasons do not appear to correspond with a legitimate goal capable of justifying the difference in treatment at issue in the main proceedings. In fact, while it is true that Union law does not prevent Member States from taking budgetary considerations into account alongside other political, social or demographic considerations, as well as to influence the nature or scope of the measures they intend to adopt, such considerations cannot in and of themselves constitute a purpose of general interest.

The CJEU also held that the national court must assess the requirement of the comparability of the situations under consideration in order to determine the existence of an infringement of the principle of equal treatment, assessing this not from a global and abstract point of view, but in a specific and concrete manner in light of the entirety of the context.

Thus, the Court held that Articles 20 and 31 of the Charter were to be interpreted in such a way that the normal length of night work, fixed at seven hours for workers in the private sector in the national law of the Member State, did not need to be applied to public sector workers, including police officers and firefighters, only in the case that such a difference in treatment is based on an objective and reasonable criterion – that is, if the difference relates to a legally permitted aim pursued by that legislation, and it is proportionate to that aim.

3.1.2. Night work and appropriate solutions

In addition to the issue of the equal treatment of workers, a further issue examined by the CJEU concerned the requirement to adopt national legislation providing that the normal length of night work for public sector workers (such as police officers and firefighters) must be shorter than the normal length of day work laid down for such workers.

According to the CJEU, Article 8 of the WTD requires that the maximum length of night work should be fixed. However, the obligation under Article 12(a) of the Directive to take the measures necessary to ensure that night workers and shift workers should receive safety and health protection appropriate to the nature of their work allows the Member States a degree of latitude with regard the appropriate measures to be implemented (Paragraph 48).[22]

Taking into consideration the principles laid down by the ILO, the CJEU held that while the measures that Member States are obliged to take, in accordance with Article 12(a) WTD, are not required to refer expressly to the length of night work, Member States must ensure that night workers enjoy other protective measures in the form of working time, pay, allowances or similar benefits, such as compensation for the particular burden entailed by this type of work (as emphasised in particular by the WTD) and accordingly, to recognise the nature of night work (Paragraph 51).

The CJEU therefore held that in this case, in light of the greater burden associated with night work compared with day work, the reduction of the normal length of night work in relation to that of day work **may be an appropriate solution, with a view to ensuring the protection of the health and safety** of the workers concerned (although it was acknowledged that this was not the only possible solution). Depending on the nature of the activity concerned, granting additional rest periods or periods of free time (for example) could also contribute to the protection of the health and safety of those workers (paragraph 53).

4. Social security coordination

4.1.1. Judgement of the Court (Third Chamber), 13 September 2017, X v Staatssecretaris van Financiën, Case C-570/15, ECLI:EU:C:2017:674

This judgement concerns a preliminary ruling requested by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) in the proceedings between *X v Staatssecretaris van Financiën*, concerning an assessment in respect of income tax and social insurance contributions.

The case concerned a worker ("X") whose work for the same employer was physically carried out in two different Member States. Specifically, during 2009, X, a national of the Netherlands

[22] See, to this effect, the judgements of 24 January 2012, Dominguez, C-282/10, EU:C:2012:33, paragraphs 35 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.

who was resident in Belgium, worked for 1.872 hours as an account manager and manager of telecommunication relations for his employer, which was established in the Netherlands.

Out of those 1,872 hours of work, 121 hours were performed in Belgium, representing approximately 6.5% of the total number of hours worked that year. This time included 17 hours spent visiting clients and 104 hours during which X worked from home. These activities were not carried out according to a set pattern, and X's employment contract did not contain any arrangement for working in Belgium. The rest of the work X carried out for his employer in 2009, amounting to 1,751 hours, was performed in the Netherlands, both in the office and during visits to potential clients.

The dispute in the main proceedings between X and the Staatssecretaris van Financiën concerned the assessment of income tax and social insurance contributions imposed for the 2009 financial year.

The Supreme Court of the Netherlands requested a preliminary ruling from the CJEU regarding the interpretation of Regulation (EEC) No 1408/71, which was at that time the applicable regulation (Regulation 1408/71 has since been replaced by Regulation (EC) No 883/2004, the current applicable regulation, from 1 May 2010).

In particular, the Supreme Court of the Netherlands asked what standards should be used to assess which legislation was designated by Regulation (EEC) No 1408/71 as being applicable in the case of a worker residing in Belgium who performed the bulk of his work for his Dutch employer in the Kingdom of the Netherlands, and who in addition performed 6.5% of that work in Belgium during the year in question, either at home or with clients, without there being a fixed pattern and without any prior agreement having been made with his employer with regard to the performance of work in Belgium.

One of the main principles to take into account, enshrined in Regulation No 1408/71 (Article 13(2)(a), is that a person employed in the territory of one Member State is to be subject to the legislation of that State, even if he resides in the territory of another Member State. However, that principle is stated to be 'subject to the provisions of Articles 14 to 17' of Regulation No 1408/71. In certain specific situations, the unrestricted application of the rule set out in Article 13(2)(a) of that regulation might create (rather than prevent) administrative complications for workers as well as for employers and social security authorities, which would place obstacles in the way of the freedom of movement of persons covered by that regulation (paragraph 16).[23]

Thus, in the case of working in the territory or two or more Member States, it is possible to derogate from the above rule and to apply the legislation of the Member State in whose territory the worker resides, if he pursues his activity partly in that territory. However, such a derogation applies on condition that the person in question is **normally employed** in the territory of two or more Member States (Article 14(2)(b)(i) of Regulation (EC) No 1408/71). Such a requirement assumes that the person concerned **habitually** carries out significant activities in the territory of two or more Member States[24] (paragraph 19). Therefore, in the case of a person who works in a Member State merely occasionally, the derogation rule cannot be applied.

To determine whether a person should be considered as being normally employed in two or more Member States or, conversely, whether they work merely occasionally in multiple Member States, regard must be given to

[23] Judgement of 4 October 2012, Format Urządzenia i Montaże Przemysłowe, C-115/11, EU:C:2012:606, paragraph 31.
[24] See, by analogy, the judgement of 30 March 2000, Banks and Others, C-178/97, EU:C:2000:169, paragraph 25.

- the duration of periods of activity;
- the nature of the employment, as defined in the contractual documents; and
- the actual work performed, where appropriate.[25]

In the present case, a person such as the one in question in the main proceedings cannot be considered to have habitually carried out significant activities in the territory of his Member State of residence, because: (i) the employment contract did not provide for X to carry out work in the territory of his Member State of residence (i.e. such an arrangement having been agreed with his employer in advance); (ii) during the year in question, X performed only approximately 6.5% of his total hours worked in that Member State. It is necessary to derogate from the general rule of connection to the Member State of employment only in specific situations demonstrating that another connection is more appropriate (paragraph 27). Therefore, the derogation could not apply because, in the aforementioned circumstances, X was not to be considered to be normally employed in the territory of two Member States, within the meaning of that provision.

In addition to the decision of the CJEU, also of note in this case is the Opinion of Advocate General Szpunar[26], who warned of the possibility for telework to change the applicable rule. In particular, he highlighted that teleworking could "potentially undermine the concept of a particular place of employment, as a relevant factor for determining the Member State which has the closest link to the employment relationship." He noted that the Court would, in future, have to decide how such circumstances should be taken into account for the purposes of determining applicable laws.[27]

[25] See, to this effect, the judgements of 12 July 1973, Hakenberg, 13/73, EU:C:1973:92, paragraph 20, and of 4 October 2012, Format Urządzenia i Montaże Przemysłowe, C-115/11, EU:C:2012:606, paragraph 44.
[26] Case C-570/15: Opinion of Advocate General Szpunar, of 8 March 2017, *X v Staatssecretaris van Financiën*.
[27] Ibid.

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