



European
Commission

Directive 2003/88/EC on working time

Adam Pokorny

Head of Unit EMPL C1 Labour Law



Role of social partners in implementation of social policy Directives

The autonomy of social partners is recognised in EU primary law:

Article 28 of the Charter of Fundamental Rights:

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

TFEU Article 152(1):

The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their² autonomy.



Role of social partners in implementation of social policy Directives

General – Article 153(3) TFEU

"A Member State may entrust management and labour, at their joint request, with the implementation of directives [adopted under Art 153 or Art 155] ... the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive..."

Important interpretations from CJEU:

Case 143/83 Commission v Denmark

- *All workers in the EU (para 8)*
- *Full protection of the directive (para 8)*
- *Clear and precise understanding (para 11) – more so when individuals are allocated rights (principle of legal certainty (para 10))*
- *Creates a binding and predictable legal basis: Must enable the court to ensure that the rights and obligations are observed (para 11) – confirmed in C-311/21 TimePartner*



Role of social partners in implementation of social policy Directives

Specific – established in Working Time Directive

Article 18

- **“Article 17-type derogations” may be made (from daily and weekly rest, breaks, night work requirements and reference periods) in any sector, if laid down by means of collective agreements or agreements between the two sides of industry at (in principle) national or regional level.**

Article 19

- **The reference period for the calculation of the 48 hour weekly working time limit may be extended to 12 months on the basis of a collective agreement, if Member States provide so.**

Working Time Directive 2003/88/EC “Back to basics”

1. “working time” means any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice;
2. “rest period” means any period which is not working time;’.

As per Recital 5 of the Directive, the concept of ‘rest’ must be expressed in units of time, i.e. in days, hours and/or fractions thereof.

- **Art 3: Daily rest: at least 11 consecutive hours per 24 hour period**
- **Art 5: Weekly rest: 24+11 hours (confirmed in C-477/21 MAV-Start)**
- **Art 6: Weekly working time max 48 hours - may be averaged over 4 months (Art 16), 6 months or 12 months if based on a collective agreement (Art 19) – possibility of individual opt-out (Art 22) under strict conditions**



Working Time Directive 2003/88/EC

Derogations and disapplication

- **Art 17: Derogations for autonomous workers and for certain situations, notably those requiring continuity of service, distant workplaces, surge of activity, unusual and unforeseeable circumstances beyond the employer's control (Art 5.4 OSH Framework Dir 89/391/EC), accident or imminent risk of accident.**
- **Art 18: Derogations for any sector, if contained in a collective agreement in principle at national or regional level.**
- **Missed rest must be compensated (daily rest immediately (C-151/02 *Jaeger* para 94)) or, exceptionally if compensatory rest not possible, subject to "appropriate protection" (WTD Art 17.2)**
- **CJEU case-law defines situations where the WTD may be disappplied "where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain activities in the civil protection services inevitably conflict with it" (Dir 89/391/EC Art 2.2). Notably C-52/04 *Feuerwehr Hamburg*, C-147/17 *Sindicatul*, C-742/19 *Ministrstvo za obrambo* 6**



What is (and is not) working time?

- Working time defined as organisation of activity : *“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 Art 2.1) Form of work (presence, telework) immaterial. WTD does not define fixed working hours; rest in opposition to working time.

- *C-55/18 CCOO*

Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured (§ 60).

The form of that system is to be determined by the Member States, taking account of the different sectors and characteristics and size of undertakings (SMEs) (§ 63)



Back to basics – what is (and is not) working time?

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EuGH-Urteil

Kommt jetzt die Stechuhr?

Der Europäische Gerichtshof hat entschieden: Arbeitszeit muss vollständig erfasst werden, zum Schutz der Arbeitnehmer. Was das Urteil bedeutet und welche Folgen es hat.

Von [Viola Kiel](#)
14. Mai 2019, 13:09 Uhr



It's not this:

Welche Schwierigkeiten drohen bei der Umsetzung?

Das EuGH-Urteil sieht vor, Arbeitszeit vollständig zu erfassen. In manchen Berufen ist es aber gar nicht so einfach, klar einzugrenzen, was als Arbeit gilt: Wann beginnt zum Beispiel für eine Wissenschaftlerin, die über Wochen und Monate über ein Problem nachdenkt, die Arbeitszeit? Wie kann Zeit, in der berufliche Kontakte und Netzwerke gepflegt werden, bewertet werden? Der DGB schlägt diese Definition vor: "Alles, was ich mache, um das betriebliche Interesse meines Arbeitgebers zu befriedigen, ist Arbeit und als solche zu erfassen." Eine einheitliche, rechtlich bindende Abgrenzung, gibt es bislang aber nicht.

What is working time? – CJEU case-law on on-call and standby

- Status of “on-call” time at the place determined by the employer and “stand-by” at the place determined by the worker (eg at home) has long been controversial and subject to extensive jurisprudence of CJEU.
- Two main phases of jurisprudence: 1) 2000-2018; 2) 2018 – ongoing.

Phase 1:

- Following C-303/98 SIMAP and C-151/02 Jaeger – all on-call periods where the worker is required to remain at the workplace are to be treated as working time in their entirety, even when the worker is resting and not providing services
- If the worker is on stand-by outside the place determined by the employer, only time linked to the actual provision of services must be regarded as working time.
- Features to note: the place is decisive, reaction time, quality of rest time, frequency of interventions are not considered / not relevant

What is working time? – CJEU case-law on on-call and standby

- Phase two from 2018 - qualification of stand-by duty as 'rest period' or as 'working time'
- *C-518/15, Matzak*
- *C-344/19, Radiotelevizija Slovenija*
- *C-580/19, Stadt Offenbach am Main*
- *C-107/19, Dopravní podnik hl. m. Prahy*
- *C-214/20, Dublin City Council*

Case C-518/15 Matzak

- Mr Rudy Matzak was employed as a (volunteer) firefighter at the fire-station in Nivelles, Belgium
- He was regularly on evening and weekend standby duty. He was able to leave his workplace but had to return to the fire-station within 8 minutes if called.





Case C-344/19

Radiotelevizija Slovenija

- D. J. was employed as a technical transmission specialist by Radiotelevizija Slovenija.
- He worked at transmission centres ('TCs') located in high mountains. The employer **provided D.J. with accommodation** at the TC, as he did not have time to return home during daily rest periods.
- The vicinity of the TCs offered limited possibilities of leisure activities and the TCs were difficult to access.
- While on stand-by, he had to reach his place of work **within one hour**.

Case C-580/19

Stadt Offenbach am Main



- R. J. was a firefighter employed by Offenbach am Main fire service.
- While on stand-by duty, he had to be constantly reachable, keep his uniform ready and have an operational vehicle with him. This vehicle was granted special rights when using alarm signals in road traffic.
- He had to accept calls by which he was informed, as incident commander, of events and on which he had to make decisions. In certain situations, he needed to go to the incident scene or place of employment.
- During his duty R. J. had to choose his whereabouts in such a way that, if he is alerted, he can reach **the Offenbach city boundary within 20 minutes with the operational vehicle and in uniform.**



Case C-107/19


Dopravní podnik hl. m. Prahy

- XR worked as a firefighter.
- He was entitled to two **30-minutes breaks** during his 12-hour and 15 hours shifts.
- During the breaks, he could go to the staff canteen in a neighboring building, but **could not leave the compound.**
- He was equipped with a transmitter and had to be ready for emergency call-outs **within two minutes.**



Case C-214/20, Dublin City Council

- M.G. worked for the Dublin City Council who employed him as a 'retained firefighter'.
- He could spend his stand-by duty time in the place of his choice and was authorized to work for another employer under the condition that his second employer released him in case of an emergency. **He worked during his stand-by duty as a self-employed taxi driver.**
- During his stand-by duty he was obliged to respond to calls preferably within **5 minutes and within 10 minutes maximum**. But he was not required to respond to all the calls (he had to attend 75% of fires and 85% of trainings).



What's new?



What is new?

- Distinction between stand-by from a place determined by the employer (in principle 'working time') and stand-by from the place of worker's choice (further assessment necessary) is maintained BUT with **specific approach for stand-by performed from worker's home**;
- Emergence of a **uniform general criterion** based on the **possibility for the workers to dedicate themselves during their stand-by to activities of their own interest**, with **specific guidance** for different type of factual circumstances;
- Necessity to take into account the general **obligation of protection of the workers' health and safety** stemming from Directive 89/391 even when stand-by qualifies as 'rest periods'.



Stand-by at home

- In C-580/19, § 34, C-214/20, § 45 and C-107/19, § 31:

*'[...] the Court has held, regarding periods of stand-by time undertaken at places of work which were **separate from the workers' residence**, that the decisive factor [...] is the fact that the worker is required to be physically present **at the place determined by the employer** [...]*

- C-344/19, § 43 and C- 580/19, § 43:

- If the workplace **includes or is indistinguishable from the worker's residence**, the mere fact that, during his or her stand-by, the worker is required to remain at his or her workplace does not suffice for that period to be classified as 'working time'.
- In that case, the worker must not necessarily remain apart from his or her family and social environment.
- And remaining at the place of residence is less likely to interfere with the possibility of the worker freely managing the time during which his or her professional services are not required.

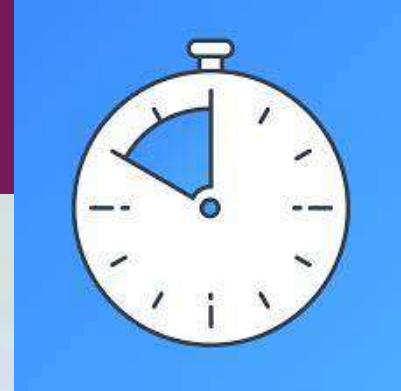
General criterion based on workers' possibility to dedicate their time to their own interests

- **This Criterion appears in all the cases** (C-518/15, § 63; C-344/19, § 37; C-580/19, § 38; C- 107/19, § 34 and C-214/20, § 42).
- 'Working time' covers **the entire periods** of stand-by time, during which the **constraints imposed on the worker affect objectively and very significantly the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests.**
- Conversely, where the constraints imposed on a worker allow him or her to manage his or her own time, and to pursue his or her own interests **without major constraints, only the time linked to the provision of work actually carried out during that period constitutes 'working time'.**



What elements the national judge must take into account?

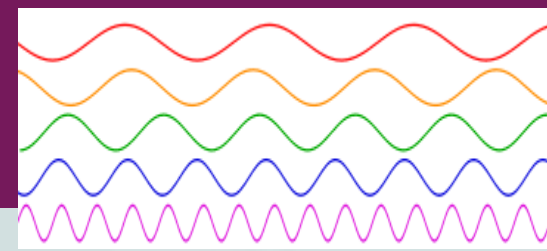
- **The time** required to resume work;
- **Frequency** of interventions;
- **Other constraints** imposed on the worker;
- **Facilities** provided to the worker;
- Possibility to carry out **another professional activity**;
- **Possibility not to respond to a certain part of calls.**



Time required to resume work

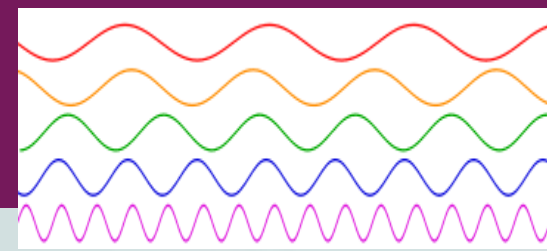
- In C-518/15, Matzak: **8 minutes**;
- In C-344/19, Radiotelevizija Slovenija : **1 hour**;
- In C-580/19, Stadt Offenbach am Main: **20 minutes**;
- In C-107/19 Dopravní podnik hl. m. Prahy: **2 minutes**;
- In C-214/20 Dublin City Council: **5-10 minutes**;

- **Few minutes = in principle 'working time'**;
- However, the judge also needs to assess other constraints and facilities granted to the worker (for example: C-344-19, §41).



The average frequency of the actual services (1)

- Must be taken into account only **where it is possible to objectively estimate this frequency** (C-344/19, § 51);
- If the worker is called upon to act on **numerous occasions** and 'as a general rule' the duration of **activity to be performed is of 'non-negligible duration'** the stand-by period qualifies as 'working time' (C-344/19, § 52-53).



The average frequency of the actual services (2)

- However, **the fact that the worker is rarely called does not lead necessarily to qualification of those periods as 'rest periods'**: when the time period to react is very constraining, they can still qualify as 'working time' (C-344/19, § 54);
- **'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 put that worker on permanent alert'** (C-107/19).



Other elements to be taken into account

- **Other constraints imposed** by employer, legislation or collective agreements (C-344/19, § 39), such as obligation to be dressed in uniform (see C-580/19 § 49);
- **Facilities provided by the employer** (such as a car with special traffic rights or possibility to perform the requested service from home see C-580/19, § 49);
- **Possibility to carry out another professional activity** (C-214/20: §§ 43-44, where the Court refers to 'the effective pursuit of such an activity for a significant portion' of stand-by periods);
- The fact that the worker is **not obliged to respond to all the calls** (C-214/20 § 44: in the case at stake the worker was not obliged to take part in a quarter of interventions).

What elements are not relevant?

- **Constraints that are not imposed on the worker** (C-344/19: §§ 40-41 and C-580/19 §§ 41-42)
 - **the consequence of natural factors or of his or her own free choice** (including the choice of residence or remote geographical location of the working place);
 - **the choice by the worker of their place for the pursuit of another professional activity** (C-214/20 § 45).
- **Constraints inherent to the specificity of breaks** (C-107/19 § 39: in this case 'inevitably resulting from the 30 minute duration of each break')
- **Service accommodation** located at workplace or in its immediate vicinity 'does not constitute, in itself, a decisive factor' (C-344/19, § 50).



Overriding obligation to protect the workers' health and safety (1)

- The qualification of a stand-by period as 'rest period' is 'without prejudice' to the employers' **duty to comply with their obligations under Directive 89/391 to protect the safety of their workers** (C-344/19, § 61).
- It follows from Article 5(1) and Article 6 of Directive 89/391 that **employers are obliged to evaluate and prevent all risks to the safety and health of workers**. This includes certain psychosocial risks, such as stress or burnout (C-344/19, § 62).



Overriding obligation to protect the workers' health and safety (2)

- The worker needs to be able to **withdraw from the working environment for a sufficient number of consecutive hours**, so as to permit him or her to neutralise the effects of work (C-344/19, § 66).
- The employers **cannot establish periods of stand-by so long and frequent that they could put at risk workers' health** (idem §67).
- **It is for the MS to define detailed arrangements** for the application of that obligation (idem § 67).

Other judgments on WTD to bear in mind

- *C-262/20 VB*

Article 20 of Charter of Fundamental Rights “everyone is equal before the law” requires objective justification for unequal treatment under EU law, including WTD (§ 58)

More favourable treatment of one group of workers vis a vis another [in this case private vs public sector workers performing night work] must be based on such an objective and reasonable criterion (§ 80)