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Standby periods as working time in the view of European Directives 2003/88/EC and (EU) 2019/1152

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ABSTRACT: *The objective of this study is to analyze the concept of working time in the case of standby workers. First, it highlights the regulation of working time in the European directive 2003/88/EC. Then, it focuses on working time patterns in standby periods and the variables that shape the diversity of these periods in the light of the case law of the European Court. Finally, it emphasizes to the standby periods as a form of flexible employment that falls under the employers' information obligation according to directive (EU) 2019/1152. This research reaches the conclusion that the two above-mentioned European directives move towards protected flexibility, each from a different perspective, though there is still progress to be made in protecting the various constantly emerging working patterns.*

KEYWORDS: working time, Court of Justice, standby worker, rest period, working time directive, unpredictable and flexible working conditions

INTRODUCTION

On-call or standby work is an occupational arrangement where an employee must be available to start or resume work, at short notice. Over the past decade, irregular work schedules have become increasingly prevalent worldwide. These shifts are typically defined as non-restrictive, meaning they allow the employees to use this time for their own purposes, they just require employees to carry a phone and return to work within a set period of time if needed. On-call shifts are often scheduled in between regular working shifts and frequently include weekends and overnight. On-call shifts are often used to provide daily coverage for facilities where emergencies require trained onsite personnel but the business volume does not require regular shift coverage (Kogan et al, 2021). This type of work involves handling issues that arise unexpectedly. Work on call is usually combined with part-time work; the employee is employed for standard hours and after the end of his/her shift remains on call for a certain period.

Among the most pressing questions for regulatory frameworks on non-standard forms of work is **how to address periods** in which workers must remain on-call or standby, during which they are not required to carry out their primary tasks but to be ready to return to duty as and when the employer requires them. As the unpredictability in working hours suggests, the nature of

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this kind of employment implies that employees may be called upon at short notice to perform tasks for which it is difficult or impossible to plan (McCann/Murray, 2010). Our present study focuses on two questions; (a) whether time spent on 'standby' is working time or rest in the view of Directive 2003/88/EC concerning certain aspects of the organization of working time and (b) whether standby workers must have early information on work schedules according to Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union.

The working time in the view of the Directive 2003/88/EC

In the first place, it must be clarified that the purpose of Directive 2003/88 is to lay down **minimum requirements** concerning the duration of working time in order to improve the living and working conditions of workers. It establishes a maximum average working week of 48 hours for all EU workers and regulates paid annual leave, minimum weekly and daily rest periods, rest breaks during the working day, and limits on the length of night work. This organization of working time at European level intends to **guarantee better protection of the health and safety of workers** by ensuring that they are entitled to minimum rest periods – particularly daily and weekly – as well as adequate breaks, and by providing for a ceiling on the duration of the working week (Radiotelevizija Slovenija, paragraph 25).

The Court of Justice of the European Union has had the opportunity to interpret the scope of the provisions of the Working Time Directive on numerous occasions (Maiso Fontecha, 2022). The various requirements laid down in Directive 2003/88 concerning maximum working time and minimum rest periods constitute **rules of EU social law** of particular importance from which every worker must benefit and compliance with which should **not be subordinated to purely economic considerations** (Radiotelevizija Slovenija, paragraph 26). Moreover, by establishing the right of every worker to a limitation of maximum working hours and to daily and weekly rest periods, Directive 2003/88 gives specific form to the fundamental right expressly enshrined in Article 31(2) of the Charter of Fundamental Rights of the European Union and must, therefore, be interpreted in the light of that Article 31(2) (Stadt Offenbach am Main, paragraphs 26-28).

Article 2 of Directive 2003/88 defines 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*". In its second paragraph, Article 2 defines 'rest period' as "*any period which is not working time*". As the Court has clarified in previous case law, these two concepts are **mutually exclusive** and there is **no scope for intermediate categories** (Maiso Fontecha, 2022). A worker's time on standby must therefore be classified as either 'working time' or a 'rest period' for the purpose of applying Directive 2003/88, since the directive does not provide for any intermediate category (Judgments: Federación de Servicios Privados del sindicato Comisiones obreras, paragraphs 25 and 26, Matzak, paragraph 55, Dopravní podnik hl. m. Prahy, paragraph 28). Furthermore, the concepts of 'working time' and 'rest period' are concepts of EU law, which must be defined in accordance with objective characteristics by

reference to the scheme, and purpose of Directive 2003/88. Only an autonomous interpretation of that nature is capable of ensuring the **full effectiveness** of that directive and the uniform application of those concepts in all the Member States (Jaeger, paragraph 58).

The Court's initial case law seemed to draw a straightforward line between working and rest time, based on **the criterion of presence at the workplace**. Along the way, it revisited that case law and stipulated a more nuanced approach, confirming that at least certain forms of offsite standby duty needed to be classified as "working time" in the meaning of the Working Time Directive (Hießl, 2021). Ever since the European Court accepts that the concept of 'working time' within the meaning of Directive 2003/88 covers the entirety of periods of standby time, during which **the constraints** imposed on the worker are such as to **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 during a specific period of standby time **do not reach such a level of intensity** and 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' for the purposes of applying Directive 2003/88 (Radiotelevizija Slovenija, paragraph 38, Stadt Offenbach am Main, paragraph 38).

In particular, the criteria set by the Court for the evaluation of waiting periods as working time are the following:

First, **the physical presence and availability of the worker at the place of work** during the standby period with a view to providing his professional services is regarded as working time, even if the activity actually performed varies according to the circumstances (Simap, paragraph 48, Matzak, paragraph 59, Jaeger, paragraph 63). If the standby period in the form of physical presence at the place of work were excluded from the concept of 'working time', that would seriously undermine the objective of Directive 2003/88, which is to ensure the safety and health of workers by granting them adequate rest periods and breaks (Simap, paragraph 49).

Furthermore, it is apparent from the case-law of the Court that the determining factor for the classification of 'working time', within the meaning of Directive 2003/88, is the requirement that the worker be physically present at the **place determined by the employer** and to be available to the employer in order to be able to provide the appropriate services immediately in case of need. In fact, those obligations, which make it **impossible for the workers concerned to choose the place** where they stay during standby periods, must be regarded as coming within the ambit of the performance of their duties (Jaeger, paragraph 63, and Grigore, paragraph 53).

Secondly, the impact of **the time limit within which the worker is required to return to work** is a relevant criterion for classifying the whole of the period of standby as 'working time' within the meaning of Article 2(1) of Directive 2003/88 (Radiotelevizija Slovenija, paragraph 47-49). By contrast, organizational difficulties that a period of standby time may generate for

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the worker, which are not the result of such constraints but are, for example, the consequence of natural factors or of his or her own free choice, may not be taken into account (Radiotelevizija Slovenija, paragraph 40). So, a substantial distance between the residence freely chosen by the worker and the place that he or she must be able to reach within a certain time during the period of standby time is not, in itself, a relevant criterion for classifying the whole of that period as 'working time'.

Another criterion is, thirdly, **the average frequency of the activities** that the worker is actually called upon to undertake over the course of standby period (Radiotelevizija Slovenija, paragraph 46). Thus, if the worker is, on average, called upon to act on numerous occasions during a period of standby, he or she has less scope freely to manage his or her time during those periods of inactivity, given that they are frequently interrupted. That is even truer where the activity required of the worker, during a period of standby, is of a non-negligible duration. It follows that, if the worker is, on average, frequently called upon to provide services during his or her periods of stand-by time and, as a general rule, those services are not of a short duration, the entirety of those periods constitutes, in principle, 'working time' within the meaning of Directive 2003/88.

All these **intermediate categories of working time** are characterized by the fact that the employee is not obliged to carry out his/her normal tasks with the usual continuity, but has to be ready to work if called upon to do so, in response to specific events which cannot be predicted precisely in advance. The distinctions between the different intermediate categories relate **to the degree of availability**, which the employee must provide. National laws frequently distinguish between the **'active' periods of on-call time** where the worker is actually called upon to work (either at home or at the workplace) and the **'inactive' periods of on-call time** where the worker is still on call, but is not called upon to carry out tasks (European Commission, 2010).

In any case, the Court notes that the classification of a period of standby 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 that obligation (Radiotelevizija Slovenija, paragraphs 61 to 65).

The outcome in these cases was a welcome development for those who favor a more flexible approach to the interpretation of the Directive. Yet, there has been criticism of the Court's view, as well. At a time when the boundaries between work and leisure time are increasingly blurred – a trend that has been accelerated by the Covid-19 pandemic – it is unfortunate that the EU

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first and the CJEU secondly did not use this opportunity to be more forthright in its assessment of what it means to be at an employer's disposal (Zahn, 2021).

Timely information to standby employees about work schedules according to Directive (EU) 2019/1152

The Directive's 2019/1152 primary objective is the improvement of working conditions by promoting more transparent and predictable employment while ensuring labor market adaptability. In particular, the Directive 2019/1152 aims at guaranteeing that all workers, regardless of their specific working arrangements, receive more **thorough and complete information** regarding essential aspects of their work. It further concentrates on workers' rights to be informed within a reasonable period in advance of when exactly their employment would start. This is especially important for those with very **variable working schedules** that are determined by the employer (Bednarowicz, 2019). In these cases, the work pattern is entirely or mostly **unpredictable.**

In particular, the employer must inform the worker that the work schedule is variable, the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours, the reference hours and days within which the worker may be required to work, and the minimum notice period to which the worker is entitled before the start of a work assignment. In other words, the worker is not obliged to work unless both of the following conditions are fulfilled: (a) the work takes place within predetermined reference hours and days and (b) the worker is informed by his or her employer of a work assignment within a reasonable notice period established in accordance with national law, collective agreements or practice. Where one or both of those requirements are not fulfilled, a worker has the right to refuse a work assignment **without adverse consequences**. National law, collective agreements or practice should ensure that the worker is entitled to compensation if the employer cancels, after a specified reasonable deadline, the work assignment previously agreed with the worker (article 10 of the directive). The provision of article 10 is supplemented by the provision in article 3 that the obligation to inform the employee of the essential working conditions includes the reference hours and days within which the employee may be called upon to work. The purpose of the regulations is to create **transparent and predictable working conditions** that will provide the employee with security in planning his/her professional and private life.

The EU legislator has in mind on-demand contracts, under which the employer has the flexibility to call the employee to work according to his needs. According to Article 11 of the Directive, Member States should take complementary measures for on-demand contracts such as (a) limitations to the use and duration of on-demand or similar employment contracts; (b) a rebuttable presumption of the existence of an employment contract with a minimum amount of paid hours based on the average hours worked during a given period; (c) other equivalent measures that ensure effective prevention of abusive practices.

Although article 10 of the Directive, as explained in paragraph 12 of the preamble, refers mainly to zero hour contracts and some on-demand contracts (Zerdelis, 2023), there is no doubt that **the work pattern of all kind of standby workers** is entirely or mostly unpredictable. In this sense, the requirements laid down in article 10 can be utilized by the national legislations when incorporating the directive, in order to protect all types of standby periods, which fall under the provision anyway. After all, standby workers as well as workers on demand and on zero hour contracts need to benefit from a minimum level of predictability. The scope of Directive 2019/1152/EU is, moreover, particularly broad, as it seeks to ensure the protection of "all workers" employed in the European Union regardless of the form of work, including those with flexible employment (Poluchroniadou, 2019). These flexibility standards are fashioned to facilitate unpredictable demands. The work pattern in these cases is entirely or mostly unpredictable, because the work schedule is determined mainly by the employer, be it directly, such as by allocating work assignments, or indirectly, such as by requiring the worker to respond to clients' requests.

In conclusion, all kind of workers must be subject to a certain level of employment and social protection. Stability and predictability of employment is surely crucial for the vulnerable workforce prone to experience precarity (Bednarowicz, 2019). In that field, the Directive certainly aims to contribute towards making unpredictable employment more secure, and to the broader agenda of making employment more decent and sustainable (Bozhko, Kulchi, Zadorozhnyy, 2020, Georgiou, 2022).

CONCLUSION

The objective of this study has been to conceptualize the working hours of standby workers as a subject of legal regulation. The study first identified the regulatory dimensions of contemporary working time patterns in standby periods. It then reviewed the variables that shape the diversity of standby periods under the light of the case law of the European Court. The study highlights the standby periods as a form of flexible employment, requiring interventions that address the interplay of flexibility and protection. The two European directives 2003/88/EC and 2019/1152/EU are moving towards protected flexibility, each from a different perspective. The "framed flexibility" model permits the kinds of flexibility needed in many new forms of employment while simultaneously offering sufficient protection to workers to ensure decent work (McCann /Murray, 2010).

References

1. Bednarowicz Bartłomiej (2019) Industrial Law Journal, Vol. 48, No. 4, December 2019. Published by Oxford University Press on behalf of Industrial Law Society. https://doi:10.1093/indlaw/dwz021
2. Bozhko Volodymyr, Kulchi Inna and Zadorozhnyy Volodymyr (2020). SHS Web Conf. Volume 85, 2020, 7th International Interdisciplinary Scientific Conference SOCIETY. HEALTH. WELFARE. https://doi.org/10.1051/shsconf/20208501005

3. Georgiou Despoina (2022). The new EU Directive on Transparent and Predictable Working Conditions in the context of new forms of employment. European Journal of Industrial Relations. Volume 28, Issue 2, June 2022, Pages 193-210. https://doi.org/10.1177/09596801211043717
4. Hießl, C. (2021). Standby Time under European Law: Difficult Prospects for a "Right to Disconnect", International Labor Rights Case Law, 7(3), 358-363. Doi: https://doi.org/10.1163/24056901-07030014
5. Kogan, Lori & Schoenfeld-Tacher, Regina & Carney, Patrick & Hellyer, Peter & Rishniw, Mark. (2021). On-Call Duties: The Perceived Impact on Veterinarians' Job Satisfaction, Well-Being and Personal Relationships. Frontiers in Veterinary Science. 8. 740852. 10.3389/fvets.2021.740852.
6. McCann Deirdre/Jill Murray (2010). The legal regulation of working time in domestic work. International Labor Organization. Geneva.
7. Maiso Fontecha, L. (2022). Working time: recent case law of the Court of Justice of the European Union. ERA Forum 23, 1–6. https://doi.org/10.1007/s12027-022-00708-7
8. Polychroniadou A., Directive 2019/1152/EU on transparent and predictable working conditions in the European Union, OJEU 1/2022.25, sakkoulas-online. Retrieved from https://www.sakkoulas-online.gr/reader/9538ec94736b0743223c/ (12/4/2023).
9. Zahn Rebecca (2021). Does Stand-by Time Count as Working Time? The Court of Justice Gives Guidance in DJ v Radiotelevizija Slovenija and RJ v Stadt Offenbach am Main. European Papers, Vol. 6, 2021, No 1, European Forum, Highlight of 22 April 2021, pp. 121-124. Doi: 10.15166/2499-8249/456
10. Zerdelis Dimitris (2023). Work On-demand and limits on flexible organization of working time (Article 10 of Directive 2019/1152). Labor Law Review 2023, p. 193.
11. European Commission (2010). Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organization of working time ('The Working Time Directive'). Commission Staff Working Paper.

Case law of CJEU

1. Judgement of 9th March 2021, Radiotelevizija Slovenija, C-344/19, ECLI:EU:C:2021:182
2. Judgement of 9th March 2021, Stadt Offenbach am Main, C-580/19, EU:C:2021:183.
3. Judgement of 10 September 2015, Federación de Servicios Privados del sindicato Comisiones obreras, C-266/14, EU:C:2015:578.
4. Judgement of 21 February 2018, Matzak, C-518/15, EU:C:2018:82.
5. Judgement of 9 September 2021, Dopravní podnik hl. m. Prahy, C-107/19, EU:C:2021:722
6. Judgment of 9 September 2003, Jaeger, C-151/02, EU:C:2003:437
7. Judgment of 3 October 2000, Simap, C-303/98, EU:C:2000:528
8. Order of 4 March 2011, Grigore, C-258/10, not published, EU:C:2011:122