Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

9 March 2021 (*)

(Reference for a preliminary ruling – Protection of the safety and health of workers – Organisation of working time – Directive 2003/88/EC – Article 2 – Concept of 'working time' – Stand-by time according to a stand-by system – Specific work maintaining television transmitters situated far away from residential areas – Directive 89/391/EEC – Articles 5 and 6 – Psychosocial risks – Obligation to prevent)

In Case C-344/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vrhovno sodišče (Supreme Court, Slovenia), made by decision of 2 April 2019, received at the Court on 2 May 2019, in the proceedings

D. J.

v

Radiotelevizija Slovenija,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal, M. Vilaras and N. Piçarra, Presidents of Chambers, T. von Danwitz, C. Toader, M. Safjan, D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos (Rapporteur) and L. S. Rossi, Judges,

Advocate General: G. Pitruzzella,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 22 June 2020,

after considering the observations submitted on behalf of:

– D. J., by M. Šafar and P. Boršnak, odvetnika,

– Radiotelevizija Slovenija, by E. Planinc Omerzel and G. Dernovšek, odvetnika,

– the Slovenian Government, by A. Grum and N. Pintar Gosenca, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by B. Rous Demiri and by B.-R. Killmann and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 October 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2 of 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).

2 The request has been made in proceedings between D. J. and Radiotelevizija Slovenija concerning the salary claimed by D. J. for services consisting in stand-by time according to a stand-by system that he had provided. It should be noted at the outset that, in the context of the present judgment, the term 'stand-by' 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 'stand-by time according to a stand-by system' covers those periods of stand-by time during which the employee is not required to remain at his or her workplace.

Legal context

European Union law

Directive 89/391/EEC

3 Article 5(1) of 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) provides:

'The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.'

4 Article 6 of that directive provides:

'1. Within the context of his responsibilities, the employer shall take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organisation and means.

The employer shall be alert to the need to adjust these measures to take account of changing circumstances and aim to improve existing situations.

2. The employer shall implement the measures referred to in the first subparagraph of paragraph 1 on the basis of the following general principles of prevention:

(a) avoiding risks;

(b) evaluating the risks which cannot be avoided:

(c) combating the risks at source;

…

3. Without prejudice to the other provisions of this Directive, the employer shall, taking into account the nature of the activities of the enterprise and/or establishment:

(a) evaluate the risks to the safety and health of workers, inter alia in the choice of work equipment, the chemical substances or preparations used, and the fitting-out of workplaces.

Subsequent to this evaluation and as necessary, the preventive measures and the working and production methods implemented by the employer must:

– assure an improvement in the level of protection afforded to workers with regard to safety and health,

– be integrated into all the activities of the undertaking and/or establishment and at all hierarchical levels;

…’

Directive 2003/88

5 Article 1 of Directive 2003/88 provides:

‘1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and

(b) certain aspects of night work, shift work and patterns of work.

…’

6 Article 2 of that directive provides:

‘For the purpose of this Directive:

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;

…’

7 Under Article 7(1) of Directive 2011/64:

‘Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.’

Slovenian law

8 Article 142 of the Zakon o delovnih razmerjih (Law on employment relationships) of 5 March 2013 (Uradni list RS, No 21/13) provides:

‘(1) Working time shall be the actual working time and break time in accordance with Article 154 of this Law, and the time of justified absences from work according to the law and the collective agreement or to a general regulatory act.

(2) All time during which workers work, which is to be understood as meaning the period in which the worker is at the disposal of the employer and fulfils his employment obligations under the contract of employment, shall constitute actual working time.

(3) Actual working time shall form the basis for calculating labour productivity’.

9 Article 46 of the Kolektivna pogodba za javni sektor (Collective Agreement for the Public Sector) of 5 June 2008 (Uradni list RS No 57/2008 et seq.) provides:

‘A public sector employee shall be entitled to a salary supplement for periods of stand-by time according to a stand-by system in the amount of 20% of the hourly rate of the basic salary. Such periods of stand-by time for a public sector worker shall not be counted as working time.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 From 1 August 2008 to 31 January 2015, D. J. worked as a specialist technician in the transmission centres of Pohorje (Slovenia), then of Krvavec (Slovenia). The nature of the work, the distance between the centres and his home and the occasional difficulty in accessing the centres where the work was to be carried out made it necessary for him to stay in the vicinity of the sites concerned. One of the two sites was moreover so far from D. J.’s home that it would have been impossible for him to travel there on a daily basis, even in the most favourable weather conditions. In the buildings of the two transmission centres, D. J.’s employer made accommodation arrangements for him and another technician, both of whom were simultaneously present in each of those transmission centres. After carrying out their professional duties, the two technicians were able to rest in the living room or pursue leisure activities in the vicinity.

11 The two technicians carried out their work in shifts, one from 6am to 6pm, the other from 12pm to midnight, D. J. having mostly worked the latter shift. The work done on that shift was ‘normal work’ which required the worker’s presence at the workplace.

12 D. J.’s employer calculated his salary on the basis of those twelve hours of ‘normal work’, without remunerating the rest period, which generally ran from midnight to 6am in the morning, whereas the six remaining hours were regarded as a period of stand-by time according to a stand-by system.

13 During that period, the employee could leave the transmission centre concerned. However, the worker had to be contactable if called and, if necessary, had to respond and to return to his place of work within a time limit of one hour. Only urgent tasks had to be carried out immediately, other tasks could be carried out the next day. In respect of that period of stand-by time according to a stand-by system, D. J.’s employer paid the claimant in the main proceedings compensation corresponding to 20% of his basic salary. However, if during that period D.J. was called upon to work, the time required for that work was counted and paid as normal work.

14 D. J. lodged an action claiming the same rate of pay for the hours during which he was on stand-by time according to a stand-by system as for overtime work, irrespective of whether he had carried out any specific work during the period of stand-by time. He based his claim on the fact that he lived on the site where he carried out his work and that he was therefore, as a matter of fact, present at his workplace 24 hours a day. Taking into account the nature of his work and the fact that he was accommodated in the transmission centres, D. J. considered that he was not able freely to dispose of his time because, in particular, during those periods of stand-by time according to a stand-by system he was required to respond to calls, if necessary, and to be able to return to his workplace within a time limit of one hour. Having regard to the fact that there were not many opportunities for leisure activities on the transmission centres’ sites, he spent the vast majority of the remainder of the time within the transmission centre.

15 D. J.’s action was dismissed both at first and second instance.

16 D. J. brought an appeal on a point of law before the referring court in which he submitted that his employer had misinterpreted the concept of ‘actual working time’, within the meaning of Article 142 of the Law on employment relationships. According to D. J., that concept covers not only the time during which the worker actually provides his or her services, but also all the time during which he or she is present at the workplace where the employer requires him or her to be. His employer however required periods of service of several days and abused recourse to periods of stand-by time according to a stand-by system.

17 The referring court stresses that the subject matter of the dispute in the main proceedings is the remuneration of services consisting in stand-by time according to a stand-by system provided by D. J..

That court considers that, even though that issue does not fall within the scope of application of Directive 2003/88, it will be unable to rule on the merits of D. J.'s claim until it has obtained certain clarifications as to the interpretation of Article 2 of that directive from the Court.

18 In that regard, the referring court considers that the case pending before it differs from cases that have already given rise to judgments by the Court of Justice on that matter.

19 Thus, first of all, contrary to the case that gave rise to the judgment of 3 October 2000, *Simap*, (C−303/98, EU:C:2000:528), D. J.'s physical presence at the workplace during stand-by times was not necessary or requested, other than when action was required, since those periods were performed on the basis of a stand-by system. Next, unlike the case that gave rise to the judgment of 9 September 2003, *Jaeger* (C−151/02, EU:C:2003:437), it was due to the very location of his workplace rather than because he had to be contactable that the opportunities for D. J. freely to manage his time and pursue his own interests were more constrained. The referring court considers, furthermore, having regard to the judgment of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* (C−266/14, EU:C:2015:578), that the time spent by a worker travelling to clients cannot be equated to a period of stand-by time according to a stand-by system. Finally, it draws a distinction with the case that gave rise to the judgment of 21 February 2018, *Matzak* (C−518/15, EU:C:2018:82), since D. J. was not required to be physically present at a specific place determined by his employer and the response time allowed for him to return to his workplace was substantially longer than it was in that case.

20 In those circumstances, the Vrhovno sodišče (Supreme Court, Slovenia) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 2 of Directive 2003/88 be interpreted as meaning that, in circumstances such as those in the case in the main proceedings, periods of stand-by time [according to a stand-by system], during which a worker who works at a radio and television transmission centre must, during his or her free periods (when his or her physical presence at the workplace is not necessary), be contactable when called and, if necessary, be at his or her workplace within one hour, are to be considered working time?

(2) Is the definition of the nature of [stand-by time according to a stand-by system], in circumstances such as those of the present case, affected by the fact that the worker resides in accommodation provided at the site where he or she performs his or her work (radio and television transmission centre), since the geographical characteristics of the site make it impossible (or more difficult) to return home ('within the locality') each day?

(3) Must the answer to the two preceding questions be different where the site involved is one where the opportunities for pursing leisure activities during free time are limited on account of the geographical characteristics of the place or where the worker encounters greater restrictions on the management of his or her free time and pursuit of his or her own interests (than if he or she lived at home)?'

Consideration of the questions referred

21 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2 of Directive 2003/88 must be interpreted as meaning that a period of stand-by time, during which a worker must be contactable by telephone and able to attend his or her workplace, if necessary, within a time limit of one hour, constitutes 'working time' within the meaning of that article; and whether the placing of service accommodation at that worker's disposal because of the difficulty in accessing his or her workplace and the limited nature of the opportunities to pursue leisure activities within the immediate vicinity of that workplace are to be taken into consideration in that classification.

22 It is clear, more specifically, from the order for reference and the case file available to the Court that the applicant in the main proceedings is a specialist technician who is responsible, together with a colleague,

for ensuring the operation over several consecutive days of a transmission centre situated on a mountain summit. D. J. was on a period of stand-by time for six hours each day. That stand-by time was undertaken according to a stand-by system, which meant that, during that period, and unlike a period on stand-by which included the obligation of being physically present at the workplace, the person concerned was required only to be contactable at any time and to be able to attend the transmission centre concerned within a time limit of one hour, if necessary.

23 As a preliminary observation, it should be recalled that, in the context of a preliminary ruling procedure under Article 267 TFEU, the Court has no jurisdiction to assess the facts in the main proceedings or to apply the rules of EU law which it has been asked to interpret to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court (see, to that effect, the judgment of 8 May 2013, *Libert and Others*, C−197/11 and C−203/11, EU:C:2013:288, paragraph 94). However, the Court may give the referring court an answer that enables it to adjudicate on the case before it by providing that court with all the elements of interpretation of EU law which may be of assistance to that end (see, to that effect, the judgment of 18 September 2019, *VIPA*, C−222/18, EU:C:2019:751, paragraph 50 and the case-law cited).

24 Thus, while it is ultimately for the referring court to examine whether the periods of stand-by time according to a stand-by system at issue in the main proceedings must be classified as 'working time' for the purposes of applying Directive 2003/88, it remains the case that it is for the Court to provide it with guidance as to the criteria to be taken into account in that examination.

25 With the benefit of those introductory points of clarification, in the first place, it must be recalled that the purpose of Directive 2003/88 is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national rules concerning, in particular, the duration of working time. That harmonisation at European Union level in relation to the organisation of working time is intended 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 (judgment of 14 May 2019, *CCOO*, C−55/18, EU:C:2019:402, paragraphs 36 and 37 and the case-law cited).

26 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 (judgment of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*, C−266/14, EU:C:2015:578, paragraph 24) compliance with which should not be subordinated to purely economic considerations (see, to that effect, the judgment of 9 September 2003, *Jaeger*, C−151/02, EU:C:2003:437, paragraphs 66 and 67).

27 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). It follows in particular that the provisions of Directive 2003/88 may not be interpreted restrictively to the detriment of the rights that workers derive from it (see, to that effect, the judgment of 14 May 2019, *CCOO*, C−55/18, EU:C:2019:402, paragraph 30 to 32 and the case-law cited).

28 In the second place, it should be observed that Article 2(1) of Directive 2003/88 defines the concept 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. Article 2(2) of that directive defines the concept of 'rest period' as any period which is not working time.

29 It follows that the two concepts, which were defined in the same way in Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p.18) which was succeeded by Directive 2003/88, are mutually exclusive. A worker's time on stand-by periods

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 (see, to that effect, the judgments of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*, C−266/14, EU:C:2015:578, paragraphs 25 and 26 and the case-law cited, and of 21 February 2018, *Matzak*, C−518/15, EU:C:2018:82, paragraph 55 and the case-law cited).

30 Furthermore, the concepts of ‘working time’ and of ‘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 (see, to that effect, the judgment of 9 September 2003, *Jaeger*, C−151/02, EU:C:2003:437, paragraph 58).

31 Hence, despite the reference to ‘national laws and/or practice’ in Article 2 of Directive 2003/88, Member States may not unilaterally determine the scope of the concepts of ‘working time’ and ‘rest period’ by making the right, which is granted directly to workers by that directive, to have working periods and corresponding rest periods duly taken into account, subject to any condition or any restriction whatsoever. Any other interpretation would frustrate the effectiveness of Directive 2003/88 and undermine its objective (see, to that effect, the judgments of 9 September 2003, *Jaeger*, C−151/02, EU:C:2003:437, paragraph 59, and of 1 December 2005, *Dellas and Others*, C−14/04, EU:C:2005:728, paragraph 45, and the order of 11 January 2007, *Vorel*, C−437/05, EU:C:2007:23, paragraph 26).

32 In the third place, and as regards more specifically periods of stand-by time, it is apparent from the case-law of the Court that a period during which no actual activity is carried out by the worker for the benefit of his or her employer does not necessarily constitute a ‘rest period’ for the application of Directive 2003/88.

33 Thus, first, 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 for finding that the elements that characterise the concept of ‘working time’ for the purposes of Directive 2003/88 are present is the fact that the worker is required to be physically present at the place determined by the employer and to remain available to the employer in order to be able, if necessary, to provide his or her services immediately (see, to that effect, the judgments of 3 October 2000, *Simap*, C−303/98, EU:C:2000:528, paragraph 48; of 9 September 2003, *Jaeger*, C−151/02, EU:C:2003:437, paragraph 63; and of 1 December 2005, *Dellas and Others*, C−14/04, EU:C:2005:728, paragraph 48).

34 It should be specified in that regard that the workplace must be understood as any place where the worker is required to exercise an activity on the employer’s instruction, including where that place is not the place where he or she usually carries out his or her professional duties.

35 The Court has held that, during such a period of stand-by time, the worker, who is required to remain at his or her workplace and to be available to his or her employer, must remain apart from his or her family and social environment and has little freedom to manage the time during which his or her professional services are not required. Therefore, the whole of that period must be classified as ‘working time’, within the meaning of Directive 2003/88, irrespective of the professional activity actually carried out by the worker during that period (see, to that effect, the judgments of 9 September 2003, *Jaeger*, C−151/02, EU:C:2003:437, paragraph 65; of 5 October 2004, *Pfeiffer and Others*, C−397/01 to C−403/01, EU:C:2004:584, paragraph 93; and of 1 December 2005, *Dellas and Others*, C−14/04, EU:C:2005:728, paragraphs 46 and 58).

36 Second, the Court has held that a period of stand-by time according to a stand-by system must also be classified, in its entirety, as ‘working time’ within the meaning of Directive 2003/88, even if a worker is not required to remain at his or her workplace, where, having regard to 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, it differs from a period during which a worker is required simply to be at his or her employer’s disposal inasmuch as it must be possible for the employer to contact him or her

(see, to that effect, the judgment of 21 February 2018, *Matzak*, C−518/15, EU:C:2018:82, paragraphs 63 to 66).

37 It follows from the elements set out in paragraphs 33 to 36 of this judgment and also from the need, recalled in paragraph 27 of this judgment, to interpret Article 2(1) of Directive 2003/88 in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, that the concept of 'working time' within the meaning of Directive 2003/88 covers the entirety of periods of stand-by time, including those according to a stand-by system, 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.

38 Conversely, where the constraints imposed on a worker during a specific period of stand-by 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 (see, to that effect, the judgments of 3 October 2000, *Simap*, C−303/98, EU:C:2000:528, paragraph 50, and of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*, C−266/14, EU:C:2015:578, paragraph 37).

39 In that regard, it should also be specified that only the constraints that are imposed on the worker, whether by the law of the Member State concerned, by a collective agreement or by the employer pursuant, inter alia, to the employment contract, employment regulations or the system of dividing stand-by time between workers, may be taken into consideration in order to determine whether a period of stand-by time is 'working time' within the meaning of Directive 2003/88.

40 By contrast, organisational difficulties that a period of stand-by time may generate for 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.

41 Thus, first, 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 stand-by time is not, in itself, a relevant criterion for classifying the whole of that period as 'working time' within the meaning of Article 2(1) of Directive 2003/88, at least where that place is his or her usual workplace. In such a case, the worker has been in a position to assess freely the distance between that place and his or her home (see, a contrario, the judgment of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*, C−266/14, EU:C:2015:578, paragraph 44).

42 Second, the limited nature of opportunities to pursue leisure activities in the area that the worker cannot, in practice, leave during a given period of stand-by time according to a stand-by system, just like the difficulty of reaching his or her workplace, are also not relevant factors for the purpose of classifying that period as 'working time' within the meaning of Directive 2003/88.

43 In addition, if the workplace includes or is indistinguishable from the worker's residence, the mere fact that, during a given period of stand-by time, the latter is required to remain at his or her workplace in order to be able, if necessary, to be available for his or her employer, does not suffice for that period to be classified as 'working time' within the meaning of Directive 2003/88. In that case, the requirement that the worker does not leave his or her workplace does not necessarily mean that he or she must remain apart from his or her family and social environment. Furthermore, such a requirement is, in itself, less likely to interfere with the possibility, during that period, of that worker freely managing the time during which his or her professional services are not required (see, in that regard, judgment of 9 September 2003, *Jaeger*, C−151/02, EU:C:2003:437, paragraph 65).

44 It should also be added that, where, due to the very nature of the workplace, the worker does not in practice have a realistic option of leaving that place after having completed his or her working hours, only those periods during which he or she remains subject to objective and very significant constraints, such as

the obligation to be immediately available to his or her employer, must automatically be classified as 'working time' within the meaning of Directive 2003/88, to the exclusion of periods during which the impossibility of leaving his or her workplace is not the result of such an obligation but solely due to the particular nature of that place.

45 Where, owing to the absence of a requirement to remain at the workplace, a period of stand-by time cannot automatically be classified as 'working time', within the meaning of Directive 2003/88, the national courts must still determine whether that classification is nevertheless required due to the consequences that all the constraints imposed on the worker have, during that period, for his or her ability freely to manage his or her time while his or her professional services are not required and to pursue his or her own interests.

46 In that context, it is necessary, more specifically, to have regard to the time period available to the worker, during the period of stand-by time, to return to his or her professional activities, starting from the moment at which the employer requests it, 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.

47 Thus, first, as the Advocate General observed, in essence, in points 98 to 100 of his opinion, national courts must take into account the consequences for the worker's ability freely to manage his or her time, resulting from the brevity of the time period within which he or she must, where action is necessary, undertake work, which, as a general rule, requires him or her to return to his or her workplace.

48 In that regard, it should be underlined that a period of stand-by time during which the worker may, taking into account the reasonable time period allowed for him or her to resume his or her professional activities, plan his or her personal and social activities does not, a priori, constitute 'working time', within the meaning of Directive 2003/88. Conversely, a period of stand-by time during which the time limit within which the worker is required to return to work is limited to a few minutes must, in principle, be regarded, in its entirety, as 'working time', within the meaning of that directive, since in that case the worker is, in practice, strongly dissuaded from planning any kind of recreational activity, even of a short duration.

49 The fact remains that the impact of such a time limit within which the worker has to react must be evaluated following a concrete assessment that takes into account, as appropriate, the other constraints imposed on the worker, just as in the case of the facilities granted to him or her during the period of stand-by time.

50 As to the fact that the employer makes available to the worker, owing to the particular nature of the workplace, service accommodation located at that workplace or in its immediate vicinity, that does not constitute, in itself, a decisive factor for the purpose of classifying periods of stand-by time according to a stand-by system as 'working time', within the meaning of Directive 2003/88, because the worker is not subject, during those periods, to constraints such that his or her ability to pursue his or her own private interests is objectively or very significantly affected.

51 Secondly, coupled with the period of time available to the worker to resume his or her professional activity, the average frequency of the actual services that are normally carried out by that worker during each of those periods of stand-by time, must, where it is possible objectively to estimate them, be taken into account by the national courts.

52 Thus, if the worker is, on average, called upon to act on numerous occasions during a period of stand-by time, 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 all the more true where the activity required of the worker, during a period of stand-by time, is of a non-negligible duration.

53 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.

54 However, the fact that, on average, the worker is only rarely called upon to act during the periods of stand-by time cannot lead to those periods being regarded as 'rest periods' within the meaning of Article 2(2) of Directive 2003/88 where the impact of the time limit imposed on the worker to return to his or her professional activities is such that it suffices to constrain, objectively and very significantly, the ability that he or she has freely to manage, during those periods, the time during which his or her professional services are not required.

55 In the present case, it should be recalled that, according to the referring court, during the periods of stand-by time according to a stand-by system at issue in the main proceedings, D. J. was required only to be immediately contactable and to be able to return to his workplace within a time limit of one hour, if necessary. The order for reference does not indicate that other constraints were imposed on that worker or that, during those periods, the average frequency of activities requiring him to return to his workplace within that period was high. In addition, that worker was provided with service accommodation at his workplace, in which he was not however required to remain at all times during those periods.

56 It is however for the referring court to assess, having regard to all the facts of the case, whether D. J. was subject, during his periods of stand-by time according to a stand-by system, to constraints of such intensity that they affected, objectively and very significantly, his ability freely to manage, during those periods, the time during which his professional services were not required and to devote that time to his own interests.

57 In the fourth place, it is important to recall that, save in the special case covered by Article 7(1) of Directive 2003/88 concerning annual paid holidays, that directive is limited to regulating certain aspects of the organisation of working time in order to protect the safety and health of workers, with the result that, in principle, it does not apply to the remuneration of workers (judgment of 20 November 2018, *Sindicatul Familia Constanța and Others*, C−147/17, EU:C:2018:926, paragraph 35).

58 Therefore, the way in which workers are remunerated for periods of stand-by time is not covered by Directive 2003/88 but by the relevant provisions of national law. Consequently, that directive does not preclude the application of a law of a Member State, a collective labour agreement, or an employer's decision that, for the purposes of the remuneration of stand-by time which makes a distinction between the treatment of periods in the course of which work is actually done and those during which no actual work is done, even if those periods must be regarded, in their entirety, as 'working time' for the purposes of that directive (see, to that effect, the order of 11 January 2007, *Vorel*, C−437/05, EU:C:2007:23, paragraph 35).

59 Similarly, Directive 2003/88 does not preclude a law of a Member State, a collective labour agreement or an employer's decision that, as regards periods of stand-by time which should be entirely regarded as not being covered by the concept of 'working time' for the purposes of that directive, nevertheless provides for the payment to the worker concerned of a sum intended to compensate him or her for the inconvenience that those periods of stand-by time cause to the organisation of his or her time and to the pursuit of his or her own interests.

60 In the fifth and final place, it follows from paragraph 29 of this judgment that periods of stand-by time that do not meet the conditions to be classified as 'working time' within the meaning of Article 2(1) of Directive 2003/88 must be regarded, with the exception of time linked to the provision of work actually carried out during those periods, as 'rest periods', within the meaning of Article 2(2) thereof, and, as such, must be included in the calculation of minimum periods of daily and weekly rest laid down in Articles 3 and 5 of that directive.

61 However, it should be noted that the classification of a period of stand-by 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 Directive 89/391 to protect the safety and health of their workers. That latter directive is fully applicable to matters of minimum daily and weekly rest periods and maximum weekly working time, without prejudice to more stringent and/or specific provisions contained in Directive 2003/88 (judgment of 14 May 2019, *CCOO*, C−55/18, EU:C:2019:402, paragraph 61).

62 First, 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 (see, to that effect, the judgments of 15 November 2001, *Commission* v *Italy*, C−49/00, EU:C:2001:611, paragraphs 12 and 13, and of 14 June 2007, *Commission* v *United Kingdom*, C−127/05, EU:C:2007:338, paragraph 41), which includes certain psychosocial risks, such as stress or burnout.

63 Secondly, as the European Commission has pointed out, even if they do not constitute 'working time' within the meaning of Article 2(1) of Directive 2003/88, services consisting in stand-by time necessarily presuppose that professional obligations may be imposed on the worker and consequently, to that extent, are a part of their working environment in a broad sense.

64 Where such services consisting in stand-by time continue, without a break, over long periods or where they occur at very frequent intervals, such that they recurrently place a psychological burden, even of a low intensity, on the worker, it may in practice become very difficult for the latter to withdraw fully from his or her working environment for a sufficient number of consecutive hours, so as to permit him or her to neutralise the effects of work on his or her safety or health. That is all the more true where services consisting in stand-by time are provided during the night.

65 It follows that, having regard to their obligation to protect workers against psychosocial risks that may arise in the their working environment, employers cannot establish periods of stand-by 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' 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.

66 It follows from all the foregoing considerations that the answer to the questions referred is that Article 2(1) of Directive 2003/88 must be interpreted as meaning that a period of stand-by time according to a stand-by system, during which the worker is required only to be contactable by telephone and able to return to his or her workplace, if necessary, within a time limit of one hour, while being able to stay in service accommodation made available to him or her by his or her employer at that workplace, without being required to remain there, does not constitute, in its entirety, working time within the meaning of that provision, unless an overall assessment of all the facts of the case, including the consequences of that time limit and, if appropriate, the average frequency of activity during that period, establishes that the constraints imposed on that worker during that period are such as to affect, objectively and very significantly, the latter's ability freely to manage, during the same period, the time during which his or her professional services are not required and to devote that time to his or her own interests. The limited nature of the opportunities to pursue leisure activities within the immediate vicinity of the place concerned is irrelevant for the purposes of that assessment.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 2(1) of 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 must be interpreted as meaning that a period of stand-by time according to a stand-by system, during which the worker is required only to be contactable by telephone and able to return to his or her workplace, if necessary, within a time limit of one hour, while being able to stay in service accommodation made available to him or her by his or her employer at that workplace, without being required to remain there, does not

constitute, in its entirety, working time within the meaning of that provision, unless an overall assessment of all the facts of the case, including the consequences of that time limit and, if appropriate, the average frequency of activity during that period, establishes that the constraints imposed on that worker during that period are such as to affect, objectively and very significantly, the latter's ability freely to manage, during the same period, the time during which his or her professional services are not required and to devote that time to his or her own interests. The limited nature of the opportunities to pursue leisure activities within the immediate vicinity of the place concerned is irrelevant for the purposes of that assessment.

[Signatures]

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* Language of the case: Slovenian.