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Between health and salary: The incomplete regulation of working time in European law

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Abstract
The European Union competences on health and safety of workplace constituted the legal basis for the 93/104 Directive to be adopted (and for the consolidated text of 2003/88 Directive). The Court of Justice has firmly maintained this approach refusing to take into account the history of international regulation on working time, which links together work and salary in perspective to give the workers the right to fair and equal treatment as regards their working conditions (as has been recently proclaimed also by the European Pillar of Social Rights). Building on these general premises, this article analyses the more recent European pieces of legislation and cases related to on-call time and proposes a new model for the definition of working time in the light of CJEU case law.

Keywords
Working conditions, working time, rest period, on-call time, standby time, international regulation fair and equal treatment.

1. The Working Time Directive: origins and scope

Although the European Commission described Directive 2003/88 on working time as 'a key element of the acquis of the European Union'[1] in a recent communication, the Directive allows for many derogations and exceptions, but contains a number of essential rules.

In consolidating previous Directive 93/104, the Directive on Working Time regulates rest periods (daily, weekly and annual leave in Arts. 3, 5 and 7 of Directive 93/ 104) and—in

1. See Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time (2017/ C 165/01) para. 1.

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detail—night work (Arts. 8-12); it includes a concise provision on shift work and, more generally, on work patterns (Article 13) as well as one on daily breaks for work days with a duration of more than six hours (Art. 4). The Directive's most substantive provision is that on maximum weekly working time which, according to Articles 6 and 16, must be calculated on the basis of a reference period (which may not exceed 12 months) as an average. The average maximum weekly working time in a seven-day period, including overtime, may not exceed 48 hours.

Another significant provision, which has been dealt with by the Court of Justice a number of times, covers the minimum duration of annual paid leave, namely four weeks, and requires employees to take leave, which cannot be replaced by an allowance in lieu.[2] The provision on annual leave has implications for the very definition of working time.

The path of the Directive has been a very long and extremely bumpy one. Interest in issues related to working time on the part of the Community institutions emerged in the mid-1970s, when European consideration of social issues began to gain considerable ground as a result of two different trends. On the one hand was the urgency of finding a remedy at the supranational level for the industrial production crisis resulting from the spread of information technology and the 1973 oil shock. On the other, there was a widespread desire to infuse some social soul into the federalism process, which actually only emerged at a very late stage, bringing European citizens closer to an entity that still appeared to be abstract and distant to them.

In the face of the long regulatory tradition that had evolved over time within the framework of ILO legislation, it seemed easy to centre Community action on working time.[3] Based on the Social Action Programme of 1973[4] and Recommendation No. 457 of 1975,[5] the European Council proposed a general reduction of working time to 40 hours per week, without affecting employees' monthly salary. Despite the flexibility provided by the Recommendation (as regards the sectors concerned and the deadline for implementing the reduction in working hours), there was no effective follow-up to the initiative. The Council had to recognise in the subsequent Resolution of December 1979[6] that the 'emanating measures' shall be subordinated to the evaluation of costs and productive capacities of the companies: the Resolution's 'recitals', contrary to the goal of reducing working hours, address structural labour market problems, and the concern that these may further increase the inflationary trends played a decisive role.

The subsequent initiatives of the Commission, which were expressly cited in the Resolution itself, were also unsuccessful: the proposal for a new Recommendation, suggesting restructuring (and the reduction of working time) as an 'instrument of social economic policy'[7] was not

2. In recent cases *Bauer*, C-569/2016 and C-570/16; *Max Planck*, C-684/16, *Kreuziger*, C-619/2016, see G. Bronzini, *Il «trittico» della Corte di Giustizia sul diritto alle ferie nel rilancio della Carta di Nizza*, at https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=38644.
3. On ILO legislation, see N. Valticos, G. Von Potobsky, *International Labour Law*, Deventer, Boston, 1995; J.-M. Thouvenin, A. Trebilcock, *Droit international social*, Bruxelles, 2013; J.-M. Servais, *International Labour Law*, Alphen aan den Rijn, 2011.
4. The Programme, submitted by the Commission to the Council on 25 October 1973 (in OJ, suppl. No. 2/74) required (Action I.5) the immediate general application of the principle of 40 hours per week as of 1975.
5. Recommendation of the Council of 22 July 1975 on the principle of the 40-hour week and the principle of four weeks of annual paid leave (75/457/EEC) in OJ L 199, 30 July 1975.
6. See OJ C2 4 January 1980, pp. 1 ff.
7. See memorandum presented by the Commission to the Council on 7 January 1983.

approved by the Council of Labour Ministers of June 1984;[8] a proposal for a Directive on 'voluntary part-time work', which the Commission presented in January 1982, was also fruitless.[9]

A new impetus for action seemed to come from the Community Charter of Fundamental Social Rights approved by the European Council in Strasbourg in December 1989, which stated among its objectives 'an improvement in the living and working conditions', which was in particular to be achieved by targeting 'the duration and organization of working time and forms of employment other than open-ended contracts' (Article 7 of the Charter). Moreover, the Charter's provisions—possibly for the first time in the history of the European institutions—reflected a different approach to the relationship between Community and national legislation, which was no longer exclusively based on the idea of harmonising different systems, but inspired by the model of the mandatory minimum standard.[10] The EU version of this formula, which is very common in national contexts, encapsulates the notion of subsidiarity – the role of supranational sources is limited to the identification of minimum levels of protection which national legislation can improve when transposing them. The provisions on working time clearly represent an important reference model, at least in most European legal systems, but only indicate the maximum amount of working time, which can be adapted (or reduced) by negotiation or legislation.

The exclusively programmatic nature of the Strasbourg Charter's provisions and the UK's refusal to participate in its proclamation[11] prevented this new initiative from building a solid foundation: the Commission began hypothesising about the use of its competences—which were established in the 1986 Single European Act—to improve the working environment and the protection of workers' health and safety and how to translate at least part of the initiatives that had failed to materialise during the 1980s, into binding acts.[12] Consequently, Directive 1991/383 was adopted, stipulating specific rules for the protection of temporary workers based to some extent on the results of the long preliminary procedure involving atypical work, thus side-stepping the aspirations of the focus of the previous initiative, namely expanding the broad area of worker protection in the Community.[13]

In relation to working time, the Commission had already moved in the same direction, presenting a proposal for a Directive on certain aspects of the organisation of working time in August 1990.[14] The outline of this proposal laid the groundwork for Directive 1993/104: it should be pointed out that the original provisions of this version of the Directive had been limited to the regulation of rest periods only (daily, weekly and annual: Arts: 3-6) and to the protection of night workers, without any provision for the duration of working time. The Commission's intention to limit the regulation of aspects closely connected with the protection of health and safety of workers contended with the guidelines provided by the Economic and Social Committee[15] and by the

8. Draft Council Recommendation on the reduction and reorganisation of working time 23 September 1983, in OJ No C 290 of 26 October 1983, page 4
9. M. Roccella – T. Treu, *Diritto del lavoro della Comunità europea*, II ediz., Padova, 1995, p. 206.
10. C. Pettiti, *La Charte communautaire des droits sociaux fondamentaux des travailleurs: un progrès?*, in *DS*, 1990, 4, pp. 387 ss.
11. V.E. Vogel-Polsky, *Quel futur pour l'Europe sociale après le sommet de Strasbourg?*, in *Droit Soc.*, 1990, 2, pp. 219.
12. G. Lyon-Caen, *Le Royaume-Uni, mauvais élève ou rebelle indomptable?*, in *Droit Soc.*, 1994, 11, pp. 656 ss.
13. M. Roccella – T. Treu, *Diritto del lavoro della Comunità europea*, II ediz., Padova, 1995, pp. 211 ss. (*adde* M. Roccella, *Comunità europea e rapporti di lavoro atipici*, in *Quad. Dir. Lav. Rel. Ind.*, 1991,10, pp. 27 ss.).
14. OJ C 254, 9 October 1990, 4 ff.
15. OJ C 60, 8 March 1991, 26 ff.

European Parliament,[16] which from the beginning opposed the 'minimalist' approach adopted by the proposed Directive, advocating a general reduction in working time for all workers.

The Parliament, in approving the Commission's proposal, introduced a series of amendments that expanded the Directive's content, thereby strengthening its scope: the notion of working time was revised with an explicit reference to the legitimacy of collective agreements aimed at limiting working hours, a proposal to increase the duration of the daily rest period and the insertion of a special provision on overtime, establishing that working time should not exceed an average of 48 hours per week, calculated over a reference period of maximum 14 days.[17]

The Social Committee called for the Commission to comply with ILO regulations, asserting that these regulations could only be proposed as a norm applicable to all EU countries, thus suggesting using the Directive as a tool to codify the regulations, which would consequently be adopted by all Member States.[18] This request was certainly not accidental, given the fact that the correlation between international and community norms had been questioned in a number of cases involving the regulation of night time work, which resulted in international conventions—even if these had been ratified by individual Member States prior to the declaration of the Treaty of Rome—being subordinated to Community provisions.[19]

This led to a modified proposal by the Commission, which maintained the original regime in the text in force at the time (as amended by SEA) based on the health and safety competences established in Art. 118 A of the Treaty.[20] This proposal was still far from the final version of the text, as it did not include a limitation to maximum weekly working time, introduced later in Art. 6, No. 2 of the Directive. One decisive factor in the adoption of the Directive was the simultaneous development of the Commission's broader objective to promote the competitiveness and growth of European companies based on the White Paper drawn up by the Commission on initiative of its President, J. Delors.[21] To promote greater flexibility in the use of human resources, it was proposed to allow companies to modify the distribution of working time to better respond to market demands on the basis of experiences and analyses of French legislation.

Although there was no clear step towards the general reduction of working time implemented in France by President Mitterrand in the early 1980s, Delors' White Paper aimed at raising companies' hourly productivity at the time by increasing the number of jobs, yet pledging to lower the tax burden of companies. It was not an accident that the Directive was adopted at the Brussels meeting of the European Council in December 1993, just a few days before being made public. The text

16. OJ C 72, 18 March 1991, 86 ff.
17. See Art. 6, proposal to amend the Directive: a maximum threshold that did not take the overall duration of working time into account. The final text of the Directive 1993/104 on working time calculated the maximum average working time on an annual basis, thus allowing for individual work weeks with much longer working hours.
18. According to J. Savatier, *Travail de nuit des femmes et droit communautaire*, in *Droit Soc.*, 1990, 5, p. 466, the supremacy of ILO law over Community law derives from the universal rank of international norms, which is contrasted by the 'regional' character of the European norms.
19. CJEC judgment of 25 July 1991, C-345/89, *Stoeckel*, ECLI: EU: C:1991:324; by contrast, the principle of anteriority must prevail according to judg. of 2 August 1991, C-158/91, *Levy*, ECLI: EU: C:1993:332; 3 February 1994, C-13/93, *Minne*, ECLI: EU: C:1994:39; for the Italian doctrine, see S. Bertocco, *La sicurezza del lavoratore nelle fonti internazionali del lavoro*, Padova, 1995, pp. 47 ss. More recently on these issues, see. T. Teklè, *Labour Rights and the Case Law of the European Court of Justice: What Role for International Labour Standards?*, in *Eur. Labour Law Journal*, 9, 3, pp. 252 ff.
20. OJ C 124, 14 May 1991, 8 ff.
21. *White Paper on growth, competitiveness, employment: 'The challenges and ways forward into the 21st Century'.*

took into account the changing political horizon, balancing the reduction of maximum working time with an increase in the flexibility of work schedules.[22]

It was not by chance that, just few days before this document [Delors' White Paper] was made public, at the Brussels meeting of European Council on December 1993, the final approval of the Directive was recorded, in a text [of the Directive] that took into account the changed political horizon, balancing the reduction of the maximum time with an increased flexibility of the working schedules.

The version ultimately approved by the European Council differed in fact considerably from the one formulated by the Commission in May 1991, due to the introduction of a number of provisions permitting extensive derogations for specific sectors of activity,[23] and of the so-called opt-out clause, which allowed governments to postpone convergence of national legislations with Community provisions.[24]

Although the 'Directive lays down minimum safety and health requirements for the organization of working time',[25] Member States could retain the most favourable provisions for workers, thereby ensuring a gradual implementation of the Directive's standards (based on Art. 152(2)b of the TFEU) and subsequently, the effective 'progressive' nature of the legislative text. The Directive also included a 'non-regression clause' to ensure that the Directive's implementation would not constitute a 'valid ground for reducing the general level of protection afforded to workers' in Member States' national jurisdiction.[26] These changes, which were introduced shortly before the final approval of the Directive in the hope of securing the consent of the United Kingdom, did not prevent a majority vote by the Council or the subsequent action for annulment before the European Court of Justice, promoted by the British government, claiming inadequacy of the Directive's legal base, as it should have been adopted on the basis of Articles 100 or 235 of the EC Treaty, which require unanimity within the Council.[27]

The contrast manifested thereby made it difficult to find a compromise on the amendment of Directive 93/104, despite the fact that the first judgments of the European Court on on-call work within the scope of working time regulations had demonstrated the provisions' incompleteness.[28] Thus, after the ten-year period established in Art. 18(1)b(i) for the revision of the instrument, the only outcome was the adoption of Directive 2003/88, which was simply a consolidated text of the previous Directive. The UK was not blatantly opposed to the development of social issues in the EU, but based its position on the fact that British workers historically have particularly long work days. After a long and bumpy path, the UK and many Eastern European countries, unwilling

22. Council Directive No. 104 of 23 November 1993.
23. Art. 17 Dir. 2003/88.
24. See Art. 18.1, lett. b (i), Dir. 1993/104 (now Art. 22.1. Dir. 2003/88); this option was clearly connected to the last part of the provision, according to which a re-examination '*of the provisions of this point (i*)' was to be carried out to '*decide on what action to take'* after a ten-year period from the publication of the Directive.
25. See Art. 1(1) Dir. 1993/104.
26. See Art. 18(3), Dir. 1993/104 (Art. 23, Dir. 2003/88).
27. Judgment of 12 November 1996, C-84/94 *United Kingdom v Council*, ECLI: EU: C:1996:431. 37. The Court only annulled the second sentence of Art. 5 of Directive 93/104/EC asserting that the Council 'has failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week' (para. 37).
28. Mainly, judgment of 3 October 2000, C-303/98 *SIMAP*, ECLI: EU: C:2000:528; judgment of 9 September 2003, C-151/02, *Jaeger*, ECLI: EU: C:2003:437.

to give up their competitive advantage deriving from lower labour costs and prolonged working hours, conceded and accepted the proposed changes.

After a long path, finally the United Kingdom was no longer alone in refusing the proposed changes, because it had met many Eastern European countries, unwilling to give up the competitive advantage deriving from lower labour costs and longer working hours.

In May 2005, after the EESC and the European Parliament had taken highly critical positions towards Directive 2003/88, a proposal was issued by the Council without any result. On 7 November 2006, a special meeting of the Employment, Social Policy, Health and Consumer Affairs Council once again failed to reach an agreement on the revision of the Directive, rejecting the new compromise texts tabled by the Finnish Presidency.[29]

This rejected proposal established that: 'The inactive part of on-call time shall not be regarded as working time unless national law or, in accordance with national law and/or practice, a collective agreement or an agreement between the social partners decides otherwise'.[30] Another proposed (and rejected) amendment, which was based on French legislation, read: 'The inactive part of on-call time may be calculated on the basis of an average number of hours or a proportion of on-call time, taking account of experience in the sector concerned, by collective agreement' and it were 'not to be taken into account in calculating the rest periods'.[31] This proposal also suggested an amendment of the opt-out clause of Art. 22 in a restrictive sense, providing that 'no worker works more than 55 hours in any week, unless the collective agreement or agreement concluded between the social partners lays down otherwise'.[32]

In any case, no compromise was reached, and Directive 2003/88 remained unaltered, while the competence to apply (and transform) European laws is now in the hands of the European Court of Justice, which seems have become the main 'driver' of the Union.

2. International regulation on working time

From a comparative point of view and bearing in mind the origins of the Directive described above, the restrictive approach to the regulation of working time has (at least) three underlying purposes: 1) to protect workers' health and safety (at the beginning, especially for children and women); 2) to redistribute job opportunities; and 3) as a key principle of the right to fair wages. A limitation to working hours goes hand in hand with the principle of equal pay because it would be unfair if workers had to work very long hours just to be able to earn a living.

History teaches that such objectives cannot be pursued in a single country only, as restrictions limited to one state have negative effects on that country's economy due to the increase in production costs, given the inelasticity of wages. Hence, already the socialist movement built on the premise of pursuing coordinated action at the international level to protect workers. The regulation of working time and other working conditions at the international level developed after

29. See at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005PC0246&from=EN the 31.5.2005 COM(2005) 246 final 2004/0209 (COD) proposal for a new Directive presented by the Commission, as amended by the Council
30. See n. 2, added Art. 2a,
31. *Ibid.*
32. See n. 9, amended Art. 22

the 1906 Berne Convention on night work for women (see 1919 ILO Conv. No. 4) and ILO Convention No. 1 of 1919.[33]

In the aforementioned 1996 ruling in case C-84/94, *United Kingdom v Council*, the Court acknowledged that restrictions to working time could affect the level of employment (para. 30), but at the same time asserted that the purpose of the Treaty of Rome's provisions was not to regulate working time or working conditions. Since then, EU institutions have accepted the notion that the Directive on Working Time is just one component in the overall legislation on health and safety of workers; nevertheless, only a few of the Directive's provisions are expressly linked to health and safety Directives, thus giving Member States leeway in the calculation of pay and in the definition of working time, which may deviate from the provisions postulated in the Directive on Working Time.

This aspect was also taken into account in the recent *Matzak* case:[34] in her opinion, quoting the *Vorel* case,[35] Advocate General Sharpston emphasised that working time regulations are relevant in national jurisdictions primarily for determining salary levels (paras. 41-44); however, the Court, closely following C-84/94, rejected the Advocate General's reasoning in favour of other concerns such as health and safety issues. This point is anything but secondary; if a worker is continuously employed on standby, his/her pay will be very low which obviously betrays the logic supporting the provisions of maximum weekly working hours. It is not a coincidence that a clear ratio has been established between on-call time and rest periods in some national systems, like in Finland.[36]

A solution that only partly differs was recently adopted by the Grand Chamber in the recent *Sindicatul Familia Constanţa* case,[37] in which a Romanian trade union and some foster parents filed a claim for an increase in their base salary for work performed on weekly rest days and during statutory leave and public holidays, as well as compensation equal to the allowance for paid annual leave. In accordance with Advocate General Wahl's opinion, the Court held that the Directive does not deal with how workers are to be remunerated for specific types of work such as shift work, night work and on-call time or, indeed, how they are to be compensated for overtime. On the basis of Article 153 TFEU, those questions are a matter of national law.[38]

Nevertheless, the judges held that the Court may only refuse to rule on a question referred to it by a national court where it is obvious that the request for an interpretation of EU law is unrelated to the facts underlying the case pending before the referring court. In other words, the Directive only dictates fragments of a given subject matter, thus establishing binding rules on working time, but leaving all other decisions on remuneration (apart from paid annual leave, Art. 7) to national jurisdiction. No matter whether such a partial regulation may appear pointless from the salary perspective, collective bargaining agreements are free to include the employer's obligation to pay for time that is not 'proper' working time.

To further emphasise the Directive's incompleteness, no ruling to date has dealt with the issue of risks to health and safety resulting from having several jobs or other aspects related to working time regulations, particularly problems arising from work-life balance in ordinary or atypical

33. For a commentary on ILO Conv. No. 1, see C. Spinelli in E. Ales, M. Bell, O. Deinert, S. Robin-Olivier (eds.), *International and European Labour Law*, Beck und Hart Publishing, Baden-Baden, 2018, pp. 1321 ff.
34. Judgment of 21 February 2018, C-518/15, *Ville de Nivelles v. Matzak*, ECLI: EU: C:2018:82.
35. Order of 11 January 2007, C-437/05, *Vorel*, ECLI: EU: C:2007:23.
36. See *Flash Reports on Labour Law*, May 2018, national report; the ratio is 2:5.
37. Judgment of 20 November 2018 C-147/17, ECLI EU: C:2018:926.
38. See Advocate General's opinion delivered on 28 June 2018 ECLI: EU: C:2018:518, n. 38.

contracts. This point was also highlighted in the abovementioned proposal of the Commission to amend the Directive, according to which Member States 'shall encourage the social partners at the appropriate level [. . .] to conclude agreements aimed at improving compatibility between working and family life' and also 'shall take measures necessary to ensure that: – employers inform workers in good time of any changes in the pattern or organisation of working time; [and] – workers may request changes to their working hours and patterns, and that employers are obliged to examine requests taking into account employers' and workers' needs for flexibility'.[39] It seems that these provisions will soon be embodied in European legislation.

3. Other recent European provisions on working time

Several pieces of EU legislation currently being developed take a broader approach to working time regulations, paying particular attention to extremely atypical forms of work such as 'zero-hours contracts', in an effort to prevent precariousness and in-work poverty and to develop a comprehensive approach to working time regulations to ensure a work-life balance. The main reference to working time in European legislation is Art. 31 of the Charter of Fundamental Rights of the European Union, which provides that every worker has the right to working conditions that respect his or her health, safety and dignity, to a limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Yet there is general consensus among scholars that marginal workers, who conclude contracts for minimal working hours or contracts that do not establish fixed working hours, i.e. the employer has no obligation to provide the employee with a fixed number of working hours ('zero-hours contracts'), are more exposed to the risk of being trapped in insecure employment relationships without a tangible prospect of transitioning to more permanent jobs, and need support if they are to have access to training, which might give them the chance to climb the social ladder.

Workers' rights, such as rest periods, daily breaks and on-demand work, must be introduced for workers who prefer (or who are available) to work on a casual or intermittent basis (such as workers with family responsibilities, students, semi-retired persons), because there is a de facto imbalance in terms of their bargaining power, which prevents them from negotiating their work schedules and, consequently, from having autonomous control over their own private life. The Working Time Directive, which as a legal framework is generally applicable, does not address these specific problems, although these issues are well-known to the European sources of the social legal system.

Firstly, implicitly recognising the very narrow scope of the Directive on Part-time Work, the European Parliament has invited the social partners and the European Commission to present a proposal for a Framework Directive on decent working conditions for all forms of employment,[40] extending the existing minimum EU standards to new types of employment relationships to ensure a core set of enforceable rights for every worker, regardless of their type of contract or employment

39. See the abovementioned proposal for a new Directive presented by the Commission, as amended by the Council, n.3, added Art. 2b

40. See EP Resolution of 19 January 2017 on 'a European Pillar of Social Rights'; see also EP Resolution of 4 July 2017 on 'Working conditions and precarious work' 2016/2221(INI). See particularly recital 'A', according to which: 'non-standard, atypical forms of employment have been emerging; [. . .] the number of workers with fixed-term and part-time contracts has increased in the EU over the past 15 years; [. . .] efficient policies are needed to embrace the various forms of employment and adequately protect workers'.

relationship, including health and safety protection, maternity leave, provisions on working time and rest periods, work-life balance, and many others.

In the same way, the recently approved Directive of the European Parliament and of the Council on transparent and predictable working conditions in the EU[41] focuses on a revision of Directive 91/533 (W*ritten Statement Directive*), proposing a set of universal rights that all workers should benefit from, such as predetermined working hours and daily work schedules for more predictable employment, giving workers the right to request 'a form of employment with more predictable and secure working conditions, where available', and the right to receive a 'reasoned written reply' (Art. 12(1)).[42]

The newly approved Directive also provides rights for very atypical workers, stating that when the 'work pattern is entirely or mostly unpredictable' (Art. 4(2) point (m) and Art. 10), the worker shall not be required by the employer to perform work unless (a) the work takes place within predetermined 'reference hours and days' and the worker is informed by his or her employer of the work assignment within a reasonable period of time established in accordance with national law, collective agreements or practice. The conclusion is that: 'Where one or both of the requirements [above] laid down is not fulfilled, a worker shall have the right to refuse a work assignment without adverse consequences' (Art. 10(2)).

Working time rules have again also garnered the ILO's attention, which has devoted its General Survey for the 107th session of the annual International Conference[43] to working time, as the flip side of the coin to the right to equal pay, in order to ensure decent working conditions. The aim of ensuring availability of work for the majority of the population requires a legal system that regulates non-standard forms of work (which very often entail special arrangements in terms of work schedules) through special provisions, where the mere application of the principle of equal treatment does not seem to guarantee effective protection of rights for these workers. This is primarily due to the remuneration paid to such workers, often preventing them from fully participating in the labour market and representing an insurmountable obstacle for their professional development.

It is not a coincidence that the European Pillar of Social Rights, proclaimed in Gothenburg on 17 November 2017, provides both the principle of secure and adaptable employment and the right to fair wage (Arts. 5-6); employment must ensure freedom from want for the worker and his/her family in such a way as to prevent in-work poverty. In this sense, the recently enacted Directive on transparent and predictable working conditions is much more than a follow-up of the 91/533 WS Directive, because the development of the information right has affected the scope of working conditions (point (b) of Article 153(1)) and thus supplements some of the Directive's provisions in terms of work schedules. The European Pillar of Social Rights is referred to in the recitals (No. 3), where Principle No. 7 provides that workers, regardless of the type of contract they have concluded, enjoy the 'right to fair and equal treatment regarding working conditions, access to social protection and training'. The same Principle affirms that the transition to open-ended forms of employment is to be fostered.

41. Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, in OJ No. L 186, 11 July 2019, page 105 ff.
42. See EP legislative Resolution of 16 April 2019 on the proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union COM (2017) 0797.
43. 'Ensuring decent working time for the future'.

The notion of working time will further be examined in the light of the development of case law and legislation to better understand whether significant changes are visible in the approach to the definition of working time.

4. An overview of the notion of 'working time' according to the Directive and CJEU case law

Directive 2003/88/EC of 4 November 2003 on 'certain aspects of the organisation of working time' consolidates previous Council Directive 93/104/EC of 23 November 1993, and is based on Article 137 of the Treaty of Rome (amended),[44] which provides that the Community shall support and complement the activities of the Member States with a view to improving the working environment to protect workers' health and safety. According to Article 2 (1) of the Directive, *'**"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'.* Paragraph 2 of the same provision specifies that *'**"rest period"** means any period which is not working time'.*

The initial definition proposed for the Directive differed,[45] and only referred to the worker who is '*present at his workplace, at his employer's disposal'*. This notion was modified before the final version was approved, perhaps because the Directive's provisions had been broadened in the meantime and included the introduction of a 'maximum weekly working time of 48 hours', reflecting the mainstream national and international regulations of working time.

In his conclusion in the *SIMAP* case, the Advocate General,[46] combining the definitions of both 'working time' and 'rest period' stipulated in the Directive 'the provisions which lay down the minimum rest periods that every worker must be granted' (paras. 34-35) and, referring to ILO Convention 30 of 1930 on the duration of work (for commercial companies and offices), suggested that the three criteria defining working time, namely 'working', 'at the employer's disposal' and 'carrying out one's activities or duties', could not apply together. The European Court of Justice, which was requested to issue preliminary rulings on 'on-call' and 'standby' time, neither of which is defined in the Directive, did not concur with Advocate General Saggio's Opinion in *SIMAP* and in other cases (including *Matzak*), asserted that the concepts of 'working time' and 'rest period' are mutually exclusive, and that all three criteria must be met for on-call and standby time to be qualified as 'working time'.[47]

This solution still remains valid, even if in the recent *Matzak* case the Court seems to have expanded the notion of working time.

5. The *Matzak* case

In CJEU case C-518/15 *Matzak*, the Court was asked for a preliminary ruling on the interpretation of Directive 2003/88/EC on working time, as it applies to a retained firefighter who was required, on a rotational basis (one week within every four-week period), to be available on standby duty within a specified radius (expressed in terms of time) from his place of work. The main question

44. See 153(a) TFEU.
45. See V. Ferrante, *Il tempo di lavoro fra persona e produttività*, Torino, 2008, pp. 228 ff.
46. ECLI: EU: C:1999:621.
47. Judgment of 3 October 2000, C-303/98 *SIMAP*, ECLI: EU: C:2000:528, paras. 46-52; judgment of 9 September 2003, C-151/02, *Jaeger*, ECLI: EU: C:2003:437, paras. 44-71.

the ruling addressed was whether the standby time a worker spends at home with the obligation to respond to calls from his/her employer within eight minutes must be regarded as 'working time' according to the Directive.

The Court responded (n. 66) that Article 2 of Directive 2003/88 (Definitions) 'must be interpreted as meaning that stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes, very significantly restricting the opportunities for other activities, must be regarded as ''working time''. The Court clearly endorsed the definition of working time stipulated in Article 2 of the Directive, which must be interpreted as meaning that every element of the definition must be fulfilled in order to constitute working time. Not only tautologically does the worker have to perform 'work', he/she must be both 'at the employer's disposal' and 'carrying out his activity or duties' as well.

The Court recalled that according to the *Dellas* case,[48] 'the intensity of the work by the employee and his output are not among the characteristic elements of the concept of ''working time''. This means that despite the fact that non-'effective' work is an important concept (according to the French Labour Code or to Italian legislation), the definition must nevertheless be interpreted in the light of the Directive and EU competences, which aim to harmonise working conditions rather than regulate pay (Article 153.5 TFEU). Quoting the *SIMAP* case, the Court held that 'carrying out his duties' must be interpreted in a broad sense, i.e. that the activity actually performed can vary 'according to the circumstances'. This means that 'being at the disposal of the employer' (or the employer's 'availability') is the hallmark feature of the definition of working time, qualifying the time the worker is subject to managerial rights.

The Court, referring to the 2015 *Tyco* case,[49] stated that the definitions in the Directive must be interpreted as '*improving workers' living and working conditions'*. This is the case because *'the concepts of ''working time'' and of ''rest period'' are mutually exclusive*' (para. 55). Therefore, 'rest period' according to Article 2.2 of Directive 2003/88, is not simply '*any period which is not working time*' (that is, the three conditions that constitute working time are not fully met during that period), but is a period that is regulated in a complementary way to the working time definition.

The Court does not go so far as to affirm that 'rest period' refers to a period in which the worker is free from performing any duties that derive from his/her condition of subordination, but supports the notion that working time can be defined as '*a contrariis'*, similarly to the Opinion of AG Saggio in the *SIMAP* case quoted above (case C-303/98, para. 34-35), as though the definition of rest time is based on rationality or nature—not on the Directive—as a period in which the worker is not under the employer's authority.

It should be noted that according to the Directive's legal perspective and bearing in mind that the Directive allows the calculation of working time as an average, without exceeding the 48-hour work week (without considering breaks), the primary focus is the protection of the worker's health and safety and his/her rest periods (rather than compliance with the maximum annual thresholds). It must also be added that the alternation of working times/rest periods is not relevant for the calculation of pay and for the qualification of standby time or similar activities (e.g. dressing time

48. Judgment of 1 December 2005, C-14/04, *Dellas and Others*, ECLI: EU: C:2005:728.
49. Judgment of 10 September 2015, C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, ECLI: EU: C:2015:578.

or preparatory duties). An allowance or lump-sum can be included in collective bargaining agreements to take account of working hours that are not considered to be 'regular' working time.[50]

According to the *Matzak* judgment, remaining 'at the disposal' of the employer is not '*simply being at the employer's disposal inasmuch as it must be possible to contact him*' (para. 64). In paragraph 59, quoting the *Jaeger* and *Grigore* cases,[51] the CJEU states that '*those obligations, which make it impossible for the workers concerned to choose the place where they stay during stand-by periods, must be regarded as coming within the ambit of the performance of their duties*'. Paragraph 61, more explicitly, asserts that the time an employee is '*required to be physically present at the place determined by the employer*' shall be considered working time, adding that '*that place was Mr. Matzak's home and not, as in the cases which gave rise to the case-law cited in paragraphs 57 to 59 of the present judgment, his place of work*'. This point is key to the Court's final decision.

According to the AG's Opinion (para. 57), 'a degree of caution' is required when making the statement that 'the requirement to be present at a place determined by the employer to provide the appropriate services immediately is the ''decisive factor'' in determining what is, and is not, working time'. In this sense, the AG also stated that 'it is the quality of the time that is spent rather than the precise degree of required proximity to the place of work that is of overriding importance in this context', thus differentiating between working time and rest periods. The quality of time is too much of an indeterminate concept to give any basis to the CJEU's judgment.

At the same time, it is difficult to define time constraints that are universally considered to set a significant limit for the worker: in Austria, the Supreme Court stated that on-call time that requires the employee to arrive at the workplace within 30 minutes shall be qualified as rest period;[52] Finland's Supreme Court has held that requiring an on-call employee to reach his or her workplace within five minutes is so restrictive that such on-call time must be regarded as working time (a different decision was taken for the requirement to reach the workplace within 15 minutes, however);[53] in the UK, retained firefighters are requested to be available within five minutes from the employer's call; they receive a retained fee based on the hours they are on call per week, with an additional payment for responding to calls.[54] In the same paragraph, the AG emphasised that a different solution can be applied '*where a worker may be able to intervene remotely*'. This is an important factor as well, albeit in a different way.

Any employee can receive a phone call, even late at night, requesting him/her to come to work as soon as possible. Clearly (ordinarily), public health or security or a human life will not be placed at risk by the employer by relying on 'on-call' workers. A worker who is on call is not required to immediately start working; in some cases, he/she can intervene remotely or delay his/her intervention (e.g. food hygiene and safety services, drugs and poisonings; protection of working conditions and of the environment; emergency for care or detention homes; network maintenance, etc.). This is not the case for Belgian firefighters in the town of Nivelles, who are on standby time, and must be ready to intervene within eight minutes. On-call firefighters must therefore avoid any risk factors that may reduce their capacity to respond within a very short time.

50. See *Flash Reports on Labour Law*, May 2018, National Report of Spain or UK.
51. C-258/10, *Grigore* ECLI: EU: C:2011:122.
52. *Flash Reports on Labour Law*, May 2018, National Report.
53. *Flash Reports on Labour Law*, March and May 2018, National Report; see also finlex.fi/fi/oikeus/kko/kko/2015/20150049#idp446308848.
54. *Flash Reports on Labour Law*, May 2018, National Report.

The obligation to be ready to start working immediately (or within a very short time) falls within the scope of the provisions of Article 2 (1) of the Directive, implying that the worker is 'carrying out his activity or duties'. This rule derives directly from the *SIMAP* and *Jaeger* judgments and follows the same rationale of previous rulings. In its reasoning, the Court—in my opinion—only developed preceding case law to more clearly distinguish the case of on-call or standby time spent at home.

6. The 'sentinel model': an evolutionary proposal for definitions in the light of CJEU case law

Finally, it must be stressed that the recently adopted Directive on transparent conditions of work refers to the concept of 'actual' working time in Art. 1(3), to individualise the scope of the regulation's application, referring to atypical forms of work, like zero-hours and on-call contracts which require workers to spend their time waiting for the employer's call. The French, Spanish and Italian translations of the Directive[55] avoid giving this term any special significance, as if it had not been included in the legislative text. In any case, it would be a very pointless justification to use this provision to interpret others in a different legal text aimed at preserving workers' health.

Scholars must propose new criteria that can be applied to the definitions enshrined in the Working Time Directive. As previously stated, and quoting the *Vorel* case, remuneration clearly is necessarily commensurate to that part of the worker's personal commitment that provides the employer with a productive advantage by means of the concept '*travail effectif*' (in the French legal system) or '*trabajo efectivo*' Art. 34.5 ET).[56] But this is not relevant in the light of Directive 2003/88. From this very specific perspective, adopting a sentinel model to reflect the notion of working time might be sensible.

'Rest period' means any period that is not working time (in the sense that the worker is free of any obligations that 'significantly restrict opportunities for other activities'). This clarification does not modify the definition of 'working time' and of 'rest period', which remain two mutually exclusive concepts, but focuses on the worker's right to effective daily and weekly rest periods in accordance with the legal basis of the WTD (WTD Recital No. 5, 'All workers should have adequate rest periods').

55. '*Les États membres peuvent décider de ne pas appliquer les obligations prévues par la présente directive aux travailleurs ayant une relation de travail d'une durée totale inférieure ou égale à 8 heures au cours d'une période de référence d'un mois'* (French version); '*Los Estados miembros pueden decidir no aplicar las obligaciones de la presente Directiva a los trabajadores que tengan una relación laboral igual o inferior a ocho horas en total en un período de referencia de un mes*' (Spanish version); '*Gli Stati membri possono decidere di non applicare gli obblighi stabiliti nella presente direttiva ai lavoratori il cui rapporto di lavoro sia di durata inferiore o uguale a 8 ore totali in un periodo di riferimento di un mese*' (Italian version).

56. See F. Favennec-Héry, P.-J. Verkindt, *Droit du travail*, 4th ed., Paris, 2014, p. 537 ff.; J.-C. Villalon, *Compendio de derecho del trabajo*, 8th ed., Madrid, 2014, p. 253 ff. it is debateable whether Italian legislation has cancelled this concept, even if the term '*lavoro effettivo*' is no longer present in the current law (legislative decree 2003/66). From an Italian perspective, see also A. Fenoglio, *The Working Time Directive and its interpretation: another major piece in the European social rights puzzle*, *Eur. Jour. Soc. Law*, 2011, 3, pp. 215-226.

'Working time' means any period during which the worker is:

- working (meaning that the worker is at the workplace or in another place indicated by the employer or, in any case, close to the place where he/she is expected to perform his/her activity, and allows for an immediate response);
- at the employer's disposal (meaning the worker must respond immediately, start his/her activity without delay and it is therefore not possible to shift or postpone the intervention or to work remotely); and
- carrying out his/her activity or duties (meaning that the worker must be ready to immediately start working at any time, even when he/she is sleeping).

If the worker is physically present at the workplace but is on a break,[57] he/she does not have the obligation to respond immediately (the worker knows when his/her break ends) and consequently, this time cannot be considered as working time (except if the rest period is so short that the employee cannot perform any other activity during that time or if his/her duty cannot be interrupted because he/she is requested to verify the efficiency of certain machinery or to perform a routine check).

If the worker is on standby at home, but must be ready to intervene within a few minutes, he/she:

- is working (because he/she is in a place indicated by the employer or in any case close to the workplace);
- is at the employer's disposal (because he/she cannot delay or refuse to carry out his/her duties); and
- is carrying out his/her activity or duties (because he/she is ready to start working and cannot perform other activities).
- If the worker is on standby at home but has no obligation to be ready to intervene immediately, he/she:
- is not at the employer's disposal (because he/she can delay the start of his/her work or can refuse to carry out his/her duties or postpone carrying out these duties until the moment he/she can start working again); and
- and is not carrying out his/her activity or duties (because he/she is not ready to start working and can therefore perform other activities).

If the employee can freely choose where to spend his/her on-call duty, but must remain in close proximity to his/her workplace to be able to intervene immediately in case of necessity (no matter, in my opinion, how long it takes to reach the workplace), the standby time shall be considered as working time.[58] The same rule can be applied to the standby time of surgeons who perform organ transplants and depend on organ donors, bearing in mind that the person in charge of such transplants is probably not an ordinary physician but a very specific one, and thus falls within the scope of derogations of Art. 3 provided in Art. 17(1)(a) WTD, for 'managing executives or other persons with autonomous decision-taking powers'.

As regards other members of the transplant team who are on standby, an on-call system on a rotational basis could be established without evading WTD provisions via the opt-out clause

57. See *Flash Reports on Labour Law*, May 2018, Czech Republic National Report.
58. As far as national legislation on remuneration is concerned, the time needed for the intervention and the travelling time to intervene is considered working time: see, for instance, *Flash Reports on Labour Law*, May 2018, French National Report.

stipulated in Art. 22. If there is no possibility for such workers to delay intervention, the entire team shall be on standby; if they are called to intervene, the maximum weekly working time and the minimum rest periods must be guaranteed.

From a purely comparative point of view, the French Labour Code provides some coherence by distinguishing between the concepts of 'working time' and 'rest period'. If an on-call employee is not called by his/her employer to intervene, his/her on-call time will be considered a rest period, regardless of whether or not the employee has the possibility to pursue his/her personal interests during that period. Law No. 2016-1088 of 8 August 2016, Art. L. 3121-9 of the French Labour Code defines on-call periods as periods during which 'the employee, without being at the work-place and without being at the employer's permanent and **immediate** disposal, must intervene in order to perform work for the company'.

In short, working time requires the worker to be ready to perform a task that is not predictable and not delayable: like a sentinel, remaining at home, he/she must always be prepared to intervene, even when he/she is sleeping.

7. Conclusions

Following Alain Supiot's suggestion, to resolve the Court's dilemmas, the notion of 'times of the third type' could be applied, introducing a category of hours that are neither working time, nor rest periods. This notion already exists in legislative texts, where implicit or explicit limitations to personal freedom in the use of worker's own time have always existed. In fact, the obligation to render work derives not only from the employment contract, but a wide range of services exist that are preparatory or ancillary to this (for example, wearing specific work clothes, maintaining confidentiality on company information, adopting sanitary protective measures).

These obligations generally represent implied terms and conditions of the employment contract and do not involve any serious deviation from the ordinary standards of life; in other cases, many legal systems provide for limitation rules or recognise the legitimacy of limitation agreements (such as when it involves a question of transferring one's residence after a change of workplace); in some other cases, the limits are voluntarily assumed by the worker on the basis of an express agreement, as in the non-competition agreement, according to which, upon payment of a fee, the worker may not seek a new job in the same professional area he/she just stopped working to not damage the company after the end of the relationship.

Now on-call time is deemed to limit the employee's freedom: he/she is wedged somewhere between positive and negative performance of work (he/she must be ready and, therefore, he/she is not free to spend his/her time as he/she wants) and—looking at various jurisdictions—wages that specifically remunerate the worker for this additional burden have been introduced. The aspects of limitation, however, affect the employee's rest period and consequently, the general principle of working time. The employee cannot know how many times he/she will be called on to work and a limitation to such calls must apply to avoid that a major part of the employee's life is spent waiting for the employer's call.

The recent Directive, founded on the general principles of working conditions in accordance with Art. 153(1) (b) TFEU, reconnects with Principle No. 5 of the European Pillar of Social Rights, which provides that regardless of the type and duration of the employment relationship, workers are entitled to fair and equal treatment as regards their working conditions. Due to its very narrow competence on health and safety, the Working Time Directive cannot ensure the same.

It is clear that the convergence of on-call time with work is the only possible solution for the bi-partition embodied in the notions provided by the Directive itself. When we take a look at the history of the legislation on working time (which we briefly touched upon above), this seems to be a pointless bi-partition, because the worker may not be interested in whether or not he/she is working or not working. What matters is whether remuneration is expected. Not to say that a lump-sum is an implicit limitation, as it avoids having to resort to ancillary obligations outside the hypothesis in which this appears convenient. It is no coincidence that Directive 2003/88 provides for the right to paid annual leave, as it would otherwise be possible to assign leave that significantly exceeds the four-week limit (to the detriment of the worker). Nothing would therefore prevent the scope of the Directive from being expanded, even if only implicitly, by providing for the obligation of additional pay in case of any additional burden that is added to the terms established in the employment contract (shift hours, overtime, nightwork not included in regular periodic shifts).

In any case, it must be emphasised that according to the Directive, the work day can be extremely long when considering Article 3 on daily rest and Article 16 on the reference period, reaching very high levels in the absence of a daily maximum (e.g. 77 hours of work per week with a daily rest break of only 10 minutes in the Italian legislation). If the Directive's aim was truly to give workers the right to a limitation of his/her maximum working time and minimum rest periods, as the recent judgment on overtime in Spain (quoting the earlier judgment of September 2006)[59] emphatically pointed out, then special attention must be paid to overtime and stress-related diseases, as the experiences of some countries (above all, Japan) have shown that particularly prolonged working hours cause serious physical and mental illnesses and that it is not uncommon in particularly serious cases for workers to be driven to extreme acts of self-inflicted injury.[60]

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59. Judgment of 14 May 2019, C-55/18 *Federación de Servicios de Comisiones Obreras v. Deutsche Bank*, ECLI ECLI: EU: C:2019:402

60. See *Ensuring decent working time for the future*, International Labour Conference, 107th Session, 2018, International Labour Office, particularly with regard to rest breaks and night work (pp. 54, 61 ff. and 161). No mention at all (a part of a brief quotation of 'planning' working time) is made on working time in the European framework agreement on work-related stress signed in Brussels on 8 October 2004. Just to quote a recent press release on cardiovascular risks associated with long work hours (i.e. more than 10 hours for at least 50 days per year), see American Heart Association, 'Long work hours associated with increased risk of stroke'. ScienceDaily, 20 June 2019. <www.sciencedaily.com/releases/2019/06/190620100045.htm>.