Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 13 February 2020 [1]

Case C-107/19

XR
v
Dopravní podnik hl. m. Prahy, a.s.

(Request for a preliminary ruling
from the Obvodní soud pro Prahu 9 (District Court, Prague, 9, Czech Republic))

(Reference for a preliminary ruling – Social policy – Directive 2003/88/EC – Organisation of working time – Concept of 'working time' – A worker's break, during which he or she must be available to his or her employer to be called out within two minutes – Obligation to uphold the legal rulings of a higher court that do not comply with EU law – Primacy of EU law)

I. Introduction

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. [2]

2. This request has been made in proceedings between XR and Dopravní podnik hl. m. Prahy, a.s. ('Dopravní podnik') concerning Dopravní podnik's refusal to pay XR 95 335 Czech koruny (CZK) (approximately EUR 3 735) [3] plus default interest, as pay for breaks taken during his professional activity as a firefighter between November 2005 and December 2008.

3. By the questions it has referred for a preliminary ruling, the Obvodní soud pro Prahu 9 (District Court, Prague, 9, Czech Republic) invites the Court to identify the criteria according to which a break can be classified as 'working time' or as a 'rest period' under Directive 2003/88.

1 Original language: French.

2 OJ 2003 L 299, p. 9.

3 At the rate of exchange on 3 January 2019, the date of the decision to refer.

II. Legal context

A. Directive 2003/88

4. Recital 5 of Directive 2003/88 states:

'All workers should have adequate rest periods. The concept of "rest" must be expressed in units of time, i.e. in days, hours and/or fractions thereof. [European Union] workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. …'

5. Article 1(1) and (2) of that directive provides as follows:

'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, entitled 'Definitions', provides as follows:

'For the purposes of this Directive, the following definitions shall apply:

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;

…

5. "shift work" means any method of organising work in shifts whereby workers succeed each other at the same work stations according to a certain pattern, including a rotating pattern, and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks;

…

9. "adequate rest" means that workers have regular rest periods, the duration of which is expressed in units of time and which are sufficiently long and continuous to ensure that, as a result of fatigue or other irregular working patterns, they do not cause injury to themselves, to fellow workers or to others and that they do not damage their health, either in the short term or in the longer term.'

7. Chapter 2 of Directive 2003/88 concerns, inter alia, 'minimum rest periods'. Article 3 of that directive, on 'Daily rest', is worded as follows:

'Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.'

8. Article 4 of that directive, concerning 'Breaks', provides that:

'Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation.'

9. The first paragraph of Article 5 of Directive 2003/88, entitled 'Weekly rest period', provides:

'Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.'

10. Under Article 17(3)(c)(iii) of that directive, derogations may be made in particular from Article 4, in the case of fire services, amongst others.

B. Czech law

11. Paragraph 83 of Zákon č. 65/1965 Sb zákoník práce (Law No 65/1965 establishing the Labour Code), which applied until 31 December 2006, provided that:

'(1) "Working time" is the time in which the employee is required to carry out work for the employer.

(2) "Rest period" means a period which is not working time.

…

(5) "Standby service" is the period during which, under his or her employment contract, an employee has to remain ready for a possible assignment which, in the event of overriding need, must be performed outside the schedule for his or her shift.

…'

12. Paragraph 89 of that law, on 'Breaks', stated that:

'(1) An employer shall offer his or her employees, after no longer than six hours of continuous work, a food and rest break of at least 30 minutes; a person aged under 18 shall be offered such a break after no longer than four and a half hours of continuous work. If the work concerned cannot be interrupted, employees shall be ensured an adequate period to rest and eat, albeit without interruption of the service or work; a person aged under 18 shall always be offered a food and rest break in accordance with the first sentence.

(2) The employer may determine the appropriate duration of the food break, after consultation with the competent professional body.

(3) The employer shall determine the start and end of those breaks, after consultation with the competent professional body.

(4) The meal and rest breaks offered may not be at the start or the end of working time.

(5) The meal and rest breaks offered shall not be included in the calculation of working time.'

13. Those provisions were amended by Zákon č. 262/2006 Sb zákoník práce (Law No 262/2006 establishing the Labour Code), which came into force on 1 January 2007. Under Paragraph 78 of that law:

'(1) For the purposes of the provisions governing working time and rest periods:

(a) "working time" shall mean the time in which the employee is required to carry out work for the employer and the time in which the employee remains ready, at the workplace, to perform a task according to the employer's instructions;

…

(h) "standby service" shall mean the period during which, under his or her employment contract, an employee has to remain ready for a possible task which, in the event of overriding necessity, must be performed outside the schedule for his or her shift. The standby service may be provided only at another location agreed with the employee, other than the employer's workplace;

…'

14. In respect of the duration of breaks and safety breaks, Paragraph 88 of that law states that:

'(1) An employer shall offer his or her employees, after no longer than six hours of continuous work, a food and rest break of at least 30 minutes; a person aged under 18 shall be offered such a break after no longer than four and a half hours of continuous work. If the work concerned cannot be interrupted, employees shall be ensured an adequate period to rest and eat, albeit without interruption of the service or work. That period shall be included in the calculation of working time. Employees aged under 18 shall always be offered a food and rest break in accordance with the first sentence.

(2) If the food and rest break must be split, part of that break must be of at least 15 minutes.

…'

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

15. From November 2005 to December 2008, XR worked for Dopravní podnik as a firefighter (head of the squad), and later as a firefighter.

16. XR worked on a shift pattern, which consisted of a morning shift, from 6.45 to 19.00, and a night shift, from 18.45 to 7.00. His daily working times included two meal and rest breaks of 30 minutes each.

17. From 6.30 to 13.30, XR could go to the staff canteen, 200 m from his workplace, provided he carried a transmitter to warn him, in case an urgent call out required attendance, that he had two minutes to reach the exit and a vehicle would call for him in front of the staff canteen. The depot where XR worked also had an area where snacks could be prepared, inter alia when the staff canteen was closed.

18. Breaks were only included in the calculation of XR's working time to the extent that they were interrupted by a call out. Uninterrupted breaks were therefore not remunerated.

19. XR contested that method of calculating his remuneration and, taking the view that breaks, even uninterrupted breaks, were working time, claimed CZK 95 335 (approximately EUR 3 735), plus default interest, as pay owed to him for the two daily breaks not remunerated during the period of employment at issue in the main proceedings.

20. Hearing the case at first instance, the referring court upheld XR's claim. The Městský soud v Praze (Prague City Court, Czech Republic) subsequently upheld that judgment of 14 September 2016 on appeal.

21. Dopravní podnik brought an appeal on a point of law against those judgments to the Nejvyšší soud (Supreme Court, Czech Republic), which set them aside by its judgment of 12 June 2018. That court found that, on the basis of the relevant national provisions, whilst it was indeed not inconceivable that breaks might be interrupted by call outs, those call outs only occurred at random and unpredictably, and therefore could not be characterised as frequently forming part of the performance of the employment obligations. Accordingly, breaks could not, prima facie, be regarded as working time.

22. The Nejvyšší soud (Supreme Court) therefore referred the case back to the referring court to be judged on the merits. The referring court states that, in accordance with national procedural rules, it is bound by the opinion of the Nejvyšší soud (Supreme Court).

23. Nevertheless, the referring court takes the view that the circumstances in which XR was required to take his breaks militate in favour of their being classified as 'working time' within the meaning of Article 2 of Directive 2003/88.

24. Against that background, the Obvodní soud pro Prahu 9 (District Court, Prague, 9) stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a break period in which an employee must be available to his or her employer within two minutes, in case there is an emergency call out, to be considered "working time" within the meaning of Article 2 of Directive [2003/88]?

(2) Is the assessment to be made in relation to the question above influenced by the fact that such interruption [of the break] in the event of an emergency call out occurs only at random and unpredictably and, as the case may be, by how often such interruption occurs?

(3) Can a court of first instance, ruling after its decision has been set aside by a higher court and the case referred back to it for further proceedings, fail to comply with a legal opinion pronounced by the higher court and which is binding on the court of first instance, if that opinion conflicts with EU law?'

IV. Analysis

A. The first and second questions referred

25. By its first and second questions, which should, in my view, be examined together, the referring court enquires, in essence, whether Article 2 of Directive 2003/88 must be interpreted as meaning that breaks offered to a worker during his or her daily working time, during which he or she must be available to his or her employer to be called out when necessary within two minutes, constitute 'working time' within the meaning of that article and whether that classification is influenced by the fact that call outs occur at random and unpredictably or, as the case may be, by how often call outs occur.

26. As a preliminary remark, it should be noted that the main proceedings relate to a worker's remuneration for meal and rest breaks that are not included in the calculation of working time and therefore do not give rise to payment of salary, since only the periods when the worker is actually called out are included in the calculation of working time and paid as overtime.

27. In that regard, it is apparent from the Court's case-law that, save in the special case envisaged 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 so that, generally, it does not apply to the remuneration of workers. [4]

28. However, that fact does not diminish the relevance of the questions referred or the need to answer them. The Court has jurisdiction to provide the referring court with an interpretation of the concepts of 'working time' and 'rest period' contained in Directive 2003/88, and it is then for that court to infer the consequences of that interpretation, under national law, for the remuneration of breaks. [5]

29. I will now begin by recalling that the Court has repeatedly held that, within the meaning of Directive 2003/88, the concept of 'working time' is understood as any period during which the worker is working, at the employer's disposal and carrying out his or her activity or duties, in accordance with national laws or practice. [6] The definition of 'working time' within the meaning of that directive is therefore dictated by a combination of three criteria, that is to say, a spatial criterion (being at the workplace), an authority criterion (being at the disposal of the employer) and a professional criterion (carrying out his or her activity or duties).

30. The Court's case-law on whether breaks should be classified as 'working time' has been constructed on the basis that 'working time' is the mirror image of 'rest period', which, according to Article 2(2) of Directive 2003/88, means 'any period which is not working time'. 'Working time'

[4] See, amongst others, judgment of 20 November 2018, *Sindicatul Familia Constanța and Others* (C-147/17, EU:C:2018:926, paragraph 35 and the case-law cited).

[5] The referring court also points out that the subject of the questions it has referred is not in any sense the determination of the rate of remuneration in respect of the break at issue (see paragraph 23 of the decision to refer).

[6] See, in particular, judgment of 26 July 2017, *Hälvä and Others* (C-175/16, EU:C:2017:617, paragraph 41 and the case-law cited).

is therefore placed in opposition to 'rest period', the two concepts being mutually exclusive,[7] with no intermediate category between them. Even though such a binary distinction may seem inflexible,[8] the text of Directive 2003/88 leaves no room to establish any 'grey period' part way between working time and rest period. There can therefore be no exception to that dichotomy, meaning that 'anything not covered by the concept of "working time" is covered by the concept of "rest period", and vice versa'.[9]

31. I also note that, according to the Court's case-law, the concepts of 'working time' and 'rest period' within the meaning of Directive 2003/88 constitute concepts of EU law which must be defined in accordance with objective characteristics, by reference to the scheme and purpose of that directive, which is intended to lay down minimum requirements to improve workers' living and working conditions.[10]

32. Although the Court has not yet had an opportunity to rule on whether breaks should be classified as 'working time' or 'rest period' within the meaning of Directive 2003/88, it has in contrast several times addressed how stand-by time should be classified in respect of workers falling within the scope of that directive. Examining the case-law developed by the Court in that context will help guide our thinking, although without glossing over the specific characteristics of breaks.

33. On the premiss that 'as EU law currently stands, the stand-by time spent by a worker in the course of his activities carried out for his employer must be classified either as "working time" or "rest period"',[11] the Court has held that, having regard to the objective of Directive 2003/88, which is to ensure the safety and health of workers by granting them minimum rest periods and adequate breaks, 'the physical presence and availability of the worker at the place of work during the stand-by period with a view to providing his professional services must be regarded as carrying out his duties, even if the activity actually performed varies according to the circumstances'.[12]

34. It is therefore apparent from the Court's case-law that 'the determining factor for the classification of "working time", within the meaning of Directive 2003/88, is the requirement that the worker be physically present at the place determined by the employer and to be available to the employer in order to be able to provide the appropriate services immediately in case of need. In fact, those obligations, which make it impossible for the workers concerned to choose the place where they stay during stand-by periods, must be regarded as coming within the ambit of the performance of their duties'.[13]

35. Applying that case-law, the Court has given special treatment to the situation where a worker performs a stand-by duty according to a stand-by system which requires that the worker be permanently accessible without being required to be present at the place of work. According to the Court, 'even if he is at the disposal of his employer, since it must be possible to contact him,

7 See, in particular, judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, 'the *Matzak* judgment', paragraph 55 and the case-law cited).

8 See, to that effect, Opinion of Advocate General Sharpston in *Matzak* (C-518/15, EU:C:2017:619, point 49).

9 See Opinion of Advocate General Bot in *Commission* v *Ireland* (C-87/14, EU:C:2015:192, point 40).

10 See, in particular, the *Matzak* judgment (paragraph 62 and the case-law cited).

11 See the *Matzak* judgment (paragraph 55 and the case-law cited).

12 See, in particular, the *Matzak* judgment (paragraph 57 and the case-law cited).

13 See, in particular, the *Matzak* judgment (paragraph 59 and the case-law cited).

in that situation the worker may manage his time with fewer constraints and pursue his own interests. In those circumstances, only time linked to the actual provision of services must be regarded as "working time", within the meaning of Directive 2003/88'. [14]

36. In the case giving rise to the *Matzak* judgment, the Court had to address the following scenario: Mr Matzak was not only to be contactable during his stand-by time. He was also, on the one hand, obliged to respond to calls from his employer within eight minutes and, on the other, required to be physically present at the place determined by the employer. However, that place was Mr Matzak's home, not his place of work.

37. In response to such a situation, the Court held that 'the obligation to remain physically present at the place determined by the employer and the geographical and temporal constraints resulting from the requirement to reach his place of work within 8 minutes are such as to objectively limit the opportunities which a worker in Mr Matzak's circumstances has to devote himself to his personal and social interests'. [15] Effectively, according to the Court, 'in the light of those constraints, Mr Matzak's situation differs from that of a worker who, during his stand-by duty, must simply be at his employer's disposal inasmuch as it must be possible to contact him'. [16] The Court drew the conclusion that the concept of 'working time' provided for in Article 2 of Directive 2003/88 must be interpreted as applying to a situation in which a worker is obliged to spend stand-by time at his or her home, to be available there to his or her employer and to be able to reach his or her place of work within eight minutes. [17] In its reasoning, the Court attached decisive significance to the fact that a worker's duty to respond to calls from his or her employer within eight minutes whilst on standby at home very significantly restricted the opportunities for other activities. [18]

38. In my view, the Court's ruling in the *Matzak* judgment applies with all the more reason in the situation where a worker, whose freedom of movement during his or her break is already limited because the break is short, is subject to the geographical and temporal constraints resulting from the requirement to be ready to be called out within two minutes when necessary.

39. Because of those overriding constraints, a worker is unable to manage his or her break as he or she sees fit in order to pursue his or her personal and social interests. On the contrary, such a worker must be regarded as being at the disposal of his or her employer during his or her break, since he or she is legally obliged to obey the instructions of his or her employer and carry out his or her activity for that employer. [19] I would add that the constraint consisting of the requirement for a worker to be ready to be called out during his or her break within two minutes when necessary means that the worker performs his or her work on a continuous basis and is constantly on alert. I also note that the worker in question is not relieved during his or her break.

40. Where those circumstances pertain, whether or not a break is classified as 'working time' within the meaning of Directive 2003/88 cannot, to my mind, depend on the fact that call outs during that break occur at random and unpredictably or on how often they occur. Its classification must not depend on the variation in a contingent factor of that kind, on pain of

[14] See the *Matzak* judgment (paragraph 60 and the case-law cited).

[15] See the *Matzak* judgment (paragraph 63).

[16] See the *Matzak* judgment (paragraph 64).

[17] See the *Matzak* judgment (paragraph 65).

[18] See the *Matzak* judgment (paragraph 66).

[19] See judgment of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:578, paragraph 36).

opening the way to casuistic argument and the resulting legal uncertainty. Furthermore, the Court has already held that the directive must apply to the activities of the fire service, 'even though the actions which those activities may entail are inherently unforeseeable'. [20]

41. I also note that, according to the Court, the intensity of the work by the employee and his or her output are not among the characteristic elements of the concept of 'working time' within the meaning of Article 2 of Directive 2003/88. [21] Accordingly, whether or not a period when the worker is present at the workplace is classified as 'working time' within the meaning of that directive cannot depend on the intensity of that worker's activity, but depends only on his or her obligation to be available to his or her employer. [22] Furthermore, the fact that the activity actually performed varies according to the circumstances does not mean that the worker cannot be regarded as carrying out his or her duties. [23]

42. I conclude from the foregoing that the definition of 'working time' within the meaning of Directive 2003/88 should not be reserved solely for actions that a worker performs during his or her break, but should extend more broadly to include the period during which that worker is available to his or her employer to be called out within two minutes when necessary.

43. I concede that, as the European Commission argues, breaks inherently have specific features that distinguish them from the daily and weekly rest periods established in Articles 3 and 5 of Directive 2003/88 and can lead to breaks being subject to specific constraints and restrictions. [24] It is therefore not a question of arguing that, in qualitative terms, breaks should offer workers the same opportunities for pursuing their personal and social interests as the other rest periods which, because of their length in particular, give those workers different opportunities in terms of personal occupations. [25] That being so, to my mind, only the interpretation I am suggesting ensures that the break under Article 4 of Directive 2003/88 effectively allows a worker to use that time for rest.

44. Breaks are, effectively, rest time, as borne out by recital 5 of Directive 2003/88, which includes 'adequate breaks' in the requirement that 'all workers should have adequate rest periods'. It should also be noted, first, that Article 4 of that directive is in Chapter 2, which addresses, in particular, 'minimum rest periods', and, secondly, that Article 4 comes between Article 3, on daily rest, and Article 5, on the weekly rest period.

45. I note, in that respect, 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 provisions concerning, in particular, the duration of working time. [26]

[20] See, in particular, the *Matzak* judgment (paragraph 27 and the case-law cited).

[21] See, in particular, the *Matzak* judgment (paragraph 56 and the case-law cited).

[22] See judgment of 1 December 2005, *Dellas and Others* (C-14/04, EU:C:2005:728, paragraph 58).

[23] See the *Matzak* judgment (paragraph 57 and the case-law cited).

[24] Specifically, because they are short, breaks are inherently subject to temporal and geographical constraints. The fact that the break comes between two periods of work can also mean that a worker must, for example, in certain kinds of job, remain in uniform during breaks.

[25] It is obvious that a worker cannot use his or her time as freely when he or she has a 30-minute break as when he or she has 11 hours of daily rest or 24 hours of weekly rest.

[26] See, in particular, judgment of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402, paragraph 36 and the case-law cited).

46. That harmonisation at EU level in relation to the organisation of working time is intended to guarantee better protection of the safety and health 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. [27]

47. Accordingly, in addition to the measures they must take in accordance with Articles 3 and 5 of Directive 2003/88, [28] under Article 4 of that directive, the Member States must take 'the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation'.

48. In order to ensure that Directive 2003/88 is fully effective, the Member States must ensure that the minimum rest periods laid down by that directive are observed. [29] This means that the Member States must ensure that the break effectively allows a worker to use that time for rest.

49. It is true that Article 4 of Directive 2003/88 does not establish the specific arrangements by which the Member States must ensure that the right to breaks is implemented, which must be set by collective agreements or agreements between the two sides of industry or, failing that, by national legislation.

50. Nevertheless, in keeping with the Court's finding in respect of the minimum rest periods under Articles 3 and 5 of Directive 2003/88, there is reason to consider that, while Member States thus enjoy a margin of manoeuvre for that purpose, it remains the case that, having regard to the essential objective pursued by that directive, which is to ensure the effective protection of the living and working conditions of workers and better protection of their safety and health, they are required to ensure that the effectiveness of the right under Article 4 of that directive is guaranteed in full, by ensuring that workers actually benefit from a break where the working day is longer than six hours. [30]

51. It follows that the arrangements made by the Member States to implement the requirements of Directive 2003/88 must not be liable to render the right to a break under Article 4 of that directive meaningless. [31]

52. In that regard, it must be borne in mind that the worker must be regarded as the weaker party in the employment relationship and that it is therefore necessary to prevent the employer from being in a position to impose a restriction of his or her rights on him or her. [32]

[27] See, in particular, judgment of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402, paragraph 37 and the case-law cited).

[28] See, in particular, judgment of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402, paragraph 38 and the case-law cited).

[29] See, in particular, judgment of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402, paragraph 40 and the case-law cited).

[30] See, in particular, by analogy, judgment of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402, paragraph 42 and the case-law cited).

[31] See, in particular, by analogy, judgment of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402, paragraph 43 and the case-law cited). The sole purpose of the margin of manoeuvre that Article 4 of Directive 2003/88 allows the Member States is therefore to enable the length and frequency of breaks to be tailored to constraints concerning the organisation and nature of the work. That view is moreover reflected in Article 13 of that directive, according to which 'Member States shall take the measures necessary to ensure that an employer who intends to organise work according to a certain pattern takes account of the general principle of adapting work to the worker, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate, depending on the type of activity, and of safety and health requirements, *especially as regards breaks during working time*' (emphasis added).

[32] See, in particular, by analogy, judgment of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402, paragraph 44 and the case-law cited).

53. However, to my mind, the aim that Article 4 of Directive 2003/88 pursues cannot be achieved where a worker's break can be interrupted at any time. As I stated above, that uncertainty because a call out may occur inherently places the worker on constant alert, thereby conflicting with the purpose of the break as a time for rest. In my view, that conclusion is influenced neither by the fact that breaks are interrupted randomly and unpredictably, nor by how often those interruptions occur.

54. Lastly, for the sake of completeness, I would point out that under Article 17(3)(c)(iii) of Directive 2003/88, derogations may be made from, amongst others, Article 4 of that directive in the case of, in particular, fire and civil protection services. Nevertheless, since the main proceedings centre on whether the breaks taken by XR should be classified as 'working time' or 'rest periods' within the meaning of that directive, it is not necessary to have regard to that article which, I would point out, is not mentioned in the decision to refer. In any event, I note that the Court has held that Article 17(3)(c)(iii) of Directive 2003/88 does not allow the Member States to derogate, with regard to certain categories of workers, from Article 2 thereof, which defines, in particular, the concepts of 'working time' and 'rest periods'. [33]

55. In the light of the foregoing, I suggest that the Court should answer the first and second questions referred to the effect that Article 2 of Directive 2003/88 must be interpreted as meaning that breaks offered to a worker during his or her daily working time, during which he or she must be available to his or her employer to be called out when necessary within two minutes constitute 'working time' within the meaning of that article. That finding is influenced neither by the fact that breaks are interrupted randomly and unpredictably nor by how often call outs occur.

B. The third question referred

56. By its third question, the referring court is asking the Court, in essence, to rule on whether EU law precludes a national court which is called upon to decide a case referred back to it by a higher court that has set aside its decision from being bound, in accordance with national procedural law, by legal rulings of that higher court, if those rulings are inconsistent with EU law.

57. According to the Court's consistent case-law, the principle of the primacy of EU law means that, where it is unable to interpret national law in compliance with the requirements of EU law, the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such a provision by legislative or other constitutional means. [34]

58. The national court has a duty to ensure the primacy of EU law irrespective of that court's ranking in the national legal system.

59. Accordingly, in the context of the relationship between lower and higher national courts following a reference for a preliminary ruling, it is important to remember that, according to consistent case-law, a judgment in which the Court of Justice gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main

[33] See the *Matzak* judgment (paragraph 39).

[34] See, in particular, judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 58 and the case-law cited).

proceedings.[35] The national court, having exercised the discretion conferred on it by the second paragraph of Article 267 TFEU, is therefore bound, for the purposes of the decision to be given in the main proceedings, by the interpretation of the provisions at issue given by the Court and accordingly must, if necessary, disregard the rulings of the higher court if it considers, having regard to that interpretation, that they are not consistent with EU law.[36]

60. I would add that the requirement to give full effect to EU law includes the obligation on a national court to alter established case-law, where necessary, if that is based on an interpretation of national law that is incompatible with EU law.[37] The national courts are therefore obliged to ensure that Article 267 TFEU is given full effect and, if necessary, of their own motion, to disapply any national rule, as interpreted by a higher court, where that interpretation is not compatible with EU law.[38]

61. In the light of the foregoing, I propose that the Court should answer the third question referred to the effect that EU law precludes a national court which is called upon to decide a case referred back to it by a higher court that has set aside its decision from being bound, in accordance with national procedural law, by legal rulings of that higher court, if those rulings are inconsistent with EU law.

V. Conclusion

62. In the light of the foregoing, I suggest that the Court should answer the questions referred for a preliminary ruling by the Obvodní soud pro Prahu 9 (District Court, Prague, 9, Czech Republic) as follows:

1. 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 must be interpreted as meaning that breaks offered to a worker during his or her daily working time, during which he or she must be available to his or her employer to be called out when necessary within two minutes constitute 'working time' within the meaning of that article. That interpretation is influenced neither by the fact that breaks are interrupted randomly and unpredictably nor by how often call outs occur.

2. EU law precludes a national court which is called upon to decide a case referred back to it by a higher court that has set aside its decision from being bound, in accordance with national procedural law, by legal rulings of that higher court, if those rulings are inconsistent with EU law.

35 See, in particular, judgment of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraph 29 and the case-law cited).

36 See judgment of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraph 30).

37 See, in particular, judgment of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 35 and the case-law cited).

38 See, in particular, judgment of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 36).