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SHAPING THE CONCEPT OF 'WORKING TIME' BETWEEN EUROPEAN UNION AND NATIONAL LEGISLATION – A CONTINUOUS TASK FOR NATIONAL COURTS

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Abstract: The two main functions of the concept of working time - quantifying the remuneration and health and security at work protection - are found together or separately in the laws of the member states while EU law regulates working time only for the purpose of protecting health and safety at work; when Member States adopt a single regulation on working time, it may define this concept more narrowly or broadly than EU regulation. In disputes before them, when the courts of the Member States have to apply both national and EU law, they are put in a position to bring the concept of working time under national law within the limits of EU regulation. The article examines the situations in which national courts may find themselves in this process, the obligations they have and the solutions they may apply in the context of the evolution of the CJEU jurisprudence on the content of the "working time" notion.

Key words: working time, rest time

1. INTRODUCTION

In the labour relations that were born in the process of mass industrialization, it was made the difference between the "paid time" for which the employee received a financial compensation - the salary - and the "free time" that was available to him/her[1]. The traditional concept of working time used measured time, which covered work recognized and remunerated by the employer[2]. Working time was thus a tool to determine, on the one hand, the duration of work and, on the other hand, the remuneration due to the employee[3], this being established according to the working time[4].

Along with the remuneration of work according to the working time, the employer aimed, through the measures of work organization, to increase the labour intensity and the productivity.

Losing control over effort dosing, over the intensity of work, employees began to feel more and more acutely the need to limit working time. Thus, on the one hand, employees obviously felt the lack of rest time to restore work capacity and, empirically, understood the effects of excessive work on health and the risk of accidents at work, especially during industrialization, when the use of new technologies - still not fully developed and tested - increased this risk. On the other hand, workers increasingly felt a lack of control over the time they dedicated to their family and even to the work in their own interest (in their own household).

The fact that the first Convention adopted under the auspices of the International Labor Organization (further referred to as "ILO") was Convention no. 1/1919 on working hours was obviously not accidental.

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[1] Rubery, Jill, et al. "Working time, industrial relations and the employment relationship." *Time & Society 14(1)/2005,* p.91.

[2] Supiot, Alain. "Temps de travail: pour une concordance des temps." *Droit social, 12/1995,* p.949;

[3] Del Giudice, F., Izzo, F, Solombrino, M. – Manuale di diritto del lavoro, ed.XXXIV, Editura Simone, Napoli, 2016, p.242; Del Giudice, Federico, D'Agostino, Cristina, Marano, Alessandra – Diritto del lavoro – Ipercompendio, Gruppo Editoriale Simone, Napoli, 2013, p.90;

[4] Riva, Severino – Compendio di Diritto del lavoro, ed. XXI, Editura Simone, Napoli, 2016, p.142; Moţiu, D. – Dreptul individual al muncii, Ed. CH Beck Bucureşti 2011, p.294;

At the level of European Union (further referred to as "EU"), Directives 93/104 and 2003/88, concerning certain aspects of the organisation of working time, were adopted with the stated aim of protecting health and safety at work. This is particularly important for determining the scope of these regulations.

However, national regulations must provide working time with both the function of establishing remuneration and the function of protecting health and safety at work. Disputes faced by national courts can address both issues separately or together, and those courts must take into account not only national regulations, but also those adopted at European Union level.

Member States, through all their institutions, including national courts, have an obligation to interpret national law in accordance with Union law (obligation to interpret accordingly) [5].

The priority application of Union law ensures its effective, efficient and uniform application and making its application subject to national rules would achieve the objectives of the founding treaties[6].

On the other hand, national courts are also required to comply with the case - law of the Luxembourg Court when applying the national law which it interprets in accordance with European Union law.

The obligation to respect the jurisprudence of Court of Justice of the European Union (further referred to as "CJEU"), which rests with national courts, concerns not only the operative part of preliminary rulings, but also their considerations and the effects occur retroactively, their time limitation being available only by the Court exceptionally[7].

Thus, in several judgments the Court has held that the Member States are liable for infringements of European Union law, which is a principle inherent in the system of the founding treaties[8].

The obligation of the national court to take into account the content of a directive when interpreting and applying the rules of national law is limited by the general principles of law and cannot be used as a basis for a *contra legem* interpretation of national law[9]. If, however, the national rule contains a provision which is manifestly contrary to European Union law, the national court, following the principle of supremacy but also the obligation of loyal cooperation, may put aside the national legal provisions contrary to a directive[10].

It must be pointed out that, according to the CJEU, Article 2 of Directive 2003/88 may not be derogated from[11] either in application of Article 17 of Directive 2003/88 or even in the application of Article 15 thereof, by establishing a more favourable measures for workers. Thus, in the Matzak

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[5] *Craig, P., de Búrca*, *G.,* Dreptul Uniunii Europene – comentarii, jurisprudenţă şi doctrină, ed. a VI-a, Ed. Hamangiu, Bucureşti, 2017, p. 234-236, CJEU - C-14/83, *Sabine von Colson & Elisabeth Kamann c. Land Nordrhein – Westfalen*; *G. Tudor, D. Călin*, Jurisprudenţa CJCE, vol. II, Ed. C.H. Beck, Bucureşti, 2006, p. 266-276; CJEU, Judgement of 21.10.2010, C- 227/09, *Antonino Accardo et.al. c. Comune di Torino*, ECLI:EU:C:2010:624 (*www.curia.eu*), paras. 49; CJEU, Judgement of 24.01.2012, C-282/10, *Maribel Dominguez c. Centre informatique du Centre Ouest Atlantique, Préfet de la région Centre*, ECLI:EU:C:2012:33 (*www.curia.eu*), paras. 27; C-397-403/01, *Pfeiffer et al. c. Deutsches Rotes Kreuz Kreisverband Waldshut eV* (*www.curia.eu*), paras. 115-116.

[6] *Craig, P., de Búrca*, *G.,* op.cit. p.190; Gyula Fábián – Drept instituţional al Uniunii Europene, Ed. Hamangiu şi Ed. Sfera Juridică Bucureşti 2012, p.67

[7] Andreşan-Grigoriu, Beatrice – Procedura hotărârilor preliminare, Ed. Hamangiu Bucureşti, 2010 p.349;

[8] first in the cases C-6/90 şi C-9/90, Andreea Francovich, Danila Bonifaci et al.c. Italia; see also Judgement of 5.03.1996, *Brasserie du pêcheur & Factortame*, C-46/93 şi C-48/93, Rec., p. I-1029, par. 31, and Judgement of 26.01. 2010, *Transportes Urbanos y Servicios Generales*, C-118/08, Rep., p. I-635, par. 29; CJEU, Judgement of 25.11.2010, case C- 429/09, Günter Fuß c. Stadt Halle, ECLI:EU:C:2010:717, par.45;

[9] CJEU, Judgement of 21.1 2010, C-227/09, Antonino Accardo et al. c. Comune di Torino, ECLI:EU:C:2010:624, par.25, Judgement of 15.04.2008, *Impact*, C-268/06, Rep., p. I-2483, par. 100, and the Judgement in the case *Angelidaki et al.* par. 199

[10] Groza, Anamaria – Probleme de drept european – Principii. Directive. Trimiteri preliminare. Jurispruenţă românească comentată, Ed. CH Beck, Bucureşti 2015, p.6;

[11] CJEU, Order of 4.03.2011 in the case C-258/10, Grigore, par.45 and Judgement of 10.09.2015 in the case C-266/14, Tyco, par.28; Judgement of 21.02.2018 in the case C-518/15 - Matzak, par.34.

case[12], the CJEU established that Article 15 of Directive 2003/88 must be interpreted as not allowing Member States to maintain or adopt a less restrictive definition of 'working time' than that laid down in Article 2 of that Directive.

However, when, for the interpretation of national law, the provisions of certain directives and the CJEU case - law concerning it are used, national courts must take those provisions into account only within the purpose and scope of their application.

With regard to the working time regulation adopted in the EU, the CJEU has repeatedly stated that the issue of remuneration does not fall within the scope of the working time directives[13].

The relationship between the autonomous notion of working time in EU law and the same notion in national law is fluctuating, depending on the variation of the effects that the function of quantifying work and remuneration has on the content of the latter, which remains the exclusive regulatory competence of states. Thus, in order to establish remuneration, Member States or social dialogue partners, through collective bargaining agreements, may establish:

- that remuneration is also due for periods when work is not performed but which constitutes working time in terms of safety and health in the work; or
- that it is due for periods in which work is not performed and also does not constitute working time in accordance with European directives; or
- that it is established only according to the time allocated to the actual performance of the work, and not for periods in which the worker does not carry out any activity, although these would constitute working time according to the EU directives and the CJEU jurisprudence .

As the CJEU has pointed out, *'although Member States have the right to determine the remuneration of workers falling within the scope of Directive 2003/88 in accordance with the definition of' working time 'and' rest period 'in Article 2 of Directive, they shall not be required to do so."*[14]

Simultaneously, it must be considered that, as the Court has also stated in that judgment, if the issue of remuneration does not fall within the scope of Directive 2003/88, that interpretation of Article 15 of the Directive concerns only the definition of working time adopted in order to ensure safety and health at work, without preventing States from defining working time in order to determine remuneration in a more favourable way for employees (as is the case with Belgian law which, as set out in the judgment, establishes a certain remuneration for inactive periods of time which may not be considered working time within the meaning of Article 2 of Directive 2003/88)[15].

2. NATIONAL REGULATION TYPOLOGY AND THEIR CONSEQUENCES IN LABOUR LITIGATIONS

2.1. The situation of separate regulation for remuneration purposes and safety and security at work

If the national regulation of working time is separate, corresponding to its two main functions, conforming interpretation and eventually removal from application of national law are mandatory only regarding the application of the rules on safety and health at work, while the interpretation of the rules on remuneration remains limited to national law.

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[12] CJEU, Judgement in case C-518/15, Ville de Nivelles c. Rudy Matzak;

[13] For example, CJEU, Order of 4.03.2011 in the case C-258/10, Grigore, pct. 4 of the operative part and the case-law cited there, paras. 81-83 (*www.curia.eu*); for the same conclusion see also CJEU, Judgement of 10.09.2015, C- 266/14, paras. 48-49 (*www.curia.eu*); Judgement in the case C-14/04, *Dellas et al.*, EU:C:2005:728, p.38, and also CJEU, Order of 11.01.2007 C-437/05, *Vorel*, EU:C:2007:23, p.32, and Order of 04.03.2011 C-258/10, *Grigore*, EU:C:2011:122, p.81 & 83, Judgement of 10.09.2015 in case TYCO, par.47-48; Judgement in case C-518/15, Ville de Nivelles c. Rudy Matzak, p.49;

[14] CJEU, Judgement of 2102.2018, C- 518/15, par.50;

[15] for the Czech law regarding the remuneration for on-call duty see CJEU, Order of *4.05.2017, C-653/16, Jitka Svobodová c. Česká republika – Okresní soud v Náchodě, EU:C:2017:37, p.10-11;* see R. Anghel - Timpul de lucru al judecătorilor. Efectuarea serviciului de permanenţă. Inexistenţa unei remuneraţii. Invocarea discriminării. Inadmisibilitate, Revista Forumul Judecătorilor nr.1/2017, pp.187-195;

For example, in the UK there are two separate regulations. One of them[16], which defines working time for the protection of health and safety at work, in application of Directive 93/104, which became 2003/88, which defines working time as: *any period during which the worker works, at the employer's disposal and performs his activities or tasks, any period during which he receives relevant professional training and any other additional period to be treated as working time for the purposes of this Regulation in accordance with a relevant agreement;* the regulation also includes a series of special rules for certain professional categories, work at home, working time that cannot be measured, etc., in accordance with the possibilities of derogation offered by the framework directive. The other regulation[17], which regards the minimum remuneration, operates with numerous distinctions, establishing the payment according to the work actually performed but also for the hours considered to be affected by the work; for the latter situation, the regulation establishes in detail the conditions under which the periods affected by vocational training, transport, availability service may be included in paid working time, the notion of working time having a narrower content than in the case of the regulation applicable to working conditions. For example, travel or training time is included in paid working time only if it is performed during periods when the worker should have worked if he did not perform these activities; the period of availability is remunerated only if the on-call service takes place at the workplace or in a place close to it, unless the worker is at home. As a result, in the UK jurisprudence, the period of availability was considered as the time actually allocated to the performance of a duty when, in order to fulfil a specific obligation of the employer, to ensure permanently staff at headquarters, the worker must remain at work which means that he is paid for it without having to actually perform the work[18].

Another example is that of the French regulation, which defines in the Labor Code the actual working time (art. L3121-1) as the period in which the employee is available to the employer and complies with his instructions without being able to enjoy personal occupations freely; next, however, the regime of travel time (art. L3121-4, art. L3121-5), of availability (art. L3121-9 and L3121-10) is established, also the one allocated to professional training (art. L6321-2, L6321-6), the one assigned to the wearing of work equipment (art. L3121-3) or for personal hygiene (art. R3121-1). Thus, it is expressly established that the shower time is not taken into account when calculating the duration of the actual working time but is remunerated with the normal salary for working hours; it is established that travel time, if it takes place during normal working hours, does not lead to a decrease in remuneration, being therefore remunerated, but if it takes place outside working hours it does not constitute actual working time but if it exceeds normal travel time from home to place is subject to financial or free time compensation. In the same sense, the period of availability at home may be subject to similar compensation and, possibly, only the duration of the actual intervention is part of the actual working time, the rest of the duration being taken into account for the minimum duration of rest periods; the time allocated to the professional training on which the exercise of a function or the performance of an activity is conditioned according to imperative regulations, constitutes effective and remunerated working time like other training activities, except for those that can be performed outside the work schedule and are not mandatory, but within the limit of 30 hours per year.

Therefore, the very detailed French legislation distinguishes between periods which are considered unpaid working time and paid periods even if they do not constitute working time, illustrating the differences between the concept of working time under national law for remuneration purpose and of that notions for the purpose to ensure health and safety at work, although it has been shown that it does not seem to solve, however, all the problems that have arisen. [19]

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[16] The Working Time Regulations 1998, No. 1833, available: http://www.legislation.gov.uk/uksi/1998/1833/contents/made

[17] The National Minimum Wage Regulations 2015 No. 621, available https://www.legislation.gov.uk/uksi/2015/621/contents/made

[18] it was considered that the worker is entitled to the minimum wage under art.32 din The National Minimum Wage Regulations 2015 No. 621 - Employment Appeal Tribunal, Edinburgh, Middle West Residential Care Home vs. L. Slavikovska, URL: [2014] IRLR 598, [2014] UKEAT 0217_12_0805, [2014] ICR 1037; http://www.bailii.org/uk/cases/UKEAT/2014/0217_12_0805.html

[19]Bouffartigue, P., & Bouteiller, J. (2002). L'érosion de la norme du temps de travail. Travail et emploi, 92, p.51;

Consequently, the constant opinion of the French Court of Cassation is that, although according to the jurisprudence of the CJEU, any period during which the worker is at the employer's disposal at work must be recognized as working time, it has no influence on wage rights, so those time periods cannot be considered actual working time[20]. At the same time, it has also been noted in French case-law that, for example, although the amount of financial or free time compensation of periods of availability (in which the employee, without being immediately available to the employer, has the obligation to remain at home or close to the place of work, in order to be able to appear at the request of the employer in order to perform the work) is freely established, in the absence of conventional or contractual provisions establishing the remuneration of the hours of permanence, due to the employee, it is up to the judge to sovereignly assess the amount of remuneration due to the employee [21]. Also, from the wording of art. L3121-4, art.L3121-5 of the French Labor Code, it results that the period of travel to work is not considered effective working time even if it exceeds a normal duration between home and normal place of work, being established by the Court of French cassation that even in this case this duration of travel cannot be taken into account in order to verify the observance of the maximum normal duration of the weekly working time[22].

2.2. The situation of a unique regulation of working time

The situation causing the most problems, however, is the one in which the national regulation is unique but seeks to fulfil both main functions of working time.

In this case, the definition of working time in national regulation can be either the same with the EU regulation, wider or narrower than that.

§1. When national law contains a single regulation of working time, applicable both to the function of protection of health and safety at work and to the function of quantifying work and remuneration, the definition of working time being identical to that of Directive 2003/88, the situation is in favor of the employee because the notion of EU law has a comprehensive content in order to achieve the objectives of the directives adopted in this field.

In that case, (as in Italian law), when a definition of working time identical to that contained in Directive 2003/88 is adopted in national law, a definition which has a general applicability in employment relationships and is not limited to the field of safety and occupational safety, it can also be taken into account in wage disputes. As a consequence, inactive periods can also be taken into account for remuneration even if those periods constitute working time, but not effective work time, as the regulation of these aspects remaining at states´ discretion and such regulation creates a new legal order. [23]

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[20] Cour de cassation, Chambre social, audience publique du 31.10.2012, n° de pourvoi 11-12277, audience publique du 23.01.2013, n° de pourvoi 10-20413, audience publique du 07.12.2010, n° de pourvoi 09-42711/ 09-67632, audience publique du 13.06.2007, n° de pourvoi 06-42106, audience publique du 28.05.2014, n° de pourvoi 13-10544, audience publique du 30.11.2010, n° de pourvoi 09-66672, audience publique du 28.05.2014, n° de pourvoi 13-13996(*www.legifrance.fr*); It should be noted that the French Labor Code defines the duration of actual work as *"the time during which the employee is available to the worker and complies with his instructions without being able to freely engage in personal activities."* [Article L. 3121-1 - Code du Travail (modifié par la loi n° 2016-1088 du 8 août 2016) Durée du travail effectif: La durée du travail effectif est le temps pendant lequel le salarié est à la disposition de l'employeur et se conforme à ses directives sans pouvoir vaquer librement à des occupations personnelles.]

[21]*Cour de cassation – chambre sociale, Judgement of 14 decembrie 2016, ECLI: FR:CCASS:2016:SO02380, see R. Anghel*, *Timpul de lucru şi timpul de odihnă – Jurisprudenţa Curţii de Justiţie a Uniunii Europene,* Universul Juridic 2017, p. 83-84.

[22] Cour de cassation – chambre sociale, Judgement of 25.01.2017, ECLI:FR:CCASS:2017:SO00085*,* prezentată in R. Anghel- Timpul de lucru şi timpul de odihnă – jurisprudeţa CJEU, op.cit., p.131;

[23] R. Anghel - Delimitarea timpului de lucru de timpul de odihnă in jurisprudenţa italiană recentă (mai 2017 – mai 2018). Sinteze şi note, Revista EuRoQuod nr.2/2018, p.301; Corte Suprema di Casazione , Sez. Lavoro, sentenza nr.13465/29.05.2017 (www.italgiure.giustizia.it/sncass/);

Where the national rule applies for the purpose of protection of health and safety at work, it is mandatory to take into account the CJEU interpretations for the working time definitions from EU directives. When applying the norm for the establishment of remuneration, such an obligation does not exist. Consequently, although it is difficult to imagine, given the generous nature of the working time definition in Directive 2003/88, whether a national court, in order to determine remuneration, excludes from the concept of working time a certain period which constitutes working time according to the directive and CJEU case law, it does not constitute an infringement thereof.

§2. A second situation is the one in which the notion of working time has in the unitary national regulation a more comprehensive meaning than the one resulting from the EU regulation. An example of this type is the Belgian regulation. Thus, the internal rule defines working time as the time when the employee is available to the employer. This probably led to filing of lawsuits for obtaining additional remuneration, as the legal text does not refer to attendance at work or the exercise of employee functions and performance of duties, but only requires the employee to be at the disposal of the employer[24]. Or, this could have been considered to happen even during the period of home on call duty from the perspective of national law, although the CJEU case law establishes the content of the condition for the employee to be available to the employer in relation to the definition contained in the directives, therefore by reference to the obligation of the employee to be present at work, as indicated in its case law[25]. In that context, by a judgment of 30 January 1984, delivered before the entry into force of Directive 93/104, the Belgian Court of Cassation held that both on-call duty at work and at home must be considered as working time, since the employee can be called at any time and in an unexpected manner[26].

However, subsequently, there was a reversal of jurisprudence, the Belgian courts considering that the period of availability at home does not constitute working time, in which sense the provisions of EU directives and the CJEU jurisprudence were taken into account.

According to the jurisprudential reorientation, it was noted that the period in which a fire-fighter performs guard duty at home, without performing any activity, having only the obligation to appear at the unit in case of intervention, does not constitute working time[27]. The decision is interesting because the national court adopts a solution in accordance with the definition of working time resulting from the CJEU jurisprudence, but contrary to national regulations.

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[24] Art. 8.§ 1er. La durée du travail des travailleurs ne peut excéder en moyenne trente-huit heures par semaine sur une période de référence de quatre mois.
On entend par durée du travail, le temps pendant lequel le travailleur est à la disposition de l'employeur.
(14 decembre 2000 – Loi fixant certains aspects de l'aménagement du temps de travail dans le secteur public, publication: 05-01-2001 numéro: 2000002134 page: 212), available: *http://www.ejustice.just.fgov.be/eli/loi/2000/12/14/2000002134/justel*.

[25] CJEU, Judgment of 3 October 2000, Case C-303/98, SIMAP, par.52 and p.3 of the operative part; CJEU, Order of 11.01.2007 C 437/05, Vorel, EU:C:2007:23, par.27, Judgement of 10.09.2015 in the case C-266/14, Tyco, par.35 şi 37; Judgement of 1.12.2005, case C-14/04, Abdelkader Dellas, par.46, Judgement of 9.09.2003, case C-151/02, Landeshauptstadt Kiel c. Norbert Jaeger, ECLI:EU:C:2003:437, paras.71 şi 75 ; Order of 3.07.2001, case C-241/99, Confederación Intersindical Galega (CIG) c. Servicio Galego de Saúde (Sergas), ECLI:EU:C:2001:371, par.34, Judgement of 5.10.2004, C-397/01-C-403/01, Pfeiffer et al.,par.93;

[26] The Judgement is cited by Cour du travail de Mons, 2ème Chambre, in Judgement of 18.01.2010 (*http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20100118-8*), showing that it has a unique character and can be obtained only on request from the registry of the Court of Cassation; the citation considered is the following: „Le temps de garde effectué aussi bien à domicile qu'au sein de l'entreprise doit être considéré comme du temps de travail dès le moment où le travailleur peut être rappelé à tout moment et ce de manière inattendue" ("On-call time performed both at home and within the company must be considered as working time when the worker can be called back at any time and unexpectedly".)

[27] Cour de Cassation de Belgique – Arrêt N° S.13.0024.F din 18 mai 2015, *http://jure.juridat.just.fgov.be/*, *see* Răzvan Anghel – „Timpul de lucru si timpul de odihna..." op.cit., p.80-81 ;

Thus, in the case, the applicants were employed as fire-fighters in a specialized service, performing guard duty in the barracks and at home. The dispute did not concern the correct remuneration of on-call hours spent in the barracks, which were paid as normal working time, as well as the periods of actual intervention during home guards, but the inclusion of on-call hours at home in the duration of working time. Referring to the CJEU case law, namely the judgments in SIMAP and Jaeger, the Specialized Court of Appeal for Labour Disputes in Liege held that a clear distinction must be made between the regulations of working time, which is the subject of Directive 2003/88, on the one hand and those applicable to remuneration for actual work and periods of inactivity related to the on-call period, on the other hand. The Court of Appeal notes that the on-call period constitutes full working time when the employee performs it at work, but not all this period, as defined, must necessarily be remunerated as actual working time, in this sense being necessary to apply national legislation.

Based on this principle, the Court of Appeal held that a municipal regulation cannot derogate from the definition of working time, but, as regards the remuneration of working time, it may vary according to the activity carried out, so that if the period on-call duty at the place of work must be remunerated as provided, the period of stand-by duty at home must not necessarily be remunerated as ordinary working time. Referring to the doctrine, in that case, the Court of Appeal concludes that this period of inactivity is part of a third category, which is neither working time nor rest time[28]. The Court of Appeal states that, if the on-call hours at home are to be paid, the remuneration cannot be determined in relation to the period of inactive on-call duty, but to an activity actually performed during these on-call hours; on the contrary, hours of inactivity may not be paid or may be paid, but only in accordance with a special convention or regulation which provides for such payment; or, no normative or contractual text provides for the remuneration in any way of inactive guard periods. The Court of Appeal considered the situation to be unfortunate, because, in its opinion, it would be logical to be remunerated for this time, which is neither working time nor rest time, but, compared to the current legal framework, it considered that the employer he cannot be obliged to pay such remuneration. Finally, the Court of Appeal considered that this conclusion is not affected by the fact that fire-fighters must be ready to report to the barracks in a very short time, as they are not at work and do not perform work.

The Court of Cassation dismissed the applicants' appeal, holding that it follows from the CJEU case-law that, in the case of employees who only need to be available to perform an activity while at home, only that period in which the work is actually performed can be considered working time. The Court of Cassation thus considers that Article 8 §1 of the Law of 14 December 2000 on the organization of working time, transposing art. 2 of Directive 93/104, which has been replaced by Directive 2003/88, cannot be interpreted differently.

Although interesting[29], the idea of a third category, which is neither working time nor rest time, is debatable, since Directive 203/88 defines "rest period" in art. 2 point 2 as any period that is not working time. The inactive on-call duty period is rest time as the worker can restore his work capacity, the fact that he bears certain constraints regarding the organization of free time, family life, etc. being irrelevant to the purpose of Directive 2003/88, which is to ensure health and safety at work, and not to protect family life. On the contrary, the CJEU expressly stated that Directive 93/104 "does not provide for any intermediate category between working time and rest time"[30].

With regard to the judgment of the Court of Cassation, it is interesting that it envisages an interpretation of the internal rule that is in line with the European norm and the CJEU jurisprudence , although the internal rule seems to give a broader definition of working time.

However, although the opposition of the provisions of a directive to an individual in order to limit his rights provided by the national legislation is contrary to art. 23 of Directive 2003/88, the CJEU subsequently ruled in the Matzak case, by answering a preliminary question from a Belgian court, that

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[28] reference to Kefer, F. & Clesse, J. (2006), *Le temps de garde inactif, entre le temps de travail et le temps de repos. Revue de la Faculté de Droit de l'Université de Liège*, pp. 157-168.

[29] Anghel, R. – „Timpul de lucru si timpul de odihna..." op.cit. p.81

[30] CJEU, Judgement of 1.12.2005, case C-14/04, *Abdelkader Dellas, Confédération générale du travail, Fédération nationale des syndicats des services de santé et des services sociaux CFDT, Fédération nationale de l'action sociale Force ouvrière c. Premier ministre, Ministre des Affaires sociales, du Travail et de la Solidarité*, ECLI:EU:C:2005:728, par. 43, *www.curia.eu*.

Member States could not adopt a more comprehensive definition of working time than that of Directive 2003/88.

Still, the Court decided that home on-call duty should be considered working time if the time to take action is so reduced that prevent the worker to benefit of the rest time, that being an important step in the evolution of CJEU case law.

Therefore, the Belgian definition of working time - lacking some features and conditions of working time, so by omission - determines a more comprehensive content of this notion.

In these circumstances, the Belgian courts were called upon to interpret the rule of domestic law according to EU rules, which means adding to the definition of working time the conditions for the worker to be at work or another place imposed by the employer and to exercise his function and duties.

In the judgement[31] delivered in the national litigations after the CJEU judgement in the Matzak case, the national court eventually put aside the regulation on working time as, in the particular circumstances of the case, the home on call time of the fire-fighter were to be considered working time anyway but with no relevance on the remuneration. Finally, the court awarded the claimant the supplementary remuneration for the period of home on-call duty based on the findings that the treatment of his professional category in this regard was discriminatory comparing to a different category of fire-fighters which have the benefit of a remuneration for the same period.

It is also possible, however, that this extended content of working-time definition to result from the express inclusion of certain periods in the notion of working time, regardless of the function it intends to accomplish.

Thus, for example, the German Federal Court for Labour Disputes held in a judgment that the period affected by the travel from home to work of a worker in the period of availability at home, when required to perform work, must be remunerated as it is considered working time under the applicable collective bargaining agreement[32], although it is pointed out that, according to CJEU case law, during the period of availability at home, working time should only be considered as the period during which work is actually performed and, usually, the time required to travel from home to work is also not considered working time[33]. As in other cases[34], however, the Court found that the parties to the collective bargaining agreement considered the travel time required to begin work as part of the on-call duty and therefore requires remuneration; in this respect, it was considered that by collective agreement they have increased the remuneration of doctors within the limits of their regulatory power and, at the same time, have made their work more expensive during the on-call period, thus counteracting the excessive use of this service.

Therefore, it was stated that according to the will of the parties, the activity performed by the doctor during the on-call service does not begin with the assignment to the hospital, but in fact with leaving the place of residence and the transportation to the hospital and ends only after returning to the place of residence; as the parties to the collective agreement consider the travel time required to perform work as actual work for the purpose of regulating remuneration, it was concluded that the payment of overtime is in accordance with the principle that the doctor is paid for the work actually performed.

Therefore, emphasizing the rule that a certain period does not constitute working time in principle, the Federal Court acknowledges that, for the purpose of remuneration, there is nothing to prevent parties to a collective bargaining agreement from considering working time some periods which do not meet its characteristics in the view of the European regulation, so from the perspective of health and safety at work, as in the respective case, has raised the issue of remuneration and not of limiting working time.

On the contrary, if the issue of working time and its limitation for the protection of health and safety at work would had been under examination, the German court would have acted as in other cases (cited in that judgement) establishing that the respective time interval does not constitute

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[31] Belgium, Cour du Travail de Bruxelles, Quatrième Chambre, Arrêt du 20.01.2020, 2012/AB/592;

[32] Germany, Bundesarbeitsgericht (BAG), Judgement of 20.08.2014, 10 AZR 937/13, available https://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&sid=a7da11535affc80475a8b57c4353056e&nr=17753&pos=2&anz=10, par.18-19;

[33] see also BAG, Judgement of 19.09.2012 - 5 AZR 678/11 – par. 23;

[34] see also BAG, Judgement of 12.12.2012 - 5 AZR 355 /12 – par. 18;

working time; that constituted an adaptation of the content of working time regulated at national level to the content laid down in Directive 2003/88 as interpreted by the CJEU.

However, this restriction on the content of the concept of working time could not have been achieved by a consistent interpretation of the national rules in relation to the European rules, since the contradiction between them is obvious and, in such a case, would arrive at an interpretation *contra legem*. As a result, the solution is to leave unapplied, to remove, the national legal or contractual norm, so that the content of the notion of working time is reduced to what results from the European norm.

§3. A third situation is that in which the meaning of the notion of working time in national law, for both main functions, is narrower than that resulting from European norms, by introducing restrictions or expressly excluding periods that constitute working time according to them. Such regulation aims, in principle, to ensure a system of remuneration that relates as closely as possible to the work actually performed and the time required for it.

This is also the case of Romanian law, in which the general regulation of the Labor Code is limiting, determining a limited content of the notion of working time by requiring as a constitutive feature the actual performance of work by the employee, which is a restriction brought to the notion.

The contradiction is clear between the national and the European norm, in the interpretation of the CJEU, since the latter has explicitly indicated that labour intensity is not a relevant element and the qualification of a period as working time does not depend on the actual performance of work[35], an it may also include periods in which the worker does not carry out any activity, provided that he is at the place of work, available to the employer and ready to resume his activity to fulfill his function and duties.

As a result, in the case of art.111 of the Romanian Labor Code, when applied for the purpose of protection of health and safety at work, a consistent interpretation of law in accordance with EU law cannot take place, since, defining working time in national law by taking in consideration the definition of working time in Directive 2003/88, would lead to an interpretation *contra legem,* which does not correspond to the express terms of the national definition.

In these conditions, we consider that the only solution to reconcile the national norm with the European one is to remove from application a part of art.111 of the Labor Code, as required by the jurisprudence of the CJEU cited above; It should be noted that there is no reference in the CJEU jurisprudence to any obligation of national courts to remove a national rule entirety, as there is no impediment to the removal only of that part of the national rule which is contrary to EU law, if that part can be be individualized and isolated.

Therefore, in such situation, only the phrase *"performs work"* should be removed from the national definition of working time contained in art. 111 of the Labor Code so as to save the rest of the norm, which is fully in accordance with Directive 2003/88. It follows that, in order to protect occupational health and safety, the definition of working time should contain only the other two defining elements: the worker is at the employer's disposal and performs his duties and responsibilities.

Then, the problem could arise, in this case, if it does not turn out that any period in which the two conditions are met must be considered working time, regardless of where the worker is situated. We consider that such a solution cannot be accepted for two reasons:

- first, the three defining features of working time are not only cumulative but also interdependent, the CJEU linking the condition that the worker is available to the employer and to perform his duties by his presence at work or another place imposed by the employer, which the worker cannot freely choose[36]; as a result, if the employee were not in such a place, implicitly the other conditions would not be met;

[35] CJEU, Judgement of 1.12.2005, case C-14/04, Abdelkader Dellas, Confédération générale du travail, Fédération nationale des syndicats des services de santé et des services sociaux CFDT, Fédération nationale de l'action sociale Force ouvrière c. Premier ministre, Ministre des Affaires sociales, du Travail et de la Solidarité, ECLI:EU:C:2005:728, par.43 and 58.

[36] CJEU, judgement in the case SIMAP, cited, par.48, Judgement in the case Dellas, cited, par.48, Judgement in the case TYCO par.43; see also European Commission, Communication […] on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC, COM (1998)662 final – Explanatory memorandum, ec.europa.eu/social/BlobServlet?docId=2933&langId=en, p.12 pct.6; also Del Giudice, F., Izzo, F,

- secondly, after the removal of this part of the text of Article 111 of the Romanian Labor Code, we are in a situation similar to that of Belgian law, being regulated only a part of the defining features of working time according to the framework directive; it is only in those circumstances that the obligation to interpret the law in accordance with EU law and not to establish a more comprehensive content of working time than that laid down by the directive would arise, so that the condition that the worker is at work would become applicable as it is imposed by the EU Directive.

It can be argued that this mechanism achieves the same result as a consistent interpretation of law in accordance with Union law, but in several steps. In fact, all these mechanisms created in the CJEU jurisprudence have the same purpose, the harmonization of national laws and compliance with the provisions of directives which have a clear content and leave no margin of appreciation to the Member States, without infringing the principles of application of those rules, especially the lack of the possibility of direct application and, at the same time, without leaving the directives unenforced, which would undermine the very construction of Europe. However, precisely in order to respect these principles, we believe that the use of the method of conforming interpretation cannot be protected from the criticism of interpretation *contra legem* unless, for theoretical rigor, it is used in combination with the application of the principle of supremacy of EU law.

3. CONCLUSIONS

In conclusion, when it comes to the quantification of work and remuneration, and when, although there are issues of protection of health and safety at work, EU law is not applicable *ratione personae* or *ratione materie*, national law remains applicable[37], being taken into consideration the limited content of the notion of working time. If the issue of protection of health and safety at work is raised and European norms are incidental, the content of the notion of working time according to the internal norm is extended until the content determined according to the European norm overlaps. Union regulations, adopted in the field of safety and health at work, can neither benefit nor harm the interests of employees with regard to the determination of wage rights, this area of regulation remaining at the discretion of the Member States.

This does not mean, however, that there is no connection between the two functions of working time and between their regulations, but it must be viewed in a different way, making the necessary distinctions. The connection is inevitable because the delimitation of working time from rest time and the measurement of the former have not only the function of protecting health and safety at work, but also that of determining wage rights, this being the first and only function of measuring working time for a long time, that appeared with the transition from artisanal work, remunerated for the result, to organized work according to the principles specific to the era of industrialization.

This link is illustrated by a recent CJEU judgment in *da Rosa* case (C-306/16) [38]. Thus, although it is apparent in the main proceedings that it is a question of remuneration for overtime work (paragraphs 22 to 27), the applicant's arguments, which the national court, by formulating the question referred, does not seem to exclude *de plano*, and which the CJEU does not consider them to determine the inadmissibility of the question referred, are based on a logical construction involving that, if according to Directive 2003/88 a certain day should be free, work actually performed on that day is *de facto* work performed on a weekly rest day, so that national rules on remuneration in these situations should be applied[39].

It results that the concept of working time is constantly shaped by national courts in relation to the case presented to them, the aim of the claimant, the national rules and the EU rules, taking into consideration the purpose and the scope of European Directives, and also the evolving Court of Justice of European Union case – law .

Solombrino, M. – Manuale di diritto del lavoro, ed.XXXIV, Editura Simone, Napoli, 2016 , p.244 and Roşioru, F. – Dreptul individual al muncii, Ed. Universul Juridic, Bucureşti, 2017 p.412;

[37] Curtea de Apel Constanţa, Judgement no. 117 of 2.04.2019, published in Revista de Drept Social nr.1/2020.

[38] CJEU, Judgement of 9.11.2017, C -306/16, António Fernando Maio Marques da Rosa c. Varzim Sol – Turismo, Jogo e Animação SA,

[39] Anghel, R.– Timpul de lucru şi timpul de odihnă in jurisprudenţa CJEU recentă (iulie 2017-februarie 2018) – jurisprudenţă comentată, Revista EuRoQuod nr.2/2018, p.67;

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