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ARTICLE

Have a rest or a second job instead? Rest periods in EU law

Gábor Kártyás[1]

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Abstract
The paper aims to approach the dilemmas of EU working time regulation from the novel perspective of rest periods. It examines the functions and nature of rest periods in EU law, with special regard to the ECJ's recent judgment in the MÁV-Start case (477/21). The analysis goes on with the question whether rest periods should be regarded as a right or an obligation of the worker and visits the issue of the possible role of a separate right to disconnect. The paper argues that it should be possible to work in another employment relationship during the rest period.

Keywords Working time directive · Rest periods · Secondary job · Right to disconnect

The emergence of rest periods coincides with the birth of working time rules, as they are two sides of the same coin. Since the second half of the twentieth century, rest periods have been covered in several international legal sources,[1] while the most detailed and comprehensive regulation is provided by the European Union (EU). Daily

[1]The very first convention of the International Labour Organisation (ILO), adopted in 1919, by limiting weekly working hours indirectly included the provision of rest periods, which was later clarified by a number of conventions [International Labour Conference, *Ensuring decent working time for the future* 58 (Geneva 2018)]. However, the ILO still has no explicit rules on daily rest, the 24-hour minimum weekly rest period [ILO Conventions No. 14 (1921) and No. 106 (1957)] does not cover agriculture, and breaks are only provided in certain sectors [see ILO Convention No. 153 (1973) for road transport and ILO Recommendation No. 157 (1977) for nursing staff]. Global UN conventions refer only in general terms to the right to rest and leisure, including reasonable limitation of working time [Universal Declaration of Human Rights, Art. 24; International Covenant on Economic, Social and Cultural Rights, Art. 7(d)]. The European Social Charter, adopted by the Council of Europe in 1961, provides for reasonable daily and weekly working hours, for a progressive reduction of weekly working hours and explicitly mentions weekly rest period without specifying its extent [Art. 2(1) and (5)].

✉ G. Kártyás
kartyas.gabor@jak.ppke.hu

[1] Associate professor, Pázmány Péter Catholic University, Budapest, Hungary

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and weekly rest periods are legal institutions of EU labour law which have been in force since 1996,[2] recognised by case law as rules of 'EU social law of particular importance'[3] and raised to the status of primary law by the Charter of Fundamental Rights of the European Union.[4] The consistent separation of working time and rest periods has been elaborated by the Court of Justice of the European Union (hereinafter: the Court) in a number of landmark cases which have been widely discussed in literature. While these have mainly approached from the concept of working time, the meaning of rest period has received less attention.

This paper aims to approach the dilemmas of EU working time regulation from this new perspective, first by examining the functions and nature of rest periods in EU law (Sects. 1 and 2).[5] The Court's recent judgment in the MÁV-Start case[6] is of particular importance in this respect, as its conclusions on the relationship between daily and weekly rest periods are likely to have a significant influence on future case law. Section 3 goes on with the question whether rest period should be regarded as a right or an obligation of the worker and visits the issue of the possible role of a separate right to disconnect. Section 4 seeks to answer whether it is possible to work in another employment relationship during the rest period, a practical question which have not yet been settled either by legislation or by judicial practice. The analysis ends with some conclusions (Sect. 5).

1 Functions of rest periods

Rest periods cannot be separated from the protection of workers' health, which forms the legal basis of the Working Time Directive (hereinafter: WTD).[7] However, the purpose of rest periods goes beyond health and safety considerations. These additional functions are also reflected in the case law on the WTD, although the Court could only regard them as secondary to the protection of workers' health as the declared aim[8] and legal basis of the Directive.

[2]Council Directive 93/104/EC of 23.11.1993 concerning certain aspects of the organization of working time, OJ L 307, 13.12.1993, Art. 3–5; Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, Art. 3–5.

[3]Case 55/18, *CCOO v Deutsche Bank*, 14.5.2019, ECLI:EU:C:2019:402, para. 30.

[4]Art. 31(2).

[5]The study does not cover paid annual leave for reasons of doctrine and space. Dogmatically, although its purpose is similar to that of rest periods, it is of a different nature, since annual leave is remunerated and is to be scheduled within a much longer period (one year) than rest periods. Therefore, annual leave does not interrupt periods of work, but replaces them. Besides, annual leave would require a separate analysis since its rules have been interpreted by the Court in more than thirty cases.

[6]Case 477/21 *IH v MÁV-START*, 2.3.2023, ECLI:EU:C:2023:140.

[7]The correct choice of legal basis has also been confirmed by the Court, see Case 84/94 *United Kingdom v Council*, 12.11.1996, ECLI:EU:C:1996:431. The European Committee of Social Rights has also stressed that the provisions of the European Social Charter relating to working time are intended to protect workers' safety and health in an effective manner. *Confédération générale du travail* (*CGT*) *v. France Complaint* No. 22/2003, para. 34.

[8]WTD Art. 1(1).

First, adequate resting time is seen as the key to health protection.[9] According to the Court, the aim of rest periods is to enable the persons concerned to recover from the fatigue engendered by their work and are also preventive in nature so as to reduce as much as possible the risk of affecting the safety or health of employees which successive periods of work without the necessary rest are likely to produce.[10] Rest periods are based on the finite nature of human capacity to work. Human labour cannot be separated from the worker him/herself, whose performance is necessarily limited by his/her biological endowments. This is clearly evidenced by research on the health effects of performing overtime. Accordingly, the risk of adverse health outcomes such as accidents or injury at work, fatigue, sleep disorders, cardiovascular attack and obesity increases exponentially rather than linearly with increasing working hours, particularly for those working more than 12 hours a day.[11] It is also in the employer's interest that the worker is able to perform to the best of his/her physical and mental abilities during working hours, something which is objectively not possible without adequate rest.

Second, just as important as protecting workers' health is protecting their private lives. This is linked to working time in two ways. On the one hand, the employment relationship necessarily implies a restriction on the exercise of the right to privacy, which must not go beyond what is justified by the purpose of the employment relationship.[12] Without periods when the employee is released from the obligations to stand at the employer's disposal and to carry out his/her duties in accordance with the employer's instructions, a private sphere free from outside influence would be inconceivable. In the words of the Court, during rest periods workers may manage their time, pursue their own interests and be in their family and social environment.[13] This principle forms the basis of the case law which consistently treats periods of availability outside regular working hours as working time if during such periods the constraints imposed on the worker are such as to affect, 'objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interest'.[14]

On the other hand, private life in general has a temporal dimension. The right to an undisturbed private life cannot be achieved if it is not possible to enjoy it for sufficiently long, regular and predictable periods. There are many private activities that are rather time consuming and/or require preliminary scheduling (e.g. raising children, caring for family and friends, playing sport or studying). Protecting privacy fails if it excludes all outside intrusion but does not allow the worker to spend sufficient

[9] Teun Jaspers & Frans Pennings & Saskia Peters, *European labour law* 481 (Intersentia 2019).

[10] Case 151/02 *Landeshauptstadt Kiel v Norbert Jaeger*, 9.9.2003, ECLI:EU:C:2003:437, para. 92., 96.

[11] Sharona Aharoni-Goldenberg, *Overtime: Re-Interpreting the opt-out derogation*, 10 European Labour Law Journal, (2019/1), 22–26.

[12] Frank Hendrickx & Aline Van Bever, *Article 8. Judicial Paterns of Empolyment Privacy Protection* 185–186 (Filip Dorssemont & Klaus Lörcher & Isabelle Schömann eds, *The European Convention on Human Rights and the Employment Relation*, Hart, 2013).

[13] Case 303/98 *Simap v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, 3.10.2000, ECLI:EU:C:2000:528, para. 50.; Case 344/19 *D.J. v Radiotelevizija Slovenija*, 2021.3.9, ECLI:EU:C:2021:182, para. 35.

[14] Case 214/20 *MG v Dublin City Council*, 11.11.2021, ECLI:EU:C:2021:909, para. 38.

and appropriately scheduled time in this protected sphere. Emerging information and communication technologies also link the issue of working time to the protection of private and family life.[15]

A third function is the role that rest periods play in the labour market. The limitation of working hours and the introduction of minimum rest periods also has an impact on employment,[16] which was recognised by the Court.[17] A continuous activity (e.g. ambulance, fire-fighting, medical care, armed forces, police) can only be organised while respecting the mandatory rest periods if the employer uses more workers for the task, which means more employment opportunities. This correlation is apparent in those cases where the specific activity of the employer has led to the question whether such employer falls under the scope of the WTD. As the Court has consistently held, the uninterrupted nature of the activity does not necessarily conflict with the rules of the directive if it is predictable and can be organised by replacing the worker or by introducing a rotation system.[18] Consequently the solution is not to set aside the WTD, but to employ more workers for the job.[19] In addition to protecting the health of the individual worker, this is also beneficial from a labour market perspective, as it is in the public interest to guarantee employment – and consequently regular income and social security – for three workers rather than only for two who have to perform overtime regularly.

Finally, an economically important function which also relates to the protection of private life is that the worker shall have sufficient time for consumption. In a consumer society, it is essential for the economy that workers have time to spend their wages. Entire sectors would become dysfunctional if customers did not have enough time to enjoy the service, from tourism and beauty to entertainment, from adult education to self-awareness and therapy groups.

Much of the WTD's criticism is based on the fact that it follows a health and safety approach and the other functions of rest periods are marginalised.[20] In particular, it does not pay sufficient attention to the work-life balance, an aspect which is

[15] Christophe Vigneau, *Negotiating working time in times of crisis: the El Khomri law*, 99 Bulletin of comparative labour relations (2018) 203.

[16] Vincenzo Ferrante: *Between health and salary: The incomplete regulation of working time in European law*, 10 European Labour Law Journal, (2019/4), 375.

[17] Case 84/94 *United Kingdom v Council*, para. 28–30. The adoption of ILO Convention No. 47 (1935), which introduced the 40-hour working week, was also largely motivated by the rising unemployment caused by the Great Depression. ILO, *supra* n. 2, 9.

[18] Case 147/17 *Sindicatul Familia Constanţa and Others v Direcţia Generală de Asistenţă Socială şi Protecţia Copilului Constanţa*, 28.6.2018, ECLI:EU:C:2018:926, para. 73.; Case 211/19 *UO v Készenléti Rendőrség*, 30.4.2020, ECLI:EU:C:2020:344, para. 44.; Case 742/19 *B. K. v Republika Slovenija* (*Ministrstvo za obrambo*), 15.7.2021, ECLI:EU:C:2021:597, para. 61., 74., 76.

[19] However, this practice can be circumvented by the opt-out under Article 22 of the directive, which allows for working time in excess of 48 hours per week under strict conditions and by the agreement of the parties. Around two thirds of Member States use this instrument to include on-call time in working time. Manuel Antonio García-Muñoz Alhambra & Christina Hiessl, *The Matzak judgment of the CJEU: The concept of worker and the blurring frontiers of work and rest time*, 10 European Labour Law Journal, (2019/4), 349.

[20] Iacopo Senatori, *EU Law and Digitalisation of Employment Relations* 71 (Tamás Gyulavári & Emanuele Menegatti eds *Decent Work in the Digital Age. European and Comparative Perspectives*, Hart, 2022).

now regulated by specific directives.[21] The regulation is also incomplete in the sense that it cannot affect remuneration,[22] which is a shortcoming mainly from the point of view of the labour market function. The dominance of the health and safety aspect means that many practical problems may not be fully addressed by the directive. More specifically, considering solely health and safety at work would lead to an interpretation that during the rest period the worker is obliged to rest, and consequently he/she shall not work for another employer. However, as I explain below, I believe that these answers would be simplifying and misleading.

2 What happens outside working time? – the nature of rest periods

In EU labour law, working time and rest period are mutually exclusive concepts. While the directive defines three elements of working time (a period during which the worker is working, at the employer's disposal and carrying out his activity or duties), rest period is a residual concept[23] (the period which is not working time).[24] The rich case law on the delineation of working time and rest period is thus based on the interpretation of the conceptual elements of working time, which in turn also allows us to outline the meaning of rest periods. From this perspective, it is clear that – despite the WTD's binary system – periods when the worker is not working for the employer are not all rest periods, nor can it be argued that the worker has no obligations vis-á-vis the employer during the rest periods.

2.1 Inactivity during working hours is not a rest

A period during which no actual activity is carried out by the worker for the benefit of his/her employer does not necessarily constitute a rest period.[25] For example, there is no rest period if the worker is at the disposal of the employer for the whole of the scheduled working day but does not have any tasks to perform. As the Court pointed out, the intensity of the work done by the employee and his output are not among the characteristic elements of the concept of 'working time' within the meaning of the directive.[26]

In contrast, being at the disposal of the employer at the workplace – in the broad sense of the term – can in itself qualify as working time. For example, the period of vocational training required by the employer is working time even if it is not organised at the worker's usual place of work or the activity carried out during the

[21] Ania Zbyszewska, *Reshaping EU working-time regulation: towards a more sustainable regime*, 7 European Labour Law Journal (2016/3) 336–337.

[22] TFEU Art. 153(5). Ferrante, *supra* n. 17., 376.

[23] Leszek Mitrus, *Potential implications of the Matzak judgment* (*quality of rest time, right to disconnect*), 10 European Labour Law Journal (2019/4), 395.

[24] WTD Art. 2 points 1–2. The text was the same also in the original directive, see Directive 1993/104/EC Art. 2 points 1–2.

[25] Case 344/19 *Radiotelevizija Slovenija* para. 32.

[26] Case 14/04 *Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité*, 1.12.2005, ECLI:EU:C:2005:728, para. 43.

training is different from the worker's normal duties.[27] On-call duty is also considered working time,[28] just like stand-by time performed outside the workplace, if the latter is associated with constraints that objectively and very significantly limit the employee's right to control his/her own time.[29]

If such restrictive constraints can be identified that period will constitute working time even if the workers can also carry out their personal activities during that period. The employer can exercise its right to give orders and control to ensure that workers perform as efficiently as possible during working time. If a worker can take the time to make phone calls or to have private conversations during working hours because of poor work organisation, this is a waste for the employer, but it will not make it a rest period. As the Court highlighted, 'it is for the employer to put in place the necessary monitoring procedures to avoid any potential abuse'.[30] Failing that, inactive periods during working hours shall not be considered as rest periods.

2.2 Duties during rest periods

It is also clear that a worker is never fully relieved of all his/her obligations during a rest period. A rest period is not genuine free time.[31] The Court has never imposed such a requirement. On the contrary, during the rest period, the employee may have obligations stemming both from and outside the employment relationship. The latter seems obvious, since the employee can only fulfil these 'private' obligations outside the working hours, when it is not precluded by the obligation to be at the disposal of and to work for the employer. Thus, it is the rest period during which the employee can take care of household duties, childcare, studying, official matters or exercising etc.

It is less apparent that the obligations arising from the employment relationship are not limited to working time.[32] The case law on stand-by duty shows the worker may be at the employer's disposal during the rest period, provided that the constraints imposed on him/her do not reach a certain level of intensity and allow him/her to manage his/her own time, and to pursue his/her own interests without major constraints.[33] The extent of these restrictions can ever be determined only on a case-by-case basis, weighing up all the circumstances, the main factor being how quickly the worker has

[27] Case 909/19 *BX v Unitatea Administrativ Teritorială D.*, 28.10.2021, ECLI:EU:C:2021:893, para. 43–46.

[28] Case 303/98 *Simap*; Case 241/99 *Confederación Intersindical Galega* (*CIG*) *v Servicio Galego de Saúde* (*Sergas*), 3.7.2001, ECLI:EU:C:2001:371; Case 151/02 *Jaeger*; Case 14/04 *Dellas*; Case 437/05 *Jan Vorel v Český Krumlov Hospital*, 11.1.2007, ECLI:EU:C:2007:23; Case 180/14 *Commission v Greece*, 23.12.2015, ECLI:EU:C:2015:840.

[29] Case 518/15 *Ville de Nivelles v Rudy Matzak*, 21.2.2018, ECLI:EU:C:2018:82; Case 344/19 *Radiotelevizija Slovenija*; Case 580/19 *RJ v Stadt Offenbach am Main*, 9.3.2021, ECLI:EU:C:2021:183; Case 107/19 *XR v Dopravní podnik hl. m. Prahy*, 9.9.2021, ECLI:EU:C:2021:722; Case 214/20 *Dublin City Council*.

[30] Case 266/14 *CC.OO v Tyco Integrated Security SL*, 10.9.2015. 2015, ECLI:EU:C:2015:578, para. 40.

[31] Mitrus, *supra* n. 23, 394.

[32] Ferrante, *supra* n. 17., 380.

[33] Case 214/20 *Dublin City Council* para. 39.

to respond to the employer's call.[34] For example, according to the Court's practice, stand-by time is not working time, if during such period the worker can stay in the place of his/her own choice, may refuse a quarter of the calls without consequences and the expected reaction time is long (e.g. 1-2 hours).

However, even such 'flexible' stand-by time – which constitutes a rest period – is subject to certain obvious constraints, mainly due to the worker's obligation to remain fit for work. For example, he/she must not consume alcohol or must stay in a place (from) where he/she can be available on time. An adequately long response time gives enough leeway to carry out the usual activities of daily life, but excludes a long journey, a lengthy administration, a visit to the theatre or a long uninterrupted sleep. In this respect, the Court has consistently held that the employer must ensure the protection of the worker's health and safety even where the stand-by time does not constitute working time, in particular where it is uninterrupted, shall be performed over long periods, or at frequent intervals, or at night.[35]

It is worth mentioning that the European Committee of Social Rights has also objected to treat stand-by time as rest period on the grounds of health and safety concerns.[36] Although this Commission has not developed a detailed practice on the obligations during stand-by time, it has not excluded that stand-by time may be considered as rest period 'in the framework of certain occupations or particular circumstances and pursuant to appropriate procedures'.[37]

While the Court considers respond time to be a key issue concerning the worker's freedom to manage his/her own time, it appears to be a serious shortcoming that there is no requirement in EU law to provide the employee in advance the schedule of the working hours and rest periods. It is not only the amount of time spent at work that is relevant from a legal point of view, but also the scheduling of such periods.[38] However, neither the WTD provide for any prior notification of the schedule,[39] nor the directive on transparent and predictable working conditions has made any progress in this respect. The latter only prescribes a 'reasonable' notice period for assignments in the case of entirely or mostly unpredictable work patterns.[40] In any case, taking the Court's case law on stand-by time as an analogy, it seems clear that a rest period – be it daily or weekly – can only be in line with the purpose of the directive if the

[34] For the summary of the case law: Leszek Mitrus, *Defining working time versus rest time: An analysis of the recent CJEU case law on stand-by time*, 14 European Labour Law Journal, (2023/1), 38–42.

[35] Case 344/19 *Radiotelevizija Slovenija* para. 64. Christina Hiessl, *Standby Time under European Law: Difficult Prospects for a "Right to Disconnect"*, 7 International Labor Rights Case Law (2021/3), 362–363.

[36] *Confédération générale du travail* (*CGT*) *v. France*, Complaint No. 22/2003, para. 34–37. and No. 55/2009, para. 65–66.

[37] Complaint No. 22/2003, para. 35.

[38] Emily Rose, *Workplace Temporalities: A Time-Based Critique of the Flexible Working Provisions*, 46 Industrial Law Journal (2017/2), 249.

[39] As the Court put it, Articles 3, 5 and 6(b) do not establish the specific arrangements by which the Member States must ensure the implementation of the rights that they lay down. As is clear from their wording, those provisions leave the Member States to adopt those arrangements, by taking the 'measures necessary' to that effect. Case 55/18 *CCOO*, para. 41.

[40] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20.6.2019 on transparent and predictable working conditions in the European Union, OJ L 186, 11.7.2019, Art. 4(2) m) and Art. 10 1).

worker is given sufficient prior notice of its scheduling. It is, however, entirely up to the Member States to decide on this issue.

The workers' obligations during rest periods are not limited to stand-by duty. A rest period is not 'pure leisure time' also because it is the time for commuting. The Court does not consider travel time as working time even if there is a substantial distance between the place of work and the residence of the worker, as the worker is free to choose his/her place of residence.[41] Furthermore, during the rest period, the worker may also be subject to obligations arising from the employment relationship which are independent of being at the employer's disposal. For example, the worker must respect conflict of interest, non-competition or confidentiality rules.[42] By prohibiting certain behaviours, these can also indirectly affect the use of rest periods (e.g. the worker must refrain from taking part in leisure activities offered by a competitor).

To sum up, during a rest period the worker has no obligation to work for the employer and shall stand ready to work only to the extent that his/her right to manage his/her own time is not significantly restricted. What matters is not what he/she does during this time (e.g. leisure activities or something more strenuous, like studying), but that he/she can do it without invasive constraints from the employer, in his/her own family and social environment.[43]

2.3 The MÁV-start case: relationship between daily and weekly rest periods

In addition to the general characteristics outlined above, there are significant differences between the various types of rest periods in terms of the rules governing their extent and scheduling. Moreover, in the MÁV-Start judgment of 2023, the Court found that the daily and weekly rest period also differ in their purpose, a position which I do not find well founded.

To briefly summarise the rules for each type of rest period, the shortest is the (rest) break that interrupts the working day. EU legislation is the most flexible on this point, leaving the determination of the extent and scheduling entirely to national law (primarily to the parties to the collective agreement), stipulating, however, that a break shall be provided only on working days exceeding six hours.[44] The minimum daily rest period is 11 hours, which shall be uninterrupted and scheduled for each 24-hour period. Finally, the 24-hour weekly rest period is also continuous and granted within every seven days.[45]

[41] Case 344/19 *Radiotelevizija Slovenija* para. 41. However, travelling time may be working time if the worker does not have a fixed or habitual place of work, but the employer determines it unilaterally on a case-by-case basis, see: Case 266/14 *Tyco*.

[42] Ferrante, *supra* n. 17., 384.

[43] Mitrus, *supra* n. 35., 44.

[44] According to Eurofound's data for 2019, in national laws the extent of breaks varies between 10 and 60 minutes. Collective agreements generally provide for a break that is in line with statutory law or slightly more favourable to the worker. Eurofound, *Rest breaks from work: Overview of regulations, research and practice* 3–5 (Publications Office of the European Union, 2019).

[45] WTD Art. 3–5.

The Court drew a number of important conclusions on the relationship between the daily and weekly rest period in the MÁV-Start case. At first sight, the directive seems to resolve the issue by providing that the 24-hour weekly rest period is accompanied by the daily rest period,[46] which means at least 35 hours of uninterrupted rest. The central issue in the case was whether the two types of rest periods shall be granted separately, even if national law provides for a weekly rest period which in itself exceeds 35 hours.[47] The Court based its affirmative answer by stating, in particular, that more favourable provisions in national law cannot deprive the worker of other rights conferred on him or her by the directive, and more particularly of the right to daily rest. Therefore, in order to guarantee workers the actual enjoyment of the right to daily rest, that right must be granted irrespective of the length of the weekly rest period provided for by the applicable national legislation.[48] The Court went on to conclude that after a period of work, every worker must immediately benefit from a daily rest period, irrespective of whether or not that rest period will be followed by a period of work. In addition, when the daily rest period and the weekly rest period are granted concurrently, the weekly rest period cannot begin to run until the worker has benefited from the daily rest period.[49]

The Court made a statement on the purpose of daily and weekly rest periods at the beginning of its reasoning, which is of particular interest. The Court ruled that they are two autonomous rights which 'pursue different objectives, consisting, for the daily rest period, in enabling the worker to remove himself or herself from his or her working environment for a specific number of hours which must not only be consecutive but must also directly follow a period of work and, in the case of the weekly rest period, in allowing the worker to rest during each seven-day period'.[50] In my view, this argument is not elaborated and does not fit into the EU legal doctrine of rest periods.

On the one hand, the terms intended to demonstrate the different purpose of the two legal instruments are synonymous and, as such, are interchangeable. It would be no less plausible to say that a daily rest period allows the worker to rest between two working days, while a weekly rest period enables him/her to remove from his/her working environment.

On the other hand, although rest periods obviously differ in terms of their extent and scheduling, it does not follow, in my view, that their purpose is different. EU law regulates rest periods only from these two aspects, with the aim of ensuring that working time and rest periods are regularly alternating.[51] There is nothing in the text of the law itself to suggest that the three forms' function is different. It goes without saying that the longer the period of work has been, the longer rest period is required,

[46] Except if objective, technical or work organisation conditions so justify, see Art. 5.

[47] Hungarian law did not provide for a separate daily rest period if the work was followed by the weekly rest period (48 hours).

[48] Case 477/21 *MÁV-Start* para. 50–52.

[49] Case 477/21 *MÁV-Start* para. 57–58.

[50] Case 477/21 *MÁV-Start* para. 38.

[51] Case 151/02 *Jaeger* para. 94–96 and 98; Case 428/09 *Union syndicale Solidaires Isère v Premier ministre and Others*, 14.10.2010, ECLI:EU:C:2010:612, para. 51.

and a longer rest period apparently provides more opportunities for relaxation and privacy. It is enough to refer to social relationships as an example. A short break is enough for a phone call at most; a daily rest period may include an all-evening dinner, while during the weekly rest period the worker may also sleep over at the host's place. However, these differences do not affect the classification as rest period. As the Court pointed out, the short duration of the break necessarily limits how the worker can spend this time, but this limitation is in itself irrelevant to the question of whether this period can be regarded as working time in a particular case.[52] What is more, the MÁV-Start judgment itself states that the daily rest period is 'additional' to the weekly rest period.[53] Nonetheless, only things of the same nature can be added to each other.

It is clear from previous practice that during working time there could be periods of different intensity and efficiency, but these differences are not relevant to the concept of working time.[54] Rest period could be approached as similarly homogeneous. Therefore, the restriction that the daily rest period must necessarily precede the weekly rest period seems unnecessary. From a practical point of view, it is clearly irrelevant to the worker whether, at the end of the week, it is the daily or the weekly rest period during which he/she first gets a good night's sleep before the start of the weekend leisure. As Advocate General Pitruzzella indicated in his Opinion,[55] this interpretation would also be in line with previous case law, according to which weekly rest periods do not have to be granted after every six consecutive working days, but can fall anywhere within a seven-day period.[56] It is therefore not prohibited to have a rest day on Monday while the next is scheduled only on the following week's Sunday, which means 12 consecutive workdays. In this flexible context, it seems unreasonable that the daily rest period should follow directly after the working time and precede the weekly rest period. This interpretation might have negative consequences for workers who maintain multiple employment relationships in parallel, which I will return to in Sect. 4.

Interestingly, these 'side-conclusions' made on the mandatory sequence of working time, daily and weekly rest period might have more severe impact on future case law and national practices than the ruling on the main issue. The Court made it clear that a national law providing for an at least 35 hours weekly rest period shall also guarantee a daily rest period between the last shift and the weekly rest. Nonetheless, one could reasonably argue that it would be sufficient to meet these requirements to explicitly prescribe in national law that the first 11 hours of the (at least) 35 hours weekly rest period shall be regarded as daily rest period.

[52] Case 107/19 *Dopravní podnik*, para. 39. In this case, the question arose as to whether the break spent on stand-by duty should be counted as working time because of the short respond time.

[53] Case 477/21 *MÁV-Start* para. 44.

[54] Case 518/15 *Matzak* para. 56, Case 14/04 *Dellas* para. 43.

[55] Opinion of AG Giovanni Pitruzzella in Case 477/21 *MÁV-Start* para. 66–69.

[56] Case 306/16 António Fernando Maio Marques da Rosa v Varzim Sol – Turismo, Jogo e Animação SA, 9.11.2017, ECLI:EU:C:2017:844.

3 Right or obligation to rest?

According to the directive, workers are 'entitled' to minimum rest periods.[57] Given the health and safety objectives of the legislation,[58] the question arises as to whether it is compulsory to take advantage of rest periods and use them – literally – for rest.

As a starting point, by virtue of the functions of the legal instrument, the rest period belongs to the worker's private life, the essence of which is to be free from the employer's influence. Therefore, there can be no obligation as to how much and – above all – exactly how to rest outside working hours. It also follows from this freedom that the employer would not be able to control its expectations in this respect anyway.

It is also clear from the case-law that the Court is indifferent to the nature of the activity carried out during the rest period, if it is not aimed at fulfilling an obligation towards the employer. Thus, for example, it is irrelevant for the classification of stand-by time as working time if the place of performance has limited opportunities to pursue leisure activities.[59] Likewise, although the proliferation of electronic devices means that more and more entertaining, relaxing activities could be carried out during stand-by duty, this does not make the Court any more permissive in the classification of stand-by time as rest periods.[60] Therefore, since the essence of rest periods is that during them there may be only very limited obligations towards the employer, rest periods cannot be approached as an employee's obligation *vis-à-vis* the employer. This applies even if – undoubtedly – the worker is obliged to ensure that he/she is fit for work upon returning to work.[61] But it is up to the worker to decide what to do and when to do it during the rest period, or how many hours of sleep he/she needs before starting the next shift.

The employer's obligation is also limited to guarantee the actual use of rest periods, but not to ensure that the worker indeed rests during them. The Court rejected the opposite interpretation on essentially practical grounds. It pointed out that the employer's responsibility for ensuring that rest periods are respected is not without limits, and – as the Commission conceded during the hearing – 'should not, as a general rule, extend to requiring the employer to force his workers to claim the rest periods due to them'.[62]

Nonetheless, as Advocate General Kokot added in her opinion, an employer 'may on no account withdraw into a purely passive role'. The employer can encourage the effective use of rest periods primarily by scheduling the appropriate rest periods and by establishing a practice which makes it clear that the right of workers to rest periods

[57] WTD Art. 3–5.

[58] WTD Art. 1(1).

[59] Case 344/19 *Radiotelevizija Slovenija* para. 42.

[60] Karl Riesenhuber, *European Employment Law: A Systemic Exposition* 534 (Intersentia, 2021).

[61] Beata Rutkowska, Scope of reference of employees' right to daily and weekly rest (a discussion article), 29 Studies on Labour Law and Social Policy, (2022/2), 207.

[62] Case 484/04 *Commission v United Kingdom*, para. 43. The Court follows the same practice in relation to annual leave, see: Case 684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*, 6.11.2018, ECLI:EU:C:2018:874, para. 44–45.; Case 120/21 *LB v TO*, 22.9.2022, ECLI:EU:C:2022:718.

does not only exist on paper.[63] There is also a coordination element to this. It also needs to be organised that during the rest period the worker is not contacted by other workers, for example because of a shared task. Otherwise, a worker working outside the working hours could encourage also other workers to take up the work.[64]

It is worth noting that neither the Court nor the Advocate General has ruled out the possibility that, in certain cases, employers may be required to make the use of rest periods explicitly compulsory. However, as explained above, this does not mean that the employer prescribes how the worker spends his/her time, only that the employer ensures that the worker is not at the employer's disposal and does not work during the rest periods. This can easily be achieved in jobs where the work can only be carried out with a specific work tool or software to which the worker's access can be excluded outside working hours. However, it would be impossible to expect the worker not to think about a current problem or to practise a presentation outside working hours.

There are many possible cases in-between the mentioned evident examples. In particular, how to deal with a situation where a worker works outside working hours without being instructed to do so, for example, by compiling documentation on his/her weekly rest day. Advocate General Colomer did not consider these cases as working time on the basis that if the worker works on his/her own initiative, altruistically, and outside the employer's sphere of influence, then only one of the three conceptual elements of working time is met ('carrying out his activity or duties').[65] In my view, however, this is also working time, given the broad judicial interpretation of the conceptual elements. The place of work can now be essentially anywhere ('the worker is working'),[66] and the employer's influence ('at the employer's disposal') is, in my understanding, also met if the employer subsequently accepts the performance (e.g. uses the document compiled). A workplace practice consistent with the Court's interpretation would not expect or encourage workers to perform outside working hours, but it also follows that if they do work during their rest period and the employer accepts the performance, then the latter is obliged to recognise the time spent on the task as working time.

The EU legal concept of rest periods as described above also raises doubts whether a separate right to disconnect[67] is relevant. It follows from the strict binary system of working time and rest period that if a worker uses a digital device to carry out work for the employer during rest hours, this constitutes working time, just as a stand-by duty performed with such devices if it implies objective, significant restrictions on the use of the worker's own time. From the other perspective, the employer is obliged

[63] Opinion of AG Juliane Kokot in Case 484/04 *Commission v United Kingdom*, para. 67–69.

[64] Mark Bell, *Responding to the "Rapidification" of Working Life: the Right to Disconnect*, 110 Studies – an Irish Quarterly Review, (2021) 434–435.

[65] Opinion of AG Ruiz-Jarabo Colomer in Case 151/02 *Jaeger* para. 29.

[66] For the previous case law: Sarah De Groof, *An aged working time directive for an aging society: revising for a work-life balance approach* 79–80 (Frank Hendrickx ed, *Active ageing and labour law: contributions in honour of professor Roger Blanpain*, Intersentia, 2012).

[67] According to the European Parliament, disconnect means not to engage in work-related activities or communications by means of digital tools, directly or indirectly, outside working time. European Parliament resolution of 21.1.2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)), Art. 2.

to ensure that the worker has effective use of rest periods, which obviously includes not trying to contact the worker by digital means outside working hours. It therefore appears that the right to disconnect can be derived from the WTD itself.[68]

The European Parliament's proposal for a directive on this matter leaves the concepts of working time and rest period intact, as it requires disconnection 'outside working time' as defined in the WTD.[69] Consequently, a period would not automatically be considered working time simply because the right to disconnect is infringed upon. For example, requiring the worker to remain available by electronic means during 'flexible' stand-by duty – which is not considered working time by the Court – would be contrary to the draft,[70] but would not change the fact that stand-by time with only marginal restrictions is considered as rest period.[71]

In summary, rest period is the right of a worker to be released from the main obligations of the employment relationship and to manage this time freely and use it for personal interests. It is the employer's duty to ensure that the worker can actually exercise the right to rest periods, but cannot influence its use. This is not contradicted by the fact that the worker must ensure that he/she is fit for work when he/she starts work again. If the employer accepts voluntary performance by the worker during the rest period, it must recognise it as working time. The rise of digital communication may call for further action to enforce rest periods in practice,[72] although this does not necessarily require legislation on a separate right to disconnect.

4 Work during rest periods? The question of parallel employment

One of the most important open questions regarding the application of the WTD is whether its rules apply to an employment relationship or to a worker.[73] More specifically, are the rules on minimum rest periods absolute limits, or may the worker work for another employer during the rest period granted in the course of the other employment relationship? [74] National practice is divided on the issue: in 13 Member States

[68] Bell, *supra* n. 65, 429–431.; Loic Lerouge & Francisco Trujillo Pons, *Contribution to the study on the "right to disconnect" from work. Are France and Spain examples for other countries and EU law?*, 13 *European Labour Law Journal*, (2022/4), 452.

[69] 2019/2181(INL) Art 1(2).

[70] Except for cases such as *force majeure* or other emergencies. 2019/2181(INL) Art. 4(1).

[71] The Commission also noted that the introduction of the right to disconnect needs 'due consideration' for the concepts of 'on-call' and 'standby' as used by the Court in interpreting the definition of working time. C(2024) 2990 final, *First-phase consultation of social partners under Article 154 TFEU on possible EU action in the area of telework and workers' right to disconnect*, 23.

[72] Experience shows that compliance with working time rules is much lower among IT workers than among workers in general, Eurofound, *Right to disconnect in the 27 EU Member States* 9 (2020).

[73] This issue was raised during the review process of the directive, but no agreement was reached. Tobias Nowak, *The turbulent life of the Working Time Directive*, 25 Maastricht Journal of European and Comparative Law, (2018/1), 123–124.

[74] For young workers, an explicit rule states that where a young person is employed by more than one employer, working days and working time shall be cumulative. This directive covers only the employment relationship. Council Directive 94/33/EC of 22.6.1994 on the protection of young people at work, OJ L 216, 20.8.1994, Art. 2(1) and Art 8(4).

provisions of the directive apply to one worker, in seven Member States they apply to one contract, and in seven others they apply to one worker only if the multiple contracts are with the same employer.[75] The importance of the problem is shown by the fact that, according to Eurostat data, 7,679,200 people in the EU had a second job in 2022, while both contracts were employment relationships in the case of 4,000,000 persons among them.[76]

In order to answer this question, we need to consider separately the case where the parallel contracts are with the same or different employers, and also where there is an employment relationship or other type of contract between the parties. It should be noted at the outset that, since the scope of the WTD covers only the employment relationship,[77] the cumulative counting of contracts cannot be considered if one of them is not an employment relationship (but, for example, a voluntary relationship[78] or self-employment).[79] Consequently, EU law's answer to the question will necessarily be incomplete.

4.1 Several employment relationships with the same employer

So far, the Court has only dealt with the case where the multiple employment contracts were concluded with the same employer.[80] Since this practice would allow an open circumvention of the working time provisions, not surprisingly, the Court ruled that in such a case the minimum daily rest period applies to the whole of these contracts, not to each of them individually.[81] The reasoning deserves attention, in particular, from the point of view of whether the same arguments can be applied to other articles of the directive and also to cases involving several contracts with different employers.

The Court based its conclusion on the following grounds. First, since Article 3 of the WTD entitles 'every worker' to daily rest periods, this provision 'puts the empha-

[75] Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, COM(2023) 72 final, 3.

[76] Eurostat, *Employed persons having a second job by sex, age and professional status of both jobs* (1000). https://doi.org/10.2908/LFSA_E2GPS.

[77] The directive does not contain a specific provision on its personal scope, but it consistently refers to the 'worker', which the Court has recognised as an autonomous concept in EU law. According to settled case law, a worker performs services for remuneration for a certain period of time, for and under the direction of another person in return for which he receives remuneration. Case 692/19 *B v Yodel Delivery Network Ltd*, ECLI:EU:C:2020:288, para. 27–32.; Communication from the Commission: Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time (2023/C 109/01), 10–11.

[78] Volunteers raise a particular problem because, in the absence of remuneration, they are not considered workers in the EU legal meaning, even though their work is subordinate, and therefore would need the protection of the WTD. Martin Risak, *The position of volunteers in EU-working time law*, 10 European Labour Law Journal (2019/4), 369.

[79] 2023/C 109/01, 11.

[80] The issue of parallel legal relationships with different employers was raised in the Dublin City Council case, but was found inadmissible by the Court due to the lack of any connection between the questions and the actual facts of the main proceedings. Case 214/20 para. 29–31.

[81] Case 585/19 *Academia de Studii Economice din Bucureşti v Organismul Intermediar pentru Programul Operaţional Capital Uman – Ministerul Educaţiei Naţionale*, 17.3.2021, ECLI:EU:C:2021:210.

sis on the worker [...] regardless of whether or not he or she has concluded several contracts with the employer'.[82] Second, following the strict division between working time and rest periods, hours considered as rest periods under one contract cannot be considered as working time under another contract with the same employer.[83] Thirdly, the aim of the WTD – to protect workers' safety and health – would be undermined, since, by the combination of working time provided for separately by each of the contracts concluded with the employer it would be impossible to guarantee the daily rest period of 11 consecutive hours for each 24-hour period.[84] Finally, the Court considered that a stricter interpretation was also necessary to avoid the abuse of the employer putting pressure on the worker, as the weaker party to the contract, to split working time over several contracts and thus deprive him of the effective exercise of the daily rest period.[85]

The question, therefore, is whether the provisions of the directive apply similarly per worker in the case when the employment relationships stand with different employers. In my view, a nuanced answer is needed.

4.2 Rest periods 'per worker'? – Systematic considerations

As a preliminary point, it should be noted that the 'per worker' interpretation of rest periods does not mean that such minimum periods are spread over several legal relationships (e.g. the worker is entitled to a total of 11 hours of daily rest for two employment relationships, such as six hours in one and five in the other). This would put those who have more than one employment relationship in an incomparably less favourable situation as regards health and safety protection, which would be contrary to the aim of the directive.

It is also not the case that the worker cannot work at all during a period which is considered rest period for any of his/her employment relationships. The concept of rest period embraces all periods which are not working time.[86] Breaks, daily and weekly rest periods are only specified parts of this. But there is also an 'unspecified' part of rest, as the 'specified' forms – added to working time – do not cover the whole 24 hours of the day. The maximum weekly working time (48 hours)[87] added to the 11 hours of daily rest after each day and to the 24 hours of weekly rest equals 138 hours. If we also add breaks, defined in national law – for example 30 minutes a day –, the total of 141 hours is still well below the 168 hours of a week. In EU law – based on the binary system – these missing 27 hours will also be considered as a (unspecified) rest period. However, even a strict interpretation of the directive could only mean that the worker must benefit from the 'specified' rest periods even if he/she

[82] Case 585/19 *Academia de Studii* para. 41.

[83] Case 585/19 *Academia de Studii* para. 45.

[84] Case 585/19 *Academia de Studii* para. 47–50.

[85] Case 585/19 *Academia de Studii* para. 51–53.

[86] WTD Art. 2 point 2.

[87] WTD Art. 6.

has more than one employment relationship. But work during the 'unspecified' part cannot be restricted, for the following reasons.

On the one hand, as explained in Sect. 3, the employer is obliged to schedule the rest periods, but cannot prescribe how the worker should spend this time. Therefore, from the employer's point of view, the proper scheduling of rest periods is not undermined if, during such rest period the worker works for another employer by his/her own choice. The contrary interpretation would not be tenable for practical reasons either, since, as the Court has pointed out, the employer is normally not in a position to force workers to actually take the rest periods[88] and, similarly, to refrain them from taking up a second job. In some cases, the employer may not even be aware of such parallel contracts.[89]

This line of reasoning is also confirmed by the Court's practice, stating that only the constraints that are imposed on the worker by the law of the Member State concerned, by a collective agreement or by the employer may be taken into consideration in order to delimitate working time and rest periods. Natural factors (e.g. the difficulty of reaching the workplace) or circumstances of the worker's own free choice (e.g. a substantial distance between the residence and the workplace) are irrelevant.[90] By analogy, a period of time shall still be considered as rest period if the worker, by his/her own choice, is performing in another employment relationship during that period, as this is clearly not an obligation arising from the original employment relationship. Therefore, from the aspect of the WTD's binary system, it is an obvious abuse for the same employer to employ a worker in multiple employment relationships, but parallel employment seems irrelevant (and uncontrollable) once the employers are different.

It should be added that EU law explicitly encourages the possibility of parallel employment. The directive on transparent and predictable working conditions calls Member States to ensure that an employer neither prohibits a worker from taking up employment with other employers outside the work schedule established with that employer, nor subjects a worker to adverse treatment for doing so.[91] However, to work 'outside the work schedule' is only possible during the rest period allocated in the first employment relationship. Admittedly, this provision is silent on the type of the work-related legal relationship, but there is also no indication of a restrictive interpretation that the second job could not be an employment relationship.[92]

To sum up, in my view, it does not violate the strict dichotomy of working time and rest period if the worker has more employers at the same time. Therefore, the real question is whether the worker may spend his/her working time in one employment relationship, while he/she enjoys the directive's 'specified' rest periods scheduled in another employment relationship by another employer.

[88] Case 484/04 *Commission v United Kingdom*, para. 43.

[89] Rutkowska, *supra* n. 62, 209.

[90] Case 344/19 *Radiotelevizija Slovenija* para. 39–42.

[91] Directive 2019/1152 (EU) Art. 9(1).

[92] What is more, the directive's scope covers only the employment relationship. Directive 2019/1152 (EU) Art. 1(2).

4.3 Rest periods for 'every worker' – the grammatical interpretation

The reference to 'every worker' in the articles on breaks, daily and weekly rest periods may imply that they all apply per worker, even if the employers are different. However, if this were to apply to all three – as well as to annual leave[93] – it would significantly limit the parties' possibilities for the organisation of working time.

In the case of breaks, this would call for a break even if the worker's consecutive working time on a given day does not exceed six hours in any employment relationships, but it does if the working hours are cumulated. Nonetheless, it would be very rare that the working time in two employment relationships directly follow each other. If there is a longer interval between the two periods of working time, the purpose of the break is already achieved. However, even in the rare cases with consecutive working hours, it is questionable which employer would be obliged to grant the break.

In terms of the 11 hours of daily rest periods, 13 hours of working time would be divided between two (or more) employment relationships within a 24-hour period. However, since the daily rest period must be continuous and, according to the MÁV-Start ruling, must be granted immediately after the working time, the working time in the employment relationships should in essence follow each other directly.[94] As noted above, this would exceptionally work in practice. Another solution would be if the worker works in only one of his/her jobs in a 24-hour period, although it would obviously be difficult to find employers who would agree to take turns to employ the same worker on a daily basis. A similar difficulty would be that the weekly rest period would have to fall on the same day in each employment relationship. Finally, it would also be unrealistic for all employers to grant annual leave for the same days.

A literal interpretation would therefore both significantly restrict the parties' room for manoeuvre and presuppose close cooperation between the employers and the worker. Indeed, compliance with the rules would only be conceivable if all employers were aware of the worker's concurrent employment relationship and all made their schedules in light of this information. This would be difficult not only from a technical point of view, but also from the aspect of enforcement, since it is questionable which employer would be held liable because the worker worked for another employer during the rest period which the first employer had otherwise properly scheduled.

4.4 Health and safety or worker autonomy? – the teleological interpretation

The occupational health and safety aim of the WTD seems to be a legitimate public interest for a strict interpretation of rest periods, for which the above-mentioned constraints and practical difficulties may be accepted. More working hours mean greater risks to occupational health and safety, which means higher social costs.[95] The Commission has itself taken the view from the outset that, 'in the light of the directive's

[93] WTD Art. 3–5 and 7.

[94] Case 477/21 *MÁV Start* para. 57. For example, it would be unlawful for a worker to work between 8-16 and 20-22 in his/her respective employment relationships.

[95] Aharoni-Goldenberg, *supra* n. 12, 37.

objective to improve the health and safety of workers, the limits on average weekly working time and daily and weekly rest should, as far as possible, apply per worker.'[96] Nonetheless, the wording shows that the Commission does not consider it inherently incompatible with health and safety considerations for a worker to have more employment relationship with different employers simultaneously. However, this has not been elaborated in any of the Commission's reports over the last 20 years.

In my view, the starting point should be that there is no clear increase in occupational safety and health risks with parallel employment. The stipulation of an additional employment relationship in itself presupposes that the worker has undertaken additional work on his/her own initiative. In such a case, there is no abuse of the employer's dominant position, which the Court referred to in the context of multiple employment with one employer. Similarly, having a second job is the autonomous decision of the worker as opposed to being ordered to perform overtime within one single employment relationship. Besides, the strict interpretation of the directive would seriously interfere with workers' individual decisions about how much of their lives they want to spend at work.[97] By comparison, it would be a much smaller restriction on workers' autonomy if EU law only limited the amount of time that could be spent working for one employer.

Higher levels of worker autonomy can be demonstrated at several points when the same number of hours has to be worked for different employers. For instance, if the worker feels that the workload is too heavy, the two contracts can be terminated separately. Paid or unpaid leave can be taken independently and at different times in the two employment relationships, or during periods of illness or childcare the worker can work in one job while remaining absent from the other. Thus, while more working hours obviously means more health and safety risks, it also gives the worker more flexibility to manage such risks. A more permissive interpretation of the directive would therefore somewhat weaken the health and safety objectives, but would also be more flexible for workers and still provide adequate protection against exploitation.[98]

It should be added that the WTD itself contains certain derogations on the grounds of worker autonomy. On the one hand, the rules on rest periods do not apply to autonomous workers, when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves.[99] Since in this case it is entirely up to workers to decide their working hours,[100] there are no minimum standards for rest periods. On the other hand, under certain conditions, the limit on weekly work-

[96] COM(2023) 72 final, 3–4.; Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time, C/2017/2601, [2017] OJ C165/1., 10., and see also the previous communications cited there.

[97] Malte Jauch, *The rat race and working time regulation*, 19 Politics, Philosophy & Economics, (2020/3), 294.

[98] Nowak, *supra* n. 73, 129.

[99] WTD Art. 17(1).

[100] The Court interprets this derogation strictly and excludes from its scope workers who have only partial autonomy over their working time. Case 484/04 *Commission v United Kingdom*, para. 20.; Case 585/19 *Academia de Studii* para. 62–63.; Case 175/16 *Hannele Hälvä and Others v SOS-Lapsikylä ry*, 26.7.2017, ECLI:EU:C:2017:617.

ing time can be set aside by an individual opt-out agreement between the parties.[101] Under such agreements – thus with the consent of the worker –, although rest periods still apply, a worker can work up to 78 hours a week (including breaks) in a single employment relationship.[102] Therefore, as in these cases the directive allows for a relaxation of health and safety requirements in view of the worker's lesser subordination,[103] it would be appropriate to maintain similar flexibility in the case of multiple employment relationships.

The above is reinforced by the fact that the directive on transparent and predictable working conditions explicitly refers to the possibility for Member States to restrict parallel employment on the basis of objective grounds, such as health and safety.[104] However, it follows that health and safety considerations do not preclude the existence of multiple employment relationships as such, but this is only one aspect to be considered on a case-by-case basis.

Although the WTD does not cover remuneration, it should also be noted that higher earnings from multiple employment also increase the worker's room for manoeuvre. The economic dependency of the worker is reduced if he/she is paid by two different employers, and vice versa: limiting the number of concurrent jobs would deprive many workers of the possibility of earning a sufficient income.

Finally, as regards the teleological interpretation, reference should also be made to the narrow scope of the directive. As it is limited to the employment relationship, there is currently no EU law guarantee on working time outside the employment relationship, regardless of the number of working hours, contracts and employers. Therefore, if the WTD's provisions were to be applied per worker, it would shift the practice of second jobs towards other forms of employment. This would be unwelcome for two reasons. First, it would significantly weaken the legal protection of the worker in his/her second job. Second, there would certainly be a high proportion of bogus contracts among these agreements.

4.5 How do we proceed?

In summary, a strict interpretation of the directive means that a worker would be entitled to the specified rest periods even if he/she has more than one employment relationship with different employers. This would undoubtedly be better for the protection of workers' health and safety, which is the main objective of the WTD. However, even from a health and safety perspective, it is not necessarily justified to interpret the rest period rules on a per-worker basis. With the flexibility of multiple employment and less dependence, the risks of longer working hours are reduced. Furthermore, given its significance, it would be a mistake to assess the issue only from an occupational health and safety perspective. The need to avoid excessive intrusion into the worker's private life and the reduced (economic) vulnerability must also be taken

[101] WTD Art. 22.

[102] Aharoni-Goldenberg, *supra* n. 12, 24.

[103] However, both exceptions require respect for the 'general principles of the protection of the safety and health of workers', without specifying them.

[104] Directive 2019/1152 (EU) Art. 9(2).

into account. It appears from the directive on transparent and predictable working conditions that health and safety at work is only one, but not the sole aspect to be considered when assessing parallel employment.

The current legal uncertainty can be resolved in two ways. On the one hand, the Court could clarify the issue in a preliminary ruling procedure. However, because of the complexity of the problem, it is likely that the Court would not generally require the directive to be applied per contract or per worker, instead it could decide only on the specific facts and article(s) at issue in the main case. Thus, it would take a long time to develop case law that would settle the issue satisfactorily, as has happened in the case of stand-by duty.

On the other hand, the dilemma could be solved by legislation, which would have two advantages. First, the answer would depend on the legislators' clear decision, not on how the Court interprets a text that does not even specifically address the question raised (as was the case with stand-by duty or the obligation to keep working time records[105]). Second, this solution would allow for a more comprehensive regulation going beyond occupational health and safety. In my view, a nuanced approach would be necessary, where exceptions to the permissive main rule could define the cases where the possibility of parallel employment is limited (e.g. in the case of hazardous jobs or where the worker has exercised the opt-out for weekly working hours in any of his/her contracts). These restrictions could include minimum rest periods and a maximum weekly working time limit of more than 48 hours to be respected in the case of parallel employment.

5 Summary: a healthy balance of protection and autonomy

Apart from those related to professional life, workers can experience essentially everything of value during their rest periods, be it relationships with family and friends, community ties, personal development or self-fulfilment. This is why rest periods' special protection in EU law is justified. I propose two points to improve the current system. First, the level of protection should be strengthened where this is necessary to ensure the effective implementation of rest periods. Second, an overly strict interpretation of rest periods should not lead counter-productively to excessive interference in the worker's autonomy.

As for the first aspect, while the WTD lays down basic rules on the amount and schedule of rest periods, it fails to set a deadline for the prior notice of those. Court practice clearly shows that there can be no meaningful rest period if the worker has to be at the employer's disposal with a very short response time. Likewise, it would call into question the effectiveness of rest periods if the worker only knew at the end of the shift when he/she had to start work the next day, or that he/she would be given a day off. This shortcoming could be remedied by legislation, whereby the notification deadline shall be long enough to respect the aims of the directive but shall be specified in national law by collective agreements or, failing that, by statutory provision. I see less reason to introduce a right to disconnect. In my view, the Parliament's draft

[105] Case 55/18 *CCOO*.

does not go beyond the current system of the WTD, and the parties – even in the absence of specific legislation – can take the necessary steps to ensure that digital communication does not threat uninterrupted rest periods.

The regulation of rest periods in EU law is motivated by the need to protect workers' health and safety. It does not follow, however, that it is the worker's obligation to use them and to take the form of rest determined by the employer. The true nature of rest period is that it relieves the worker from obligations towards the employer which would significantly limit his/her autonomy to manage his/her own time. However, the worker is free to decide how to use such rest periods. In my understanding, this freedom also includes the right to spend this time with work for another employer. Yet a safety and health-oriented interpretation sticking to the wording of the directive would extremely restrict this option. The long-needed revision of the WTD could provide an opportunity for the legislator to elaborate which protections should apply per worker and under what terms.

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