ECLI:EU:C:2021:597

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

15 July 2021 (*)

(Reference for a preliminary ruling – Protection of the safety and health of workers – Organisation of working time – Members of the armed forces – Applicability of EU law – Article 4(2) TEU – Directive 2003/88/EC – Scope – Article 1(3) – Directive 89/391/EEC – Article 2(2) – Military activities – Concept of 'working time' – Stand-by period – Dispute concerning the remuneration of a worker)

In Case C-742/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vrhovno sodišče (Supreme Court, Slovenia), made by decision of 10 September 2019, received at the Court on 10 October 2019, in the proceedings

B. K.

v

Republika Slovenija (Ministrstvo za obrambo),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, M. Vilaras, E. Regan and N. Piçarra, Presidents of Chambers, T. von Danwitz, M. Safjan, D. Šváby, S. Rodin, K. Jürimäe, C. Lycourgos (Rapporteur), P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 21 September 2020,

after considering the observations submitted on behalf of:

– B. K., by M. Pukšič, odvetnik,

– the Slovenian Government, by A. Grum and A. Dežman Mušič, acting as Agents,

– the German Government, by J. Möller and S. Eisenberg, acting as Agents,

– the Spanish Government, by S. Jiménez García, acting as Agent,

– the French Government, by A.-L. Desjonquères, E. de Moustier, N. Vincent, T. Stehelin and A. Ferrand, acting as Agents,

– the European Commission, by B. Rous Demiri, N. Ruiz García and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 January 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

2 The request has been made in proceedings between B. K. and Republika Slovenija (Ministrstvo za obrambo) (Republic of Slovenia (Ministry of Defence)) concerning additional remuneration for overtime.

Legal context

European Union law

Directive 76/207/EEC

3 Article 3(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40) provided as follows:

‘Application of the principle of equal treatment means that there shall be no discrimination [whatsoever] on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.’

Directive 89/391/EEC

4 Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1) provides:

‘1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.’

Directive 89/656/EEC

5 Article 1 of Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1989 L 393, p. 18) provides:

‘1. This Directive, which is the third individual directive within the meaning of Article 16(1) of Directive 89/391/EEC, lays down minimum requirements for personal protective equipment used by workers at work.

2. The provisions of Directive 89/391/EEC are fully applicable to the whole scope referred to in paragraph 1, without prejudice to more restrictive and/or specific provisions contained in this Directive.’

6 Article 2 of that directive is worded as follows:

‘1. For the purposes of this Directive, personal protective equipment shall mean all equipment designed to be worn or held by the worker to protect him against one or more hazards likely to endanger his safety and health at work, and any addition or accessory designed to meet this objective.

2. The definition in paragraph 1 excludes:

…

(c) personal protective equipment worn or used by the military, the police and other public order agencies;

…’

Directive 2003/88

7 The first subparagraph of Article 1(3) of Directive 2003/88 states:

‘This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Articles 14, 17, 18 and 19 of this Directive.’

8 Article 2 of that directive, headed ‘Definitions’, states:

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

1. “working time” means any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

2. “rest period” means any period which is not working time;

…’

9 Article 17(3) of Directive 2003/88 provides:

‘In accordance with paragraph 2 of this Article derogations may be made from Articles 3, 4, 5, 8 and 16:

…

(b) in the case of security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms;

(c) in the case of activities involving the need for continuity of service or production …;

…’

Directive 2013/35/EU

10 Article 1 of Directive 2013/35/EU of the European Parliament and of the Council of 26 June 2013 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (20th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) and repealing Directive 2004/40/EC (OJ 2013 L 179, p. 1) provides:

‘1. This Directive, which is the 20th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC, lays down minimum requirements for the protection of workers from risks to their health and safety arising, or likely to arise, from exposure to electromagnetic fields during their work.

…

6. Without prejudice to the more stringent or more specific provisions in this Directive, Directive 89/391/EEC shall continue to apply in full to the whole area referred to in paragraph 1.’

11 Article 10(1) of that directive states:

‘By way of derogation from Article 3 but without prejudice to Article 5(1), the following shall apply:

…

(b) Member States may allow for an equivalent or more specific protection system to be implemented for personnel working in operational military installations or involved in military

activities, including in joint international military exercises, provided that adverse health effects and safety risks are prevented;

…’

Slovenian law

12 Article 46 of the Kolektivna pogodba za javni sektor (collective agreement for the public sector), in the version applicable to the dispute in the main proceedings (Uradni list RS, No 57/2008 et seq.), provided that public servants are to be entitled to a stand-by duty allowance at the rate of 20% of the hourly rate of their basic pay, without those periods of stand-by duty being regarded as working time.

13 The grounds for that collective agreement stated as follows:

‘Being on stand-by means that the public servant remains contactable so that he or she can, if necessary, go to work outside his or her normal working hours. Stand-by arrangements must be made in writing. The compensation payable for time spent on stand-by must be the same, whether the public servant is on stand-by during the day, at night, on a normal working day, on a Sunday, on a public holiday or on a day recognised by law as a holiday.’

14 Article 5 of the Zakon o obrambi (Law on defence) of 20 December 1994 (Uradni list RS, No 82/94), in the version applicable to the dispute in the main proceedings (‘the ZObr’), provides, in point 14, that a member of the military is, for the purposes of that law, a person who performs military duties and states, in point 14a, that, for the purposes of that law, a worker is a member of military personnel, a civilian who is employed in the army or another person employed to carry out specialised administrative or technical tasks in the Ministry.

15 Under Article 51 of the ZObr, a member of military personnel may, in certain circumstances, use weapons when on guard duty.

16 Article 97č of the ZObr, relating to guard duty, states:

‘(1) As a general rule, periods of guard duty shall be for 24 hours without interruption.

(2) Military personnel performing guard duty shall be treated as workers on a split schedule. The hours during which they carry out no actual work shall not be counted as working time, but shall instead be regarded as periods on stand-by at the place of work.

(3) Daily occupational activity on guard duty shall not exceed 12 hours. In the event of an emergency, or in order to complete a task already commenced, the working time of military personnel may exceptionally be extended; in such case, however, the hours actually worked in addition to the 12 hours already worked shall be regarded as overtime.

(4) Guard duty may be performed continuously for up to seven days. Military personnel shall be entitled to a rest period in order to rest at the place in which they perform guard duty, in such a way that 12 hours shall be regarded as ordinary working time and the remaining 12 hours shall be regarded as a period on stand-by.’

17 According to Article 97e of the ZObr, concerning stand-by duty:

‘(1) Stand-by duty refers to the period of time during which a worker must stand by for work at his or her place of work or in some other designated place or at home.

(2) Periods of stand-by duty shall not be counted in the number of hours worked per week or per month. In the event that a worker is required to carry out actual work during a period of stand-by duty, the hours actually worked shall be counted in the number of hours worked per week or per month.

(3) The Ministry is to determine the cases in which, and the manner in which stand-by duty shall take effect at the place of work or in some other designated place or at home. The cases in which, and the manner in which stand-by duty shall take effect in the army shall be determined by the Chief of the Defence Staff.

(4) Stand-by duty at a designated place shall be treated as the equivalent of stand-by duty at the place of work.’

18 The Pravila službe v Slovenski vojski (Staff Regulations for the Slovenian Army) (Uradni list RS, No 84/09) defines the concept of ‘guard duty’ as follows:

‘Guard duty shall be regarded as a combat mission in peacetime …, during which a soldier on guard duty may also use weapons and lethal force in accordance with the provisions of Article 51 of the ZObr. Guard duty is performed in blocks of time (within the framework of a 7-day period with a permanent presence, that is to say a presence at the workplace 24 hours of the day) so that work can be organised properly. Guard duty shall be organised at military unit level, with those units also being required to ensure that the burden of performing guard duty is shared equally between the persons in the same unit. Guard duty has a particular military and strategic importance. Ensuring continuous operational availability is a fundamental task of the army in peacetime. In order to ensure an adequate level of preparation in peacetime, the army shall ensure permanent forces and permanent measures in readiness for intervention. The permanent forces shall be such as to ensure uninterrupted capacity and allow the armed forces to intervene militarily and non-militarily on land, sea and in the air in the Republic of Slovenia. Defence forces shall constitute a part of the permanent forces.

Guard duty shall be performed by an armed unit or a group of military personnel which shall ensure the physical protection of persons, facilities, assets and territory. …

The general duties of persons on guard duty shall be to protect and defend vigilantly what is entrusted to them (facilities, persons, etc.), not to allow their weapons to leave their hands and to be permanently ready to use them, not to leave the guard post until someone has replaced them, not to allow anyone to approach the guard post or protected building or move within a forbidden area aside from a superior, a deputy commandant, a guard commandant, a duty officer or a surveillance officer. Persons on guard duty must also, as is determined for certain guard posts, stop persons and maintain contact and communicate only with the guard commandant and other security bodies, and inform the guard commandant in the event of a disturbance or fire in the vicinity, where there is a threat to the protected object or forces due to natural disasters or other disasters, and when they become unwell or require any other form of assistance.

The security forces shall ensure the security of facilities, documents, persons, weapons and military equipment, munitions and other material against various forms of threat. …’

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

19 Between February 2014 and July 2015, B. K. performed, in his capacity as non-commissioned officer in the Slovenian army, uninterrupted ‘guard duty’ for seven days per month during which he was required be contactable and present at all times at the barracks where he was posted. That ‘guard duty’ included both periods during which B. K. was required to carry out actual surveillance activity and periods during which he was required only to remain available to his superiors. In the event that the military police or an inspection or intervention team arrived unannounced, he was required to record that event on a registration form and to carry out the tasks assigned to him by his superiors.

20 The Ministry of Defence took the view that, for each of those days of ‘guard duty’, eight hours had to be regarded as working time, with the result that it paid B. K. the corresponding ordinary salary in respect of those eight hours of work. In respect of the other hours, B. K. received only a stand-by duty allowance amounting to 20% of his basic salary.

21 B. K. brought an action before the Slovenian courts in which he claimed that he should be paid, as overtime, for the hours during which, in the course of his ‘guard duty’, he had not actually performed any activity for his employer, but had been obliged to remain available to his superiors at the barracks, away from his residence and his family.

22 After his action was dismissed at first instance and on appeal, B. K. brought an appeal on a point of law before the referring court.

23 The referring court notes, in the first place, that, in accordance with Article 1(3) of Directive 2003/88, read in conjunction with Article 2 of Directive 89/391, Directive 2003/88 does not apply where characteristics peculiar to certain specific public service activities inevitably prevent it from applying. The referring court, making reference to the judgment of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584), takes the view that that exception was established only to ensure the proper functioning of services that are absolutely necessary for the protection of public safety, public health and public order in cases of exceptional gravity, where it is not possible to plan the working time of teams of emergency workers.

24 The referring court observes that, in the present case, B. K. carried out his ordinary work, that is to say ‘guard duty’ in peacetime, regularly, without there having been any unforeseeable circumstance or exceptional event during the period at issue in the main proceedings. Thus, according to that court, it was entirely possible to plan his working time.

25 However, that court is uncertain whether the exception provided for in Article 2 of Directive 89/391 may be relied on generally with regard to members of military personnel in peacetime and workers in the defence sector.

26 In the second place, assuming that Directive 2003/88 is applicable in the present case, the referring court is unsure whether the periods during which, in the course of his ‘guard duty’, B. K. was not actually performing any activity for his employer, but was required to remain at the barracks and available to his superiors, must be regarded as ‘working time’ within the meaning of Article 2 of that directive.

27 After emphasising that that question might be answered in the affirmative, the referring court notes that, under Slovenian law, such periods are excluded from working time, in the same way as periods during which a member of military personnel is required to remain at home, and that the same level of remuneration is provided for in respect of those two periods, which, according to that court, is inconsistent with Directive 2003/88.

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

‘(1) Does Article 2 of [Directive 2003/88] apply even to workers employed in the defence sector and to military personnel who perform guard duty in peacetime?

(2) Does Article 2 of [Directive 2003/88] preclude national legislation pursuant to which time spent by workers in the defence sector at their place of work or at some other designated place (but not at home) on stand-by, and time during which military personnel in the defence sector performing guard duty are physically present in barracks but not actually working, is not counted as “working time”?’

Consideration of the questions referred

Admissibility

29 By its questions, the referring court seeks, in essence, to determine whether certain periods during which both military and civilian personnel working in the defence sector are required to remain available to their superiors in case the latter should need them may be regarded as ‘working time’ within the meaning of Article 2 of Directive 2003/88.

30 It is established that the dispute in the main proceedings concerns solely a member of military personnel. It must therefore be held that, in so far as they relate to the situation of civil personnel working in the defence sector, the questions referred for a preliminary ruling bear no relation to the subject matter of the dispute in the main proceedings and are, therefore, in accordance with settled case-law, inadmissible (judgment of 2 February 2021, *Consob*, C-481/19, EU:C:2021:84, paragraph 29 and the case-law cited).

The first question

31 It should be noted as a preliminary point that, according to the settled case-law of the Court, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it. The Court may also find it necessary to consider provisions of EU law which the national court has not referred to in its questions (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 34 and the case-law cited).

32 In that regard, it should be noted, first, that, in order to determine whether, as the referring court asks, Article 2 of Directive 2003/88 is applicable to a security activity carried out by a member of military personnel in peacetime, such as the ‘guard duty’ performed by B. K. under the conditions referred to in paragraph 19 above, it is necessary to examine whether such an activity falls within the scope of that directive, which is determined not by Article 2 but by Article 1(3) of that directive.

33 Second, the referring court starts from the premiss that the dispute in the main proceedings falls within the scope of EU law. However, in so far as that dispute concerns a member of military personnel, it is necessary to examine, at the outset, the argument, put forward by the French and Spanish Governments, that EU law does not govern the organisation of the working time of military personnel on the ground that that organisation falls within the organisational arrangements of the

armed forces of the Member States, which, by their very nature, are excluded from the scope of that law, in accordance with Article 4(2) TEU.

34 In those circumstances, in order to provide the referring court with an answer which will be of use to it and will enable it to decide the case before it, it is necessary to reformulate the first question and to infer that, by that question, that court asks, in essence, whether Article 1(3) of Directive 2003/88, read in the light of Article 4(2) TEU, must be interpreted as meaning that the security activity carried out by a member of military personnel in peacetime is excluded from the scope of that directive.

35 In the first place, it is necessary to ascertain whether Article 4(2) TEU requires all members of the armed forces to be excluded from the scope of EU law and, in particular, from the rules on the organisation of working time.

36 Under Article 4(2) TEU, the Union is to respect, first, the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, and, second, their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. That provision also states that national security is to remain the sole responsibility of each Member State.

37 In that regard, it should be noted that the principal tasks of the armed forces of the Member States, which are the preservation of territorial integrity and safeguarding national security, are expressly included among the essential functions of the State which the European Union must respect in accordance with Article 4(2) TEU.

38 It is also apparent from the case-law of the Court that the Member States' choices of military organisation for the defence of their territory or of their essential interests are not governed, as such, by EU law (see, to that effect, judgment of 11 March 2003, *Dory*, C-186/01, EU:C:2003:146, paragraph 35).

39 That said, it does not result from the respect which the European Union must have for the essential functions of the State, as laid down in Article 4(2) TEU, that decisions on the organisation of their armed forces fall entirely outside the scope of EU law, in particular where the rules at issue relate to the organisation of working time.

40 According to the settled case-law of the Court, although it is for the Member States alone to define their essential security interests and to adopt appropriate measures to ensure their internal and external security, including decisions relating to the organisation of their armed forces, the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from their obligation to comply with that law (see, to that effect, judgments of 26 October 1999, *Sirdar*, C-273/97, EU:C:1999:523, paragraph 15; of 11 January 2000, *Kreil*, C-285/98, EU:C:2000:2, paragraph 15; and of 6 October 2020, *Privacy International*, C-623/17, EU:C:2020:790, paragraph 44 and the case-law cited). The same must apply to national measures adopted for the protection of the territorial integrity of a Member State.

41 Moreover, as the Advocate General noted, in essence, in points 44 and 45 of his Opinion, that assertion is not contradicted by the judgment of 11 March 2003, *Dory* (C-186/01, EU:C:2003:146).

42 Indeed, whereas the introduction of compulsory military service, which was at issue in the case which gave rise to that judgment, is not a matter covered by EU law, the organisation of

working time is a matter which has been harmonised, in accordance with Article 153(2) TFEU, by Directive 2003/88.

43 However, although it does not result from the respect which the European Union must have for the essential functions of the State that the organisation of the working time of military personnel entirely escapes the application of EU law, the fact remains that Article 4(2) TEU requires that the application to military personnel of the rules of EU law relating to the organisation of working time is not such as to hinder the proper performance of those essential functions. Therefore, those rules cannot be interpreted in such a way as to prevent the armed forces from fulfilling their tasks and, consequently, so as adversely to affect the essential functions of the State, namely the preservation of its territorial integrity and the safeguarding of national security.

44 It follows that the specific features which each Member State imposes on the functioning of its armed forces must be duly taken into consideration by EU law, whether those specific features result, inter alia, from the particular international responsibilities assumed by that Member State, from the conflicts or threats with which it is confronted, or from the geopolitical context in which that State evolves.

45 The application of the provisions of EU law and, specifically, those relating to the organisation of working time must not prevent the performance of the specific tasks which each Member State entrusts, in the light of its own constraints and responsibilities, to its armed forces with a view to preserving its territorial integrity or safeguarding its national security.

46 It follows from all the above considerations that Article 4(2) TEU does not have the effect of excluding the organisation of the working time of all military personnel from the scope of EU law.

47 In the second place, it must be recalled that the purpose of Directive 2003/88 is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national rules concerning, in particular, the duration of working time. That harmonisation at EU level in relation to the organisation of working time is intended to guarantee better protection of the health and safety of workers by ensuring that they are entitled to minimum rest periods – particularly daily and weekly – as well as adequate breaks, and by providing for a ceiling on the duration of the working week (judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 25 and the case-law cited).

48 Moreover, the provisions of Directive 2003/88 give specific form to the fundamental right to a limitation of maximum working hours and to daily and weekly rest periods expressly enshrined in Article 31(2) of the Charter of Fundamental Rights of the European Union (‘the Charter’) and must, therefore, be interpreted in the light of the latter (judgment of 17 March 2021, *Academia de Studii Economice din Bucureşti*, C-585/19, EU:C:2021:210, paragraph 37 and the case-law cited). It follows in particular that those provisions may not be interpreted restrictively to the detriment of the rights that workers derive from that directive (judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 27 and the case-law cited).

49 In that regard, it is clear from the case-law of the Court that, for the purpose of applying Directive 2003/88, the concept of ‘worker’ must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which

he or she receives remuneration. It follows that an employment relationship implies the existence of a hierarchical relationship between the worker and his or her employer. Whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties (judgment of 20 November 2018, *Sindicatul Familia Constanţa and Others*, C-147/17, EU:C:2018:926, paragraphs 41 and 42 and the case-law cited).

50 In the present case, it is not in dispute that, during the period at issue in the main proceedings, B. K. received remuneration and was, in his capacity as a non-commissioned officer in the Slovenian army, in a hierarchical relationship with his employer, within the meaning of the preceding paragraph. It follows that Directive 2003/88 is a priori applicable to his situation.

51 In the third place, it must be determined whether the activities of the armed forces in general or, at the very least, some of them must be excluded from the scope of Directive 2003/88 in accordance with Article 1(3), read in the light of Article 4(2) TEU.

52 Article 1(3) of Directive 2003/88 defines the scope of that directive by reference to Article 2 of Directive 89/391. Pursuant to Article 2(1) of Directive 89/391, that directive is to apply to 'all sectors of activity, both public and private'.

53 However, Article 2(2) of Directive 89/391 provides, in its first subparagraph, that that directive is inapplicable where characteristics peculiar to certain specific public service activities, such as the armed forces, or to certain specific activities in the civil protection services inevitably conflict with it, and states, in its second subparagraph, that, in that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of that directive.

54 It is therefore necessary to determine whether the activities of the armed forces in general or, at the very least, some of them must be excluded from the scope of Directive 2003/88 on the ground that they fall within the exception provided for in the first subparagraph of Article 2(2) of Directive 89/391, while taking due account of the need to interpret that scope in the light of Article 4(2) TEU.

55 It is clear from the Court's case-law that the first subparagraph of Article 2(2) of Directive 89/391 must be interpreted in such a way that its scope is restricted to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect (judgments of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 54, and of 30 April 2020, *Készenléti Rendőrség*, C-211/19, EU:C:2020:344, paragraph 32).

56 In addition, the criterion used in the first subparagraph of Article 2(2) of Directive 89/391 to exclude certain activities from the scope of that directive and, consequently, from that of Directive 2003/88, is based not on the fact that workers belong to one of the sectors of the public service referred to in that provision, taken as a whole, but exclusively on the specific nature of certain particular tasks performed by workers in the sectors referred to in that provision, which justify an exception to the rule on the protection of the safety and health of workers, on account of the absolute necessity to guarantee effective protection of the community at large (judgment of 20 November 2018, *Sindicatul Familia Constanţa and Others*, C-147/17, EU:C:2018:926, paragraph 55 and the case-law cited).

57 Among the characteristics peculiar to the specific activities which justify, pursuant to the first subparagraph of Article 2(2) of Directive 89/391, an exception to the rules for the protection of the safety and health of workers, is the fact that, by their nature, they do not lend themselves to

planning as regards working time (judgment of 20 November 2018, *Sindicatul Familia Constanţa and Others*, C-147/17, EU:C:2018:926, paragraph 64 and the case-law cited).

58 The first subparagraph of Article 2(2) of Directive 89/391 thus safeguards the efficiency of specific public service activities which must be continuous in order to ensure the effective performance of essential functions of the State. That continuity requirement must be assessed by taking into consideration the specific nature of the activity in question (judgment of 20 November 2018, *Sindicatul Familia Constanţa and Others*, C-147/17, EU:C:2018:926, paragraphs 65 and 66 and the case-law cited).

59 In that regard, first, the Court has held that the continuity requirement of services in the areas of public health, public safety and public order does not prevent the activities of those services, when performed in normal circumstances, from being organised, including as regards the working hours of their employees, with the consequence that the exception provided for in the first subparagraph of Article 2(2) of Directive 89/391 is applicable to such services only in circumstances whose gravity and scale are exceptional, such as natural or technological disasters, attacks or serious accidents, which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large, measures the proper implementation of which would be jeopardised if all the rules laid down in Directive 2003/88 had to be observed. In such cases, it is appropriate to give absolute priority to the objective of protecting the population, to the detriment of compliance with the provisions of Directive 2003/88, which may be temporarily disregarded within those services (see, to that effect, judgments of 20 November 2018, *Sindicatul Familia Constanţa and Others*, C-147/17, EU:C:2018:926, paragraph 67, and of 30 April 2020, *Készenléti Rendőrség*, C-211/19, EU:C:2020:344, paragraph 42 and the case-law cited).

60 Second, the Court has held that certain specific public service activities, even when performed in normal circumstances, have characteristics which mean that their very nature is absolutely incompatible with the planning of working time in a way that respects the requirements imposed by Directive 2003/88 (judgment of 20 November 2018, *Sindicatul Familia Constanţa and Others*, C-147/17, EU:C:2018:926, paragraph 68).

61 That is true, in particular, of activities which, in order effectively to meet their public interest objective, can be carried out only on a continuous basis and only by the same worker, without it being possible to establish a rotation system allowing the worker to be granted, at regular intervals, the right to rest hours or days after he or she has worked for a certain number of hours or days (see, to that effect, judgments of 20 November 2018, *Sindicatul Familia Constanţa and Others*, C-147/17, EU:C:2018:926, paragraphs 70 to 74, and of 30 April 2020, *Készenléti Rendőrség*, C-211/19, EU:C:2020:344, paragraphs 43 and 44).

62 Such activities must be excluded in their entirety, in accordance with the first subparagraph of Article 2(2) of Directive 89/391, from the scope of Directive 2003/88.

63 In the present case, it is necessary to determine the extent to which the case-law referred to in paragraphs 57 to 61 above is applicable to the activities of members of the armed forces, while bearing in mind that, as stated in paragraphs 43 and 45 above, it is necessary to ensure that the application to them of Directive 2003/88 does not affect the proper performance of the essential functions of the Member States, within the meaning of Article 4(2) TEU.

64 In that regard, it first should be noted that the first subparagraph of Article 2(2) of Directive 89/391 cannot be interpreted as meaning that all members of the armed forces of the Member States are permanently excluded from the scope of Directive 2003/88.

65 As has been pointed out in paragraphs 55, 56 and 58 above, although it seeks to preserve the effective performance of essential functions of the State, the first subparagraph of Article 2(2) of Directive 89/391 must be interpreted restrictively and is intended to exclude from the scope of that directive and, consequently, from that of Directive 2003/88, not whole sectors of the public service, but only certain categories of activity in those sectors, by reason of their specific nature.

66 First, the Court has held previously that the first subparagraph of Article 2(2) of Directive 89/391 cannot justify the exclusion in full of non-civilian staff of public authorities from the scope of that directive (see, to that effect, judgment of 12 January 2006, *Commission* v *Spain*, C-132/04, not published, EU:C:2006:18, paragraphs 30 to 40).

67 Moreover, and as the Advocate General observed, in essence, in footnote 88 of his Opinion, the specific exceptions for military personnel which are expressly provided for both in Article 2(2)(c) of Directive 89/656 and in Article 10(1)(b) of Directive 2013/35 would have been superfluous if the first subparagraph of Article 2(2) of Directive 89/391 had excluded members of the armed forces from the scope of the latter directive in general. The first subparagraph of Article 2(2) of Directive 89/391 also determines the scope of Directives 89/656 and 2013/35, as is clear from Article 1(2) of Directive 89/656 and Article 1(6) of Directive 2013/35, respectively.

68 Second, as the Advocate General also observed, in essence, in points 82 and 83 of his Opinion, it cannot be concluded that all activities carried out by military personnel have such particularities which make it impossible to plan working time in a manner compliant with the requirements laid down in Directive 2003/88.

69 On the contrary, certain activities which may be carried out by members of the armed forces, such as those connected, in particular, to administrative, maintenance, repair and health services, as well as services relating to public order and prosecution, cannot be excluded in their entirety from the scope of Directive 2003/88.

70 It is not in dispute that such activities fall, in principle, within the scope of that directive when they are carried out, under similar circumstances, by civil servants who do not have military status.

71 The exception provided for in the first subparagraph of Article 2(2) of Directive 89/391 is applicable, in the same way, to all workers who perform specific activities identical to the services of a public authority (see, to that effect, judgment of 20 November 2018, *Sindicatul Familia Constanţa and Others*, C-147/17, EU:C:2018:926, paragraph 59).

72 Moreover, while it is true that any member of military personnel is subject to a requirement to make him- or herself available such that he or she must be capable of becoming operational within a very short period of time, the application of the rules laid down by Directive 2003/88 to that member of military personnel while he or she is performing the activities referred to in paragraph 69 above is not, however, such as to conflict with effective compliance with such a requirement to keep oneself available, at least provided that those activities are not carried out in the context of a military operation, including the period of preparation immediately preceding such an operation.

73 That said, second, it follows, on the one hand, from the case-law referred to in paragraph 59 above that, where members of the armed forces are faced with circumstances whose gravity and scale are exceptional, within the meaning of that case-law, their activities are excluded from the scope of Directive 2003/88, pursuant to Article 1(3) thereof, read in conjunction with the first subparagraph of Article 2(2) of Directive 89/391.

74 That is the case where, having regard to the gravity and scale of all the relevant circumstances, it appears that it is impossible to protect the population while organising the activities of the armed forces in such a way that each of their members can benefit from the guarantees provided for by Directive 2003/88 with regard to working time and rest periods, in particular by means of a staff rotation mechanism (see, by analogy, judgment of 30 April 2020, *Készenléti Rendőrség*, C-211/19, EU:C:2020:344, paragraphs 47 to 50).

75 On the other hand, it may be inferred from the case-law referred to in paragraph 60 above that certain categories of military activity fall entirely outside of the scope of Directive 2003/88 where those activities are so particular that they are always absolutely incompatible with the requirements imposed by that directive.

76 That is true of activities carried out by members of the armed forces who, either because they are highly qualified or due to the extremely sensitive nature of the tasks assigned to them, are extremely difficult to replace with other members of the armed forces by means of a rotation system which would make it possible to ensure both compliance with the maximum working periods and the rest periods provided for by Directive 2003/88, and the proper performance of the essential tasks assigned to them.

77 Third, it should be noted that all military personnel called upon to assist in operations involving a military commitment by the armed forces of a Member State, whether they are deployed, permanently or on a temporary basis, within its borders or outside of those borders, carry out an activity which, pursuant to Article 1(3) of Directive 2003/88, read in conjunction with the first subparagraph of Article 2(2) of Directive 89/391, and in the light of Article 4(2) TEU, must, by its very nature, be excluded in its entirety from the scope of Directive 2003/88.

78 Compliance with the requirements laid down by Directive 2003/88 in the course of those operations would put at considerable risk the success of those operations, that success being predicated on the total commitment, over long periods, of the members of the armed forces involved, and would consequently also put at considerable risk the proper performance of the essential functions of safeguarding national security and preserving the territorial integrity of the Member States.

79 In that context, regard must be had to the possible interdependence not only between those operations, but also between them and other activities carried out by members of the armed forces; as the application of the rules of that directive to the latter activities would require the authorities concerned to set up a rotation system or a system for planning working time, such application would inevitably be to the detriment of those same operations, and contrary to the requirements of Article 4(2) TEU. Therefore, if it proves to be necessary for the proper performance of actual military operations, it cannot be ruled out that certain activities of the armed forces which do not relate directly to those actual military operations also fall outside the scope of Directive 2003/88 for the duration of those operations.

80 In addition, Article 1(3) of Directive 2003/88, read in conjunction with the first subparagraph of Article 2(2) of Directive 89/391, and in the light of Article 4(2) TEU, also requires that all activities which form either part of the initial training of military personnel – and compulsory military service, which must receive the same treatment – or part of the operational training which members of the armed forces are subsequently required to perform regularly, are excluded from the scope of Directive 2003/88.

81 As the French Government has pointed out, in order to ensure the operational efficiency of the armed forces, it must be possible to expose military personnel, during their initial and operational training, to situations which reproduce as accurately as possible the conditions, including the most extreme of conditions, in which actual military operations take place. That legitimate objective could not be achieved if the rules on the organisation of working time laid down in Directive 2003/88 had to be complied with during that initial and operational training.

82 Moreover, by imposing such training obligations on military personnel, Member States also ensure that the health and safety of those military personnel are best protected during actual operations of the armed forces, in so far as those obligations enable them to acquire and maintain a high level of endurance in the face of substandard living conditions.

83 The fact that initial and operational training and actual military operations take place in peacetime does not undermine the conclusion that those activities must be entirely excluded from the scope of Directive 2003/88. The armed forces must be entirely able to carry out the tasks which they undertake in order to preserve national security and territorial integrity, including during peacetime.

84 It should be added that it is the exclusive responsibility of each of the Member States, having regard, in particular, to the threats which it is facing, the international responsibilities particular to it and the specific geopolitical context in which it finds itself, to carry out the military operations which it considers appropriate and to determine the intensity of the initial and operational training which it deems necessary for the proper performance of those operations, without any review by the Court being possible in that regard, since such questions must be regarded as falling outside the scope of EU law, as was pointed out in paragraph 38 above.

85 In the present case, it is for the referring court to determine whether the security activity performed by B. K. is covered by one of the situations referred to in paragraphs 73 to 83 above. If not, then that activity will have to be deemed to fall within the scope of Directive 2003/88. In that regard, it is entirely possible, in the light of the documents available to the Court, that that court may conclude that the security activity at issue in the main proceedings constitutes an actual military operation, the result of which being that it falls outside of the scope of that directive.

86 Finally, it must be pointed out that, even where military personnel carry out activities which fall fully within the scope of Directive 2003/88, that directive contains – contrary to what is claimed by the French Government – exceptions to the rights which it establishes which may be relied on by the Member States vis-à-vis those military personnel.

87 That is the case, in any event, for Article 17(3)(b) and (c) of that directive, which permits, in essence, derogations, subject to certain conditions, from Articles 3, 4, 5, 8 and 16 thereof, both in the case of security and surveillance activities requiring a permanent presence in order to protect property and persons and in the case of activities involving the need for continuity of service or production.

88 It follows from all the considerations above that Article 1(3) of Directive 2003/88, read in the light of Article 4(2) TEU, must be interpreted as meaning that a security activity performed by a member of military personnel is excluded from the scope of that directive:

– where that activity takes place in the course of initial or operational training or an actual military operation; or

– where it is an activity which is so particular that it is not suitable for a staff rotation system which would ensure compliance with the requirements of that directive; or

– where it appears, in the light of all the relevant circumstances, that that activity is carried out in the context of exceptional events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large, measures whose proper implementation would be jeopardised if all the rules laid down in that directive had to be observed; or

– where the application of that directive to such an activity, by requiring the authorities concerned to set up a rotation system or a system for planning working time, would inevitably be detrimental to the proper performance of actual military operations.

The second question

89 As a preliminary point, it should be noted that, in the context of the answer to the referring court's second question, the expression 'stand-by periods' will be used to refer to all periods in which the member of military personnel, in the course of his or her security activity, is available exclusively to his or her superiors, without actually performing a security activity.

90 Moreover, it should be noted that it is clear from the order for reference that the dispute in the main proceedings concerns exclusively the remuneration, as overtime, of the stand-by periods completed by B. K.

91 Therefore, in order to provide the referring court with an answer which will be of use to it, it is necessary to reformulate the second question and to infer that, by that question, the referring court seeks, in essence, to ascertain whether Article 2 of Directive 2003/88 must be interpreted as requiring that a stand-by period during which the member of military personnel is required to remain at the barracks to which he or she is posted, but does not perform actual work there, is to be regarded as working time, for the purposes of determining the remuneration payable to him or her in respect of that period.

92 It should also be pointed out that the answer to that question will be relevant to the dispute in the main proceedings only if the referring court were to conclude that the security activity at issue in the main proceedings is not excluded from the scope of Directive 2003/88.

93 In the light of those preliminary observations, it should be noted, in the first place, that the concept of 'working time' within the meaning of Directive 2003/88 covers all stand-by periods during which the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests. Conversely, where the constraints imposed on a worker during a specific stand-by period do not reach such a level of intensity and allow him or her to manage his or her own time, and to pursue his or her own interests without major constraints, only the time linked to the provision of work actually carried out during that period constitutes 'working time' for the purposes of applying Directive 2003/88 (judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraphs 37 and 38 and the case-law cited).

94 As regards stand-by periods undertaken at places of work which are separate from the workers' residence, such as those in the present case, the decisive factor for finding that the elements that characterise the concept of 'working time' for the purposes of Directive 2003/88 are

present is the fact that the worker is required to be physically present at the place determined by the employer and to remain available to the employer in order to be able, if necessary, to provide his or her services immediately, it being specified that the workplace must be understood as any place where the worker is required to exercise an activity on the employer's instruction, including where that place is not the place where he or she usually carries out his or her professional duties. Since, during such a stand-by period, the worker must remain apart from his or her family and social environment and has little freedom to manage the time during which his or her professional services are not required, the whole of that period must be classified as 'working time', within the meaning of that directive, irrespective of the professional activity actually carried out by the worker during that period (judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraphs 33 to 35 and the case-law cited).

95 It follows from the foregoing that, assuming that Directive 2003/88 applies in the present case, a stand-by period imposed on a member of military personnel which involves him or her being continually present at his or her place of work must be regarded as being working time, within the meaning of Article 2(1) of that directive, where that place of work is separate from his or her residence.

96 In the second place, it is, however, important to recall that, save in the special case covered by Article 7(1) of Directive 2003/88 concerning annual paid holidays, that directive is limited to regulating certain aspects of the organisation of working time in order to protect the safety and health of workers, with the result that, in principle, it does not apply to the remuneration of workers (judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 57 and the case-law cited).

97 Therefore, the way in which workers are remunerated for periods of stand-by time is not covered by Directive 2003/88 but by the relevant provisions of national law. Consequently, that directive does not preclude the application of a law of a Member State, a collective labour agreement, or an employer's decision which, for the purposes of the remuneration of guard duty, makes a distinction between the treatment of periods in the course of which work is actually done and those during which no actual work is done, even if those periods must be regarded, in their entirety, as 'working time' for the purposes of that directive (judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 58 and the case-law cited).

98 It follows from all the considerations above that Article 2 of Directive 2003/88 must be interpreted as not precluding a stand-by period during which a member of military personnel is required to remain at the barracks to which he or she is posted, but does not perform actual work there, from being remunerated differently than a stand-by period during which he or she performs actual work.

Costs

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

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

1. **Article 1(3) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, read in the**

light of Article 4(2) TEU, must be interpreted as meaning that a security activity performed by a member of military personnel is excluded from the scope of that directive:

– where that activity takes place in the course of initial or operational training or an actual military operation; or

– where it is an activity which is so particular that it is not suitable for a staff rotation system which would ensure compliance with the requirements of that directive; or

– where it appears, in the light of all the relevant circumstances, that that activity is carried out in the context of exceptional events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large, measures whose proper implementation would be jeopardised if all the rules laid down in that directive had to be observed; or

– where the application of that directive to such an activity, by requiring the authorities concerned to set up a rotation system or a system for planning working time, would inevitably be detrimental to the proper performance of actual military operations.

2. **Article 2 of Directive 2003/88 must be interpreted as not precluding a stand-by period during which a member of military personnel is required to remain at the barracks to which he or she is posted, but does not perform actual work there, from being remunerated differently than a stand-by period during which he or she performs actual work.**

[Signatures]

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* Language of the case: Slovenian.