REPORT FOR THE HEARING
in Case E-19/16

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Supreme Court of Norway (*Norges Høyesterett*), in the case between

Thorbjørn Selstad Thue supported by **the Norwegian Police Federation (*Politiets Fellesforbund*)**

and

The Norwegian Government

concerning 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.

I Introduction

1. By a letter of 14 December 2016, registered at the Court on the same day, the Supreme Court of Norway (*Norges Høyesterett*) made a request for an Advisory Opinion in a case pending before it between Thorbjørn Selstad Thue ("the appellant") and the Norwegian Government ("the respondent"). The Norwegian Police Federation (*Politiets Fellesforbund*) is an intervener in the national proceedings in support of the appellant's case.

2. The case before the referring court concerns an action brought by the appellant, as an employee, against his employer, the respondent, in a dispute concerning the calculation of working hours, more precisely how the appellant must be remunerated for time spent on travel outside ordinary working hours where the destination is a place of work other than the appellant's usual place of attendance.

II Legal background

EEA law

3. 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, and EEA Supplement 2006 No 58, p. 78) ("the Working Time Directive" or "the Directive"), was incorporated into the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") at point 32h of Annex XVIII to the Agreement by Joint Committee Decision No 45/2004 of 23 April 2004 (OJ 2004 L 277, p. 12, and EEA Supplement 2004 No 43, p. 11). Constitutional requirements were indicated and the decision entered into force on 1 August 2005.

4. Article 1 of the Working Time Directive provides as follows:

> *1. This Directive lays down minimum safety and health requirements for the organisation of working time.*
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> *…*
>
> *3. 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.*
>
> *…*

5. Article 2 of the Working Time Directive sets out the definitions of working time and rest period as follows:

> *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;*

National law

6. The Working Time Directive has been implemented in Norway by the Act of 17 June 2005 No 62 on the working environment, working hours and employment protection etc.[1] ("the Working Environment Act").

[1] *Lov om arbeidsmiljø, arbeidstid og stillingsvern mv.* (*arbeidsmiljøloven*), LOV-2005-06-17-62.

7. Chapter 10 of the Working Environment Act is entitled "working hours" and lays down limits on normal working hours (Section 10-4), rules for the calculation of average normal working hours (Section 10-5), limits on overtime (Section 10-6) and requirements for breaks and daily and weekly rest (Sections 10-8 and 10-9).

8. Section 10-1 of the Working Environment Act reads:

> *(1) For the purposes of this Act, working hours means time when the employee is at the disposal of the employer.*
>
> *(2) For the purposes of this Act, off-duty time means time when the employee is not at the disposal of the employer.*

III Facts and procedure

9. The appellant has been employed at Gaular rural police station in Sogn og Fjordane county since 1995, where he currently is employed as a chief inspector. Between 2005 and 2014, he was a member of a special "response unit" (utrykningsenhet or "UEH") in Sogn og Fjordane police district. Every police district in Norway is required to have a UEH team of specially qualified officers, whose duties include armed response actions and escort assignments for, inter alia, government ministers visiting the district.

10. The case concerns three UEH assignments in which the appellant participated, namely: (i) an escort assignment on 7 October 2013 in Volda for the Norwegian Minister of Health; (ii) drug-related armed response action in Sogndal and the surrounding area on 8 October 2013; and (iii) an escort assignment in Årdal on 16 November 2013 for the Norwegian Prime Minister.

11. In connection with the escort assignment on 7 October 2013 in Volda, the appellant left his residence at approximately 17:00 on Sunday 6 October 2013 for Gaular police station. There, he stowed the required equipment in the police car. He then notified the police district's operations centre ("the Operations Centre") that he was leaving for Volda. On his way, the appellant dropped in at Førde police station, approximately 25 minutes away, and picked up a service weapon. He then drove to Gloppen police station, where he met the police constable, who was to accompany him on the assignment. From Gloppen to Volda, where they stayed overnight, they travelled in separate cars, practising escort driving in addition to carrying out reconnaissance work. In that regard, the respondent approved the time from 18:30 as working hours, with overtime supplement. The disputed period concerns the interval between 17:00 and 18:30, that is before they started the escort driving practice and related work. In the appellant's case, this period was approved by the respondent as travel time, but not as working hours.

12. The following day, the Minister of Health was picked up as planned and driven from Volda to Nordfjord, and later back to the airport in Volda. Then, at 16:20, the appellant and his colleague set off for home. The appellant arrived home at approximately 19:30. The time that the appellant spent on this return journey was approved by the respondent as travel time, but not as working hours.

13. The second assignment was a drug-related armed response action in Sogndal and the surrounding area on the following day, Tuesday 8 October 2013. The appellant arrived at Gaular police station at approximately 6:30, where he stowed the required equipment in the police car and notified the Operations Centre. He then drove to Førde police station, where he met up with the rest of the UEH team before they continued to Sogndal, where they arrived at about 8:00. The operation lasted until 21:53 and the appellant was back in Gaular at 23:35.

14. The time that the appellant spent on the return journey from Sogndal was approved by the respondent as travel time, but not as working hours. The journey to Sogndal was approved as working hours (with overtime supplement), but the referring court notes that the respondent maintains that this was done by mistake.

15. The third assignment was an escort assignment for the Norwegian Prime Minister on Saturday 16 November 2013, when the appellant was initially off duty. On that day, he left Gaular at approximately 8:00, after having stowed equipment in the police car. He also notified the Operations Centre. He then drove to Førde police station, where he picked up a police officer, who was to accompany him on the assignment. They drove together to Årdal, where his colleague was to transfer to another car. It is not disputed that a number of telephone calls took place en route in order to plan the assignment. They arrived in Årdal at approximately 11:00. After having completed the assignment, the appellant left for Gaular at 16:40. He was back home at 19:40.

16. The return journey from Årdal was approved by the respondent as travel time, but not as working hours. The same was initially the case for the journey to Årdal. However, during the preparation of the case before the Court of Appeal, the respondent approved this journey as working hours with overtime supplement as the appellant had so many planning tasks.

17. Hence, the periods disputed in the case are the interval from 17:00 to 18:30 on the journey to Volda and the return journeys after all three assignments.

18. For the purposes of classifying those periods, the main issues are the extent to which the appellant was under a duty to carry out tasks during his travels, and whether he was ready for work and at the respondent's disposal for other police tasks. Other issues include his possibility of choosing an alternative travel route, his possibility of choosing other means of transport, the significance of his use of an unmarked police car, and what limitations on his off-duty hours followed from the fact that he took a service weapon along

on his journey. In addition, there is disagreement about the appellant's possibility to choose time of departure and carry out private tasks while travelling, for example taking breaks and visiting family and friends. There is also disagreement about whether the appellant carried out any tasks other than brief and travel-related tasks.

19. On 31 March 2014, the appellant lodged a claim against the respondent on the grounds that his working hours had been incorrectly calculated. His claim was rejected by Oslo District Court (*Oslo tingrett*) in a judgment dated 11 December 2014. An appeal against that judgment was brought before Borgarting Court of Appeal (*Borgarting lagmannsrett*), which upheld the district court's conclusion in its judgment of 18 February 2016. By an appeal against the Court of Appeal's judgment, the appellant then brought the matter before the Supreme Court of Norway.

20. The Supreme Court of Norway has referred the following questions to the Court.

I. Is the time spent on a journey ordered by the employer, to and/or from a place of attendance other than the employee's fixed or habitual place of attendance, when such travel takes place outside normal working hours, to be considered working time within the meaning of Article 2 of Directive 2003/88/EC?

II. Insofar as travel as described in Question I is not by itself sufficient to be classified as working time, what is the legal test and the relevant elements to be considered in the assessment of whether the time spent on travel should nonetheless be deemed to constitute working time? As part of this question, an opinion is requested on whether an intensity assessment should be made of the amount of work performed while travelling.

III. Does it have any bearing on the assessments under Questions I and II how often the employer specifies a place of attendance other than the fixed or habitual one?

21. Due to illness, Judge Páll Hreinsson, who was judge rapporteur, was replaced by Ad-hoc Judge Ása Ólafsdóttir. The case was reallocated to President Carl Baudenbacher to act as judge-rapporteur on 16 May 2017.

IV Written observations

22. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

– the appellant, represented by Merete Furesund, advocate;

– the respondent, represented by Siri K. Kristiansen, advocate at the Attorney General of Civil Affairs, acting as Agent;

– the Polish Government, represented by Boguslaw Majczyna, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler and Øyvind Bø, members of its Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Michel van Beek, Legal Adviser, and Nicola Yerrell, member of its Legal Service, acting as Agents.

V Summary of the arguments submitted

General remarks

23. All those who have submitted written observations to the Court are agree that the concepts of working time and rest period are mutually exclusive. As the Directive uses only these two alternatives, there are no intermediate categories.[2] Accordingly, they all agree that travel time spent by the appellant on the disputed journeys can either constitute working time or a rest period. Furthermore, all those who have submitted written observations to the Court are agreed that the definition of working time in Article 2(1) of the Working Time Directive contains three criteria specifying that the employee must be: (1) working or at work; (2) at the employer's disposal; and (3) carrying out his activity or duties. However, as set out below, there is disagreement on the interpretation of each individual criterion.

The appellant

24. As a preliminary remark, the appellant maintains that until October 2013 his working hours, including for UEH assignments, were calculated from the time when he arrived at the district police station and until he left the same police station after he had finished his duty. Official journeys outside ordinary working hours were regularly classified as working hours. In October 2013 the respondent unilaterally changed that

[2] Reference was made to numerous judgments and orders, including Case E-5/15 *Matja Kumba T. M'Bye and Others* [2015] EFTA Ct. Rep. 674, paragraph 39; and, for comparison, the judgments in *Tyco*, C-266/14, EU:C:2015:578, paragraphs 25 and 26; *Simap*, C-303/98, EU:C:2000:528, paragraph 47; *Jaeger*, C-151/02, EU:C:2003:437, paragraph 48; and *Dellas and Others*, C-14/04, EU:C:2005:728, paragraphs 42 and 43. Reference was also made to the orders in *Vorel*, C-437/05, EU:C:2007:23, paragraphs 24 and 25; and *Grigore*, C-258/10, EU:C:2011:122, paragraphs 42 and 43.

practice and started to calculate some of the hours in question as travel time. The appellant contends that the majority of the 12 police districts in Norway accept travel time, outside normal working hours, as working time.

25. The appellant submits that if an employer can freely define where his employee is obliged to perform his duties, without classifying the time spent in the vehicle as working time, the objective of the Working Time Directive will be thwarted.

26. As regards the first question, the appellant argues that all time spent on a journey ordered by the employer must be considered working time within the meaning of Article 2 of the Working Time Directive, as the employee is under an obligation to comply with the order from the employer.

27. The appellant maintains that, according to case law, the concepts of working time and rest period within the meaning of Article 2(1) of the Working Time Directive "may not be interpreted in accordance with the requirements of the various legislations of the Member States but constitute concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of that directive".[3]

28. The appellant submits that the relevant case law shows that the three elements in Article 2(1) of the Directive are neither disjunctive nor fully cumulative. Thus, it is not necessary that all of the criteria are fulfilled in order for a period to be classified as working time.[4] Furthermore, the concepts are defined broadly and in the majority of cases it will be sufficient that two of the requirements are met for the period to count as working time.[5]

29. Addressing the first criterion of Article 2(1) of the Working Time Directive, the appellant submits that in cases concerning on-call workers with the emergency services, the Court of Justice of the European Union ("ECJ") has repeatedly held that the time the workers spend at their workplace on-call and at the premises of the employer constitutes working time.[6]

30. Furthermore, the ECJ has held that journeys made by workers without a fixed or habitual place of work between their homes and the first and last customer of the day

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[3] Reference is made to the judgment in *Jaeger*, cited above, paragraph 58.

[4] Reference is made to the judgment in *Simap*, cited above, paragraph 48, which, according to the appellant, confirmed the view expressed by Advocate General Saggio in his Opinion in the same case, EU:C:1999:621, point 36.

[5] Reference is made to the Opinion of Advocate General Ruiz-Jarabo Colomer in *Jaeger*, C-151/02, EU:C:2003:209, points 28 to 30.

[6] Reference is made to the judgment in *Jaeger*, cited above, paragraph 65.

constitute working time.[7] In the appellant's view, it is clear that not only the destination determined by the employer, but the whole timeframe of the journey in question is the employee's workplace in the context of the Working Time Directive.

31. Addressing the second criterion of Article 2(1) of the Working Time Directive, the appellant maintains that an employee is at his employer's disposal when he is obliged to follow the employer's instructions, including when he is ordered by the employer to travel to a specific location.[8] During such journeys the employee acts on the instructions of the employer, who may change the order of the customers or cancel or add an appointment.

32. Addressing the third criterion of Article 2(1) of the Working Time Directive, the appellant submits that an employee travelling as part of his work is working, as he is under an obligation to follow his employer's order to perform the journey.[9] In addition, the ECJ has repeatedly held that, even though workers are not performing work tasks, the time workers spend at their workplace on-call and at the premises of the employer constitutes working time.

33. In the circumstances of the present case, the appellant contends that he is required to comply with his employer's orders, irrespective of the assignment's location and the time he has to spend away from home in the line of duty. He maintains that in *Tyco* the ECJ held workers in such situations to be carrying out their employment duties over the whole duration of the journeys undertaken, as they were necessary parts of providing their technical services at the customers' premises.

34. As regards the second question, the appellant argues that the Working Time Directive does not call for an intensity test.

35. The appellant submits that the Directive and the relevant case law clearly state that the employee must be able to use his rest period freely and unhindered to pursue his own interests. If that is not possible, the time must be classified as working time.

36. In *Jaeger*, the ECJ held the time spent on-call by doctors in primary health care teams to constitute working time irrespective of the work actually performed by the persons concerned.[10] Similarly, according to the appellant, the ECJ has held that the definition of

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7 Reference is made to the judgment in *Tyco*, cited above, paragraph 46.

8 Reference is made to the judgment in *Tyco*, cited above, paragraphs 35, 36 and 48.

9 Reference is made to the judgment in *Tyco*, cited above, paragraph 43.

10 Reference is made to the judgment in *Jaeger*, cited above, paragraphs 68 and 69.

working time does not include any reference to the intensity of work done by the employee.[11]

37. Furthermore, the ECJ has held that during compensating rest periods the worker must not be subject to any obligation vis-à-vis his employer which may prevent him from pursuing freely and without interruption his own interests in order to neutralise the effects of work on his safety or health.[12]

38. As regards the third question, the appellant submits that frequency is of no importance when assessing whether or not the relevant periods constitute working time. In the appellant's view, the decisive factor in the *Tyco* case was not that the travel happened every day, but that the journey was a necessary and integral part of the work. The same applies in the present case, as the appellant had to travel to the assigned place in order to fulfil the assignment ordered by his employer.

39. The appellant stresses that regulation of working time is for the protection of employees. The appellant contends that allowing the frequency of employer ordered travel time to influence the assessment would leave him without compensatory rest after being at the disposal of his employer for many hours and with less than 11 hours rest. Such an interpretation would not be in accordance with the Working Time Directive and the relevant case law of the ECJ.[13]

40. The appellant proposes that the Court should answer the questions referred as follows:

1. *The time spent on a journey ordered by the employer, to and from a place of attendance other than the employee's fixed or habitual place of attendance, when such travel takes place outside normal working hours, is to be considered working time within the meaning of Article 2 of directive 2003/88/EC.*

2. *There is no room for an intensity assessment or any other legal test when assessing whether or not time spent on travel ordered by the employer constitute working time.*

3. *The frequency of how often the employer specifies a place of attendance other than the fixed or habitual one does not affect the assessments under Questions I and II.*

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[11] Reference is made to the judgments in *Dellas and Others*, cited above, paragraph 43, and *Tyco*, cited above. Reference is also made to the orders in *Vorel*, cited above, paragraph 25, and *Grigore*, cited above.

[12] Reference is made to the judgment in *Jaeger*, cited above, paragraph 95.

[13] Reference is made to the judgment in *Jaeger*, cited above, paragraph 95.

The respondent

41. In the respondent's view, it follows from the current collective agreements that time spent on travel – whether or not it is working time pursuant to the Working Time Directive and the Norwegian Working Environment Act – shall be compensated as "travel time". Such periods are compensated by granting time off in lieu, or, where that is not possible, by a specific monetary payment.

42. The respondent notes that Borgarting Court of Appeal assessed the significance of the *Tyco* judgment and concluded that it has limited transfer value, as it only concerns a special group of employees who do not have a fixed or habitual place of work, but are ordered to attend a new place every day.

43. In the respondent's view, the appellant was not a part of the operational service during the disputed periods. Furthermore, he was not in a situation where he had to be prepared to start work immediately on ordinary police tasks under his employment contract.

44. As a preliminary remark on the first question, the respondent maintains that it is not entirely correct to refer to the journeys in question as having been ordered by the employer. The employer in the present case did not order the journeys as such, but only a specific place of attendance where the work would take place.

45. The respondent maintains that the criteria set out in Article 2(1) of the Working Time Directive are not met simply by an employee spending time travelling outside ordinary working hours. Nor can a vehicle be deemed the employee's place of work under normal circumstances.

46. However, insofar as active work, over and above very brief and purely travel-related tasks that must be deemed to be part of the journey, is carried out during the journey, time spent on this must be deemed working time within the meaning of the Working Time Directive. Nonetheless, the whole time spent on travel does not as a result become working time within the meaning of the Directive, only the time spent on active work.[14]

47. The respondent submits that there are three reasons why the judgment in *Tyco* cannot support the claim that time spent on travel outside ordinary working hours to/from a place of attendance other than the employee's fixed or habitual place of attendance in itself constitutes working time within the meaning of the Working Time Directive.

48. First, the judgment must be regarded as largely limited to a special type of employees characterised by not having a fixed or habitual place of attendance. The respondent maintains that for employees who have a fixed or habitual place of attendance,

[14] Reference is made to the judgment in *Simap*, cited above, paragraph 50.

the fact that they occasionally use a car in connection with their work does not mean that travel is an inherent part of their work duties in a corresponding way. In addition, it is not natural to deem an employee travelling as "carrying out his activity or duties".

49. Second, the judgment places substantial emphasis on the situation that applied previously to the employees in question. In the case at hand, there is no such previous situation. The changes that have been made in relation to the appellant are not the result of unilateral decisions by the employer, but the result of agreements reached through ordinary collective bargaining processes.

50. Third, the ECJ stressed that the condition that an employee must be "at the employer's disposal" must also be met. It highlighted that, during a journey, the employees in question could be ordered to carry out new installation assignments, and that they otherwise were subject to substantial constraints on their freedom.[15]

51. Furthermore, the respondent argues that the interpretation of the provision advanced by the appellant would lead to inexpedient results in practice.

52. As regards the second question, the respondent reiterates that time spent on travel of this type cannot constitute working time within the meaning of the Working Time Directive unless active work is carried out, in which case only the time spent on the active work constitutes working time. However, the respondent does not rule out the possibility that, under certain circumstances, periods during which no active work is performed must also be deemed to constitute working time.[16] The decisive factor in that regard must be whether the employee is under a legal obligation to carry out his duties immediately and whether he is obliged to be physically present at a place specified by the employer.[17]

53. The respondent maintains that, for time to constitute working time, the employee must also have a duty to be prepared to carry out ordinary duties under the employment contract to a greater extent than during off-duty time. Some occupational groups – including police officers – will naturally have a certain duty to act also in their off-duty time, without this entailing that they are always at work.

54. In addition, consideration must be given to the extent to which the obligations and constraints on the employee's freedom to manage his own time and spend time pursuing his own interests mean that it is natural to deem the period working time. The key factor in such assessment must be the possibility for the employee to relax and recover from the

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[15] Reference is made to the judgment in *Tyco*, cited above, paragraphs 35, 36 and 39.

[16] Reference is made to the judgments in *Jaeger*, cited above; *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 93; and *Dellas and Others*, cited above, paragraph 50.

[17] Reference is made to the judgments in *Simap*, cited above, paragraphs 48 to 50; *Jaeger*, cited above, paragraphs 63 to 65; *Dellas and Others*, cited above, paragraph 48; and *Tyco*, cited above, paragraphs 35 and 36. Reference is also made to the order in *Vorel*, cited above, paragraph 28.

tiredness caused by work.[18] The respondent maintains that the disputed periods in the present case do not constitute working time because it was for the appellant to decide when he would start the journey, his means of transport, travel routes, possible breaks and other activities. In addition, the respondent submits that in such situations, the intensity of the work carried out is immaterial.

55. As regards the third question, the respondent maintains that, in principle, the assessment is not altered by how often a place of attendance other than the fixed or habitual one is specified. However, employees for whom this occurs often may have a somewhat greater need for protection in this regard. Therefore, the respondent does not rule out the possibility that the frequency could have a bearing when assessing whether the conditions of the Working Time Directive are met. However, that would only become relevant in cases where a different place of attendance is specified more often than in the present case.

56. The respondent proposes that the Court should answer the questions referred as follows:

> *Question I*
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> *The fact that the employee spends time on a journey as described in the question is not in itself sufficient for the time spent to be deemed to be working time pursuant to Article 2 of Directive 2003/88/EC. However, insofar as active work, over and above very brief and purely travel-related tasks that must be deemed to be part of the journey, is carried out during the journey, time spent on this must be deemed to be working time within the meaning of the Directive. Nevertheless, all the time spent on the journey will not be working time pursuant to the Directive – only the time spent on active work.*
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> *Question II*
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> *Time that does not involve active work can in exceptional circumstances be deemed to be working time provided that the employee is legally obliged to be prepared to carry out normal duties under his employment contract, and he is obliged to be physically present in a place specified by the employer.*
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> *For travelling time to be regarded as working time, the legal obligation to be prepared to carry out normal duties under the employment contract must go further than what applies during the employee's off-duty time. In addition, the obligations and the constraints on his freedom to manage his own time and spend*

[18] Reference is made to the judgments in *Simap*, cited above, paragraph 50; *Jaeger*, cited above, paragraph 65; and *Tyco*, cited above, paragraph 37.

time pursuing his own interests must be so great that it is natural to deem the time period in question to be working time.

If such an obligation to be prepared to work and such constraints on the employee's freedom as described above exist, an intensity assessment of the amount of work performed while travelling shall not in addition be carried out.

Question III

It cannot be correct to deem the time spent on this type of travel as working time within the meaning of the Directive if it is only as an exception that the employer specifies a place of attendance other than the employee's fixed or habitual place of attendance. As long as the employee has a fixed or habitual place of attendance, it is therefore irrelevant to the answer to Questions I and II whether a special place of attendance is only specified very rarely, as in the present case, or more often. In relation to Question II, it cannot in principle be ruled out, however, that, in cases of doubt, the frequency could be emphasised when assessing whether the conditions of the Directive are met.

The Polish Government

57. The Polish Government submits that only an autonomous interpretation of the concepts of working time and rest period is capable of securing full effectiveness of the Directive and its uniform application within all EEA States.[19]

58. As regards the first criterion of Article 2(1) of the Working Time Directive, the Polish Government contends that the present case differs from *Tyco*, as the latter concerned special types of employees who had no fixed or habitual place of attendance, but were ordered to a new place of attendance on a daily basis.[20]

59. However, in the present case, travel to the place of assignment should be treated as usual travel to and from the place of residence to the fixed or habitual place of attendance which the appellant performs every time he goes to work and which is not counted as working time.

60. As regards the second criterion of Article 2(1) of the Working Time Directive, the decisive factor is that the worker is required to be physically present at the place determined by the employer and to be available to the employer in order to be able to provide the

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[19] Reference is made to the judgments in *Tyco*, cited above, paragraph 27; and *Dellas and Others*, cited above, paragraphs 44 and 45; and to the orders in *Vorel*, cited above, paragraph 26, and *Grigore*, cited above, paragraph 44.

[20] Reference is made to the judgment in *Tyco*, cited above, paragraph 36

appropriate services immediately in case of need.[21] Accordingly, the employee must be legally obliged to obey the instructions of the employer and carry out his activity in that regard.

61. Conversely, the case law of the ECJ establishes that periods where workers can manage their time without major constraints and pursue their own interests do not constitute working time within the meaning of the Working Time Directive.[22]

62. The Polish Government submits that, in the present case, the appellant was not in fact at his employer's disposal for the whole time and that it was not possible for him to carry out the standard duties of a police officer. Furthermore, it was left to the appellant to decide when to start the journey as well as to choose the means of transport, the travel route, possible breaks and other activities.

63. In respect of the third criterion of Article 2(1) of the Working Time Directive, the Polish Government contends that the travel to the place of assignment cannot in general be treated as working time. For such classification, the travel must be regarded as an integral part of the performance of the worker's activity, which must be differentiated from the situation of a worker with a fixed or habitual place of attendance.[23]

64. The Polish Government proposes that the Court should answer the questions referred as follows:

> *The time spent on a journey ordered by the employer, to and/or from a place of attendance other than the employee's fixed or habitual place of attendance, when such travel takes place outside normal working hours, shall not be considered as working time within the meaning of Article 2 of Directive 2003/88/EC.*

ESA

65. As a preliminary remark, ESA notes that the underlying dispute in the main proceedings concerns the level of remuneration to which the appellant is entitled for the disputed journeys. ESA submits that this question falls outside the scope of the Working Time Directive. The definition of "working time" in the Directive does not affect the appellant's right to remuneration for the travelling time in question, at least not directly.

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[21] Reference is made to the judgments in *Tyco*, cited above, paragraph 35; and *Dellas and Others*, cited above, paragraph 48; and to the orders in *Vorel*, cited above, paragraph 28; and *Grigore*, cited above, paragraph 63.

[22] Reference is made to the judgments in *Tyco*, cited above, paragraphs 36 and 37; *Jaeger*, cited above, paragraph 63; and *Simap*, cited above, paragraphs 48 to 50.

[23] Reference is made to the judgment in *Tyco*, cited above, paragraph 36.

Rather, the concept of "working time" determines the framework within which employers can organise their employees' working time and rest periods.

66. ESA contends that although the definition of "working time" in Article 2(1) of the Working Time Directive refers to national laws or practice that does not mean that the EEA States may unilaterally determine the scope of that concept.[24] Furthermore, the ECJ has emphasised that only an autonomous interpretation of the concepts of "working time" and "rest period" can ensure full effectiveness of the Working Time Directive.[25]

67. ESA submits that the criteria set out in Article 2(1) of the Working Time Directive to determine what constitutes "working time" are cumulative.[26] It notes, however, that the ECJ has taken a flexible approach and established a rather broad concept of "working time".[27]

68. Addressing the third criterion of Article 2(1) of the Working Time Directive, ESA submits that the reasoning provided by the ECJ in *Tyco*[28] also applies to the journeys disputed in the present case. In ESA's view, the journeys were necessary for the appellant to carry out assignments he was given by his employer. They cannot be distinguished from the journeys examined in *Tyco* on the basis that the appellant, unlike the workers in *Tyco*, had a habitual place of attendance. ESA contends that the decisive factor is whether the journeys were a necessary means for workers to carry out their tasks.[29]

69. Addressing the second criterion of Article 2(1) of the Working Time Directive, ESA submits that in order for a worker to be regarded as being at the disposal of his employer, he must be placed in a situation in which he is legally obliged to obey the instructions of his employer and carry out his activity for that employer.[30] Conversely, if workers are able to manage their time without major constraints and pursue their own interests, it is a factor capable of demonstrating that the period does not constitute working time.[31]

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[24] Reference is made to *Matja Kumba T. M'Bye and Others*, cited above, paragraph 38; and, for comparison, to the judgment in *Tyco*, cited above, paragraph 38.

[25] Reference is made to the judgment in *Tyco*, cited above, paragraph 27.

[26] Reference is made to the Opinion of Advocate General Bot in *Tyco*, C-266/14, EU:C:2015:391, point 31; and to the judgments in *Tyco*, cited above, paragraph 29; and *Jaeger*, cited above, paragraph 49.

[27] Reference is made to the judgment in *Dellas and Others*, cited above, paragraphs 46 to 48.

[28] Reference is made to the judgment in *Tyco*, cited above, paragraph 32.

[29] Reference is made to the judgment in *Tyco*, cited above, paragraphs 32 to 34.

[30] Reference is made to the judgment in *Tyco*, cited above, paragraph 36.

[31] Reference is made to the judgment in *Tyco*, cited above, paragraph 37. Reference is also made to *Matja Kumba T. M'Bye and Others*, cited above, paragraph 41, and to the judgment in *Jaeger*, cited above paragraph 94.

70. Furthermore, rest periods may be considered effective when workers are able to remove themselves from the working environment during the rest periods and pursue their own interests freely and uninterrupted.[32]

71. ESA takes the view that a person such as the appellant is at the disposal of his employer during journeys such as those at issue in the present case. The appellant's employer decided where he had to travel in order to carry out his assignments, and the time at which he had to arrive. Although the appellant had a certain degree of freedom during the journeys, he still acted on the instructions of his employer during them, and the assignments could be cancelled by the employer. During the necessary travel time, the appellant could not spend his time freely and pursue his own interests, and he could not spend the time with his family or friends.[33]

72. ESA contends that the case law of the ECJ on Article 2(1) of the Working Time Directive reflects the fact that the provision does not mention an intensity assessment nor does it include a time category between working time and rest period.[34] Accordingly, neither the Court nor the ECJ have carried out an assessment of work intensity in their case law.[35]

73. In addition, travelling time cannot be classified as "rest period" on the basis that travelling is not as burdensome as normal work, as that depends on the circumstances in every case. In ESA's view, it would undermine the essential function of rest periods if they were deemed to encompass travelling time for journeys carried out at the instruction of the employer. The disputed journeys took place because the appellant was instructed to spend the necessary time to travel to a place other than his habitual place of attendance, and not because he had freely made a choice to spend his rest period travelling.

74. However, ESA maintains that in principle, it is only the necessary and not the actual travelling time that can constitute working time. If a worker stops on the journey to conduct personal business, that time does not constitute working time.

75. Addressing the first criterion of Article 2(1) of the Working Time Directive, ESA submits that where journeys are necessary for a worker to carry out his tasks, travelling is a part of that worker's activities and duties whether or not he has a habitual place of attendance. Moreover, for a worker with a habitual place of attendance, travels instructed by his employer have a stronger work element than in the case of a worker without a fixed

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[32] Reference is made to *Matja Kumba T. M'Bye and Others*, cited above, paragraph 41. See also the judgment in *Jaeger*, cited above, paragraph 95.

[33] Reference is made to the judgment in *Tyco*, cited above, paragraphs 38 and 39.

[34] Reference is made to the judgment in *Dellas and Others*, cited above, paragraphs 43 and 47. Reference is also made to the order in *Vorel*, cited above, paragraph 25.

[35] Reference is made to *Matja Kumba T. M'Bye and Others*, cited above, paragraph 44; and the judgments in *Tyco*, cited above; and *Dellas and Others*, cited above, paragraph 48 and case law cited.

or habitual place of attendance, since the former worker expects to attend work at the habitual place of attendance.

76. In light of that analysis, ESA takes the view that the three criteria in Article 2(1) of the Working time Directive are met, and that the disputed journeys constitute working time within the meaning of that provision. However, ESA proposes that the travelling time should be calculated on the basis of the time necessary to travel from the habitual place of attendance to the designated place of attendance, as normally the travelling time between home and the habitual place of attendance does not constitute working time.

77. ESA proposes that Question I is answered in the affirmative. It follows, in ESA's view, that there is no need to answer Question II. Therefore, ESA proposes that the Court should answer Questions I and III as follows:

> *Time spent outside normal working hours on a journey ordered by the employer to and from a place of attendance other than the employee's fixed or habitual place of attendance constitutes working time under 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, regardless of the frequency of such journeys. The working time amounts to the minimum time it would take to travel from the fixed or habitual place of attendance to the designated place of attendance, but without exceeding the time the worker actually spends travelling.*

The Commission

78. As a preliminary remark, the Commission notes that the referring court seeks guidance from the Court on the proper interpretation of the definitions contained in the Working Time Directive but not for the purpose of applying or interpreting the substantive health and safety right that it enshrines. In the Commission's view, there is no suggestion by the referring court that the appellant's entitlement to rest periods or the calculation of his maximum permitted working hours is in dispute. Accordingly, it is not clear whether there is an issue of EEA law as such to be resolved in this context.

79. Even though the Court has held that provisions or concepts taken from EEA law should be interpreted uniformly, irrespective of the circumstances in which they apply,[36] the Commission doubts whether the request for advisory opinion is admissible in light of recent case law of the ECJ.[37]

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[36] Reference is made, inter alia, to Case E-25/13 *Gunnar Engilbertsson* [2014] EFTA Ct. Rep. 524, paragraph 54.

[37] Reference is made to the judgment in *Pérez Retamero*, C-97/16, EU:C:2017:158. Reference is also made to the order in *Grigore*, cited above, paragraph 4 of the operative part; and the judgment in *Tyco*, cited above, paragraphs 48 and 49.

80. As regards the first question, the Commission submits, having regard to the second criterion of Article 2(1) of the Working Time Directive, that, for a worker to be considered to be at the employer's disposal, he must be physically present at a place determined by the employer and available to the employer in order to be able to provide the appropriate services immediately in case of need.[38]

81. Furthermore, according the case law of the ECJ, the key factor in this regard is that the worker "must be placed in a situation in which he is legally obliged to obey the instructions of his employer and carry out his activity for that employer".[39] Conversely, "the possibility for workers to manage their time without major constraints and to pursue their own interest is a factor capable of demonstrating that the period of time in question does not constitute working time".[40]

82. In the *Tyco* case, the ECJ accepted that workers had a certain freedom during the time spent travelling from home to customers, provided that they arrived at an agreed time. However, it was also emphasised that during these journeys the workers acted "on the instructions of the employer", who might make alterations. In any event, during the necessary travelling time, the workers were "not able to use their time freely and pursue their own interests", with the result that they were at their employer's disposal.

83. In the Commission's view, reasoning analogous to that of *Tyco* can be applied to the situation at issue in the present case. The Commission maintains that, under such circumstances, the worker is obliged to obey the employer's instructions and cannot avoid the burden of such travel time by his choice of place to live. Furthermore, the travel time is not simply part of a standard attendance at a fixed workplace and the travelling itself is part of the specific task assigned by way of the employer's instruction. The fact that such an instruction and the necessary travel occurs only occasionally cannot affect this conclusion.

84. The Commission disagrees with the respondent's argument that a police officer such as the appellant has few constraints when travelling to special assignments. In the Commission's view, there is a period of necessary travelling time which forms part of the assignment which the worker is instructed to perform by his employer. During that period the worker is not able to use his time freely and pursue his own interests as he is obliged to travel to the requested place of attendance.

85. Addressing the third criterion of Article 2(1) of the Working Time Directive, the Commission submits that the period spent by a police officer travelling to a specific

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[38] Reference is made, inter alia, to the judgment in *Dellas and Others*, cited above, paragraph 48; and the order in *Vorel*, cited above, paragraph 28.

[39] Reference is made to the judgment in *Tyco*, cited above, paragraph 36.

[40] Reference is made to the judgment in *Tyco*, cited above, paragraph 37.

location (other than his usual place of work) for a specific assignment ordered by his employer is "a necessary means" for him to be able to perform the assignment.[41] The fact that he does not carry out actual police duties in a narrow sense during the travel does not undermine the conclusion that it is a part of his broader activity.[42]

86. Addressing the first criterion of Article 2(1) of the Working Time Directive, the Commission notes that in *Tyco* the ECJ held that, if a worker is "carrying out his duties" during his journey to or from a customer, that worker must also be regarded as "working" during that journey. Of particular relevance, according to the Commission, is the ECJ's finding that when travelling is an integral part of being a worker, the place of work cannot simply be reduced to the physical areas of their work on the customers' premises.[43] It contends that, likewise, travelling constitutes an integral part of the work of a police officer who is called upon to perform an assignment at a place other than his regular place of work. The fact that this occurs only occasionally cannot alter that conclusion.

87. Therefore, the Commission concludes that all three criteria of Article 2(1) of the Working Time Directive are met and that periods of travel such as those at issue in the present proceedings constitute working time as defined in that Article.

88. In light of its answer to the first question, the Commission does not deem it necessary to address the remaining questions.

89. The Commission proposes that the Court should answer the questions referred as follows:

> *Article 2 of Directive 2003/88/EC must be interpreted as meaning that, in circumstances such as those at issue before the national court, the time spent on a journey ordered by the employer to and/or from a place of attendance other than the employee's fixed or habitual place of attendance which takes place outside normal working hours constitutes working time for the purposes of the application of the Directive.*

Carl Baudenbacher
Judge-Rapporteur

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41 Reference is made to the judgment in *Tyco*, cited above, paragraph 32.

42 Reference is made to the judgments in *Tyco*, cited above, paragraph 31; and *Dellas and Others*, cited above, paragraph 47.

43 Reference is made to the judgment in *Tyco*, cited above, paragraph 43.