JUDGMENT OF THE COURT

27 November 2017*

(Directive 2003/88/EC – Protection of the safety and health of workers – Working time – Travel to and/or from a location other than a worker's fixed or habitual place of attendance)

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 a case pending before it 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,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen, and Ása Ólafsdóttir (ad hoc), Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Thorbjørn Selstad Thue ("the appellant"), represented by Merete Furesund, advocate;

* Language of the request: Norwegian.

- The Norwegian Government ("the respondent"), represented by Siri K. Kristiansen, advocate, Office of the Attorney General (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,

having regard to the Report for the Hearing,

having heard oral argument of the appellant, represented by Merete Furesund; the respondent, represented by Siri K. Kristiansen and Ketil Bøe Moen (advocate, Office of the Attorney General (Civil Affairs), acting as Agents); ESA, represented by Carsten Zatschler and Øyvind Bø; and the Commission, represented by Michel van Beek and Nicola Yerrell, at the hearing on 14 June 2017,

gives the following

Judgment

I Legal background

EEA law

1 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 Directive"), was incorporated into the Agreement on the European Economic Area ("the EEA Agreement") at point 32h of Annex XVIII by Decision of the EEA Joint Committee 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.

2 Article 1 of the Directive provides as follows:

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

> *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.*
>
> *…*

3 Article 2 of the 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

4 The 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. (*lov 17. juni 2005 nr. 62 om arbeidsmiljø, arbeidstid og stillingsvern mv.* ("the Working Environment Act").

5 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).

6 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.*

II Facts and procedure

7 Since 1995, the appellant has been employed at Gaular rural police station in Sogn og Fjordane county, where he currently works 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.

8 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) an armed response action in Sogndal and the surrounding area on 8 October

2013 in a drug-related case; and (iii) an escort assignment in Årdal on 16 November 2013 for the Norwegian Prime Minister.

9 In connection with the first assignment, the escort of the Minister of Health in Volda on 7 October 2013, 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 to pick 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. 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, i.e. before the escort driving practice and related work commenced. In the appellant's case, this period was approved by the respondent as travel time, but not as working hours.

10 The following day, Monday 7 October 2013, 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 spent by the appellant on this return journey was approved by the respondent as travel time, but not as working hours.

11 The second assignment was an armed response action in a drug-related case in Sogndal and the surrounding area on 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.

12 The time 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.

13 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 another 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 arrived at home at 19:40.

14 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.

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

16 For the purposes of classifying these 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 the 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.

17 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. On appeal, Borgarting Court of Appeal (*Borgarting lagmannsrett*) upheld the District Court's conclusion in a judgment of 18 February 2016. The appellant then brought the matter before the Supreme Court of Norway.

18 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?

19 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Admissibility

Observations submitted to the Court

20 *ESA* submits that the underlying dispute in the main proceedings concerns the level of remuneration to which the appellant is entitled for the disputed journeys. This question falls outside the scope of the Directive. The definition of "working time" in the Directive does not affect the appellant's right to remuneration for the travel time in question, at least not directly. Rather, the scope of the concept of "working time" determines the framework within which employers can organise their employees' working time and rest periods.

21 The *Commission* notes that the referring court seeks guidance on the proper interpretation of the definitions contained in the Directive, but not for the purpose of applying or interpreting the substantive health and safety rights 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. The present case seems to concern the financial aspects of an employment relationship, which is beyond the scope of the Directive. Accordingly, it is not clear whether there is an issue of EEA law as such to be resolved in this context. In the light of recent case law of the Court of Justice of the European Union ("ECJ"), such as the judgment in *Pérez Retamero*, C-97/16, EU:C:2017:158, the Commission doubts whether the request for an advisory opinion is admissible.

22 At the hearing, the *appellant* submitted that the case before the referring court concerns the distinction between working time and rest period. The appellant's main objective is to obtain a ruling on whether his right to daily rest periods has been breached. The issue of remuneration is subordinate to that objective.

23 At the hearing, the *respondent* submitted that the Directive does not solve the question of payment for the disputed journeys. Nevertheless, the respondent stated that the referring court may find itself in a situation where it must take a stance on the interpretation of the Directive. The respondent further submitted that the final decision on whether to dismiss the case as inadmissible is in any case an *ex officio* question for the Court.

Findings of the Court

24 Pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), any court or tribunal in an

EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers an advisory opinion necessary to enable it to give judgment.

25 Article 34 SCA establishes cooperation between the Court and the national courts and tribunals. That cooperation is intended to contribute to a homogeneous interpretation of EEA law by providing assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law (see Case E-16/16 *Fosen-Linjen*, judgment of 31 October 2017, not yet reported, paragraph 41).

26 Questions on the interpretation of EEA law referred by a national court, in the factual and legislative context, which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. Accordingly, the Court may only refuse to rule on a question referred by a national court where it is quite obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Fosen Linjen*, cited above, paragraph 42).

27 The Court does not find any of the exceptions from the presumption of relevance applicable in the case at hand. It appears that the appellant's claim before the referring court is not limited to remuneration, but also concerns health and safety aspects falling within the scope of the Directive. The questions referred are thus admissible.

IV Answers of the Court

28 In essence, by its first question, the referring court asks for clarification on whether time spent travelling to and/or from a location other than the worker's fixed or habitual place of attendance in order to carry out his activity or duties in that other location, as required by his employer, constitutes working time within the meaning of Article 2 of the Directive. By its third question, the referring court asks, in essence, whether it is of any bearing how often the employer specifies a place of attendance other than the fixed or habitual one. It is appropriate to answer the referring court's first and third questions together.

First and Third Questions

Observations submitted to the Court

29 All those who have submitted written observations to the Court 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. Accordingly, there is also agreement that travel time spent by the appellant on the disputed journeys constitutes either working time or a rest period. Furthermore, all those who have submitted observations agree that the definition of working time in Article 2(1) of the 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 criterion.

30 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 police station and until he left the same police station after he had finished his duty. Official journeys outside ordinary working hours were classified regularly as working hours. In October 2013, the respondent unilaterally changed this 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.

31 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 Directive, as the employee is under an obligation to comply with the order from the employer.

32 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. 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.

33 The appellant submits that the ECJ has repeatedly held that the time that workers spend at their workplace on-call and at the premises of the employer constitutes working time. Furthermore, the ECJ held in its judgment in *Tyco,* C-266/14, EU:C:2015:578, 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 constitute working time. 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 Directive.

34 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. During such journeys, the employee acts on the instructions of the employer, who may change the order of, cancel, or add assignments.

35 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. 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.

36 The appellant argues that the Directive does not call for an intensity test and that both the Directive and case law provide 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.

37 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 *Tyco* 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.

38 The appellant states that regulation of working time is there to protect employees. 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 Directive and the relevant case law of the ECJ.

39 In the *respondent's* view, it follows from the relevant collective agreements that time spent on travel – whether or not it is working time pursuant to the 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 monetary payment.

40 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 indicated a specific place of attendance where the work would take place.

41 The respondent maintains that the criteria set out in Article 2(1) of the 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.

42 However, the respondent maintains that 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. 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.

43 The respondent submits that the judgment in *Tyco* does not support the appellant's claim. First, *Tyco* is largely limited to a special type of employees, characterised by not having a fixed or habitual place of attendance. For employees who have a fixed or habitual place of attendance, 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 regard travel as constituting an employee "carrying out his activity or duties".

44 Second, *Tyco* 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. Third, the ECJ stressed in *Tyco* 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 were

also subject to substantial constraints on their freedom and that consequently they were at their employer's disposal.

45 Furthermore, the respondent argues that the interpretation of Article 2(1) of the Directive advanced by the appellant would lead to inexpedient results in practice.

46 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 who are frequently ordered to a new place of attendance, 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 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.

47 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.

48 According to the Polish Government, 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. Travel to the place of assignment, which is at issue in the present case, should be treated as usual travel to and from the place of residence to the fixed or habitual place of attendance and should not be counted as working time.

49 Furthermore, the Polish Government emphasizes that the appellant was not in fact at his employer's disposal for the whole time and it was not possible for him to carry out the standard duties of a police officer. 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 during the journey.

50 The Polish Government contends that travel to the place of assignment cannot in general be treated as working time. For such a classification to apply, the travel must constitute an integral part of the performance of the worker's activity, which should be differentiated from the situation of a worker with a fixed or habitual place of attendance.

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

52 ESA submits that the reasoning provided by the ECJ in *Tyco* also applies to the disputed journeys in the present case. In ESA's view, the journeys were necessary for the appellant to carry out the assignments 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. The decisive factor is whether the journeys were a necessary means for workers to carry out their tasks.

53 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 activity for that employer. Conversely, if workers are able to manage their time without major constraints and pursue their own interests, that is a factor capable of demonstrating that the period does not constitute working time.

54 Furthermore, rest periods may be considered effective when workers are able to remove themselves from the working environment during such periods and pursue their own interests freely and uninterrupted (reference is made to Case E-5/15 *Matja Kumba T. M'Bye and Others* [2015] EFTA Ct. Rep. 674 ("*Matja Kumba*"), paragraph 41). 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.

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

56 In addition, ESA contends that travel time cannot be classified as a "rest period" on the basis that travelling is not as burdensome as normal work. In ESA's view, it would undermine the essential function of rest periods if they were deemed to encompass travel time for journeys carried out at the instruction of the employer. However, in principle, it is only the necessary and not the actual travel time that can constitute working time. If a worker stops on the journey to conduct personal business, that time does not constitute working time.

57 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, travelling under the instruction of his employer will have a stronger work element than in the case of a worker without a fixed or habitual place of attendance, since the former worker expects to attend work at the habitual place of attendance.

58 ESA takes the view that the three criteria in Article 2(1) of the Directive are met, and that the disputed journeys constitute working time within the meaning of that provision. However, the travel 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 travel time between home and the habitual place of attendance does not constitute working time.

59 In the *Commission*'s view, reasoning analogous to that of *Tyco* can be applied to the situation at issue in the present case. 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.

60 The Commission submits that the period spent by a police officer travelling to a specific 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. The fact that he does not carry out actual police duties in a narrow sense during the travel time does not undermine the conclusion that the travel is a part of his broader activity.

61 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 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 the work on the customers' premises. The Commission 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.

62 Therefore, the Commission concludes that all three criteria of Article 2(1) of the 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.

Findings of the Court

63 At the outset, the Court recalls that the purpose of the Directive is to lay down minimum health and safety requirements for the organisation of working time. The Directive harmonises national rules concerning, in particular, the duration of working time. Its purpose is to ensure minimum daily and weekly rest periods, breaks and maximum weekly working time (see *Matja Kumba,* cited above, paragraph 36).

64 The Directive does not generally apply to the remuneration of workers, save in respect of the special case envisaged by Article 7(1) of the Directive concerning annual paid holiday (compare *Tyco*, cited above, paragraph 48 and case law cited). However, the Directive does not prevent EEA States from applying the definition of "working time" to questions of remuneration. Whether an EEA State chooses to do so or not is a matter for national law (compare the order in *Vorel*, C-437/05, EU:C:2007:23, paragraphs 32 to 35).

65 It follows from the request that the appellant was employed as a police officer at Gaular rural police station in Sogn og Fjordane County where, at the material time, he was a member of the specially-trained UEH response unit in Sogn og Fjordane Police District. The appellant was involved in three UEH assignments: (i) an escort assignment on 7 October 2013 in Volda for the Norwegian Minister of Health; (ii) an armed response action in a drug-related case 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. In the case before the referring court, the dispute concerns four periods: the interval from 17.00 to 18.30 on the journey to Volda, and the return journeys after all three assignments.

66 While it is for the referring court to determine this, it would appear from the referring court's request that the appellant's fixed or habitual place of attendance in his work as a police officer was Gaular rural police station.

67 The term "working time" is defined in Article 2(1) of the Directive as 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. Although the definition in Article 2(1) refers to national laws or practice, that does not mean that the EEA States may unilaterally determine the scope of that concept (see *Matja Kumba*, cited above, paragraph 38 and case law cited). Rather, "working time" and "rest periods" are concepts that must be interpreted in an autonomous manner in order to ensure the full effectiveness of the Directive and its uniform application across the EEA.

68 The respondent's contention that only active work may be classified as working time finds no basis in the Directive. No such distinction is made in Article 2(1). That provision lays down only that rest periods are periods which are not working time, the two being mutually exclusive. Nevertheless, the distinction between the two concepts may be a fine one, and it will depend on a case-by-case assessment, considering several factors, some of which have already been addressed in case law (see *Matja Kumba*, cited above, paragraph 40).

69 Therefore, the Court must examine whether, in a situation such as that at issue in the main proceedings, the elements of the concept of "working time" are present.

70 The first element of the concept of "working time" is that the worker must be carrying out his activity or duties in the context of the worker's employment relationship. It seems clear that the appellant ordinarily worked at Gaular rural police station or in its locality. As ESA correctly notes, similar to the position in *Tyco*, the journeys of a worker, such as the appellant, taken in order to perform tasks specified by his employer at a location away from his fixed or habitual place of attendance, are requisite and essential for the worker to dutifully undertake those tasks (compare *Tyco*, cited above, paragraph 32).

71 The respondent's submission that *Tyco* should be limited to employees without a fixed or habitual place of attendance would have the effect that only this category of workers undertaking regular journeys, and workers with a fixed place of work for all assignments would be fully protected by the Directive, whereas those in an intermediate position, such as the appellant, would be denied the Directive's protection in situations where they are assigned a place of attendance other than the fixed or habitual place of attendance. This would distort the concept of "working time" and jeopardise the objective of the Directive to protect the safety and health of workers.

72 Any journey to and/or from a location other than the worker's fixed or habitual place of attendance shall be deemed to have begun, and its return to have ended, either at the

worker's home, or his fixed or habitual place of work, whichever is more reasonable in the circumstances. It is for the referring court to determine whether it is more reasonable, in the circumstances, for the journeys to have begun and/or been completed at either the worker's home, or his fixed or habitual place of work. In making that assessment, the referring court must consider whether the journey to and/or from the location of the worker's assignment is shorter if travelling from the employee's home as opposed to his fixed or habitual place of attendance.

73 The second element of the concept of "working time" in Article 2(1) of the Directive is that the worker must be at the disposal of the employer during that time. In order for a worker to be regarded as being at the disposal of his employer, that 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 (compare, *Tyco*, cited above, paragraphs 35 and 36 and case law cited). It should be added that the intensity of the work performed by the worker and his output are not among the characteristic elements of the concept of "working time" within the meaning of the Directive (compare the judgment in *Dellas and Others*, C-14/04, EU:C:2005:728, paragraphs 43 and 48).

74 However, the possibility for workers to manage their time without major constraints and to pursue their own interests is a factor capable of demonstrating that the period of time in question is not "working time" (compare *Tyco*, cited above, paragraph 37, and, to that effect, the judgment in *Simap*, C-303/98, EU:C:2000:528, paragraph 50). A distinction has to be made between situations where the workers are obliged to be present at the workplace and situations where they are not. It is only when workers are able to remove themselves from the working environment during the rest periods and pursue their own interests freely and in an uninterrupted manner that the rest periods may be considered effective and not to constitute "working time" (see *Matja Kumba*, cited above, paragraph 41 and case law cited).

75 A worker in a similar position to the appellant, in travelling to and/or from a location other than his fixed or habitual place of attendance in order to carry out his activity or duties at that other location, as required by his employer, may have a certain level of flexibility and choice in terms of means of transport and alternative travel routes. However, such travel time is necessary and during that time, the worker remains under the instruction of the employer, with the employer maintaining the right to cancel, change, or add assignments. As such, during the necessary travel time, which generally cannot be shortened, the worker is unable to use his time freely and pursue his own interests, thus remaining at his employer's disposal (compare, *Tyco*, cited above, paragraphs 39).

76 Consequently, the respondent's argument that the employer did not instruct the appellant to make the journeys, but merely specified certain locations away from the appellant's fixed or habitual place of attendance where the appellant should undertake certain activities at specified times, is unfounded. The employer's expectation that the appellant should not be at his fixed or habitual place of attendance but rather at Volda, Sogndal, and Årdal at the required times, and able to conduct his UEH assignments, indicate that

during the necessary travel time to and from those locations, he was at the disposal of his employer.

77 At the hearing, counsel for the appellant stated that the appellant's "assignments were conducted in compliance with normal procedure and under the supervision of his leader". She added that the appellant travelled either by police car or police bus, armed, carrying both his employer's and his own private mobile phone, with the vehicle's location being monitored by the Operations Centre by GPS. Furthermore, she said that the cars were equipped with a police communication system, which the appellant used to inform the Operation Centre of his movements.

78 The respondent and the Polish Government expressed the concern that workers in the appellant's position would be able to engage in personal business, or break the journey to engage in social activities with the period still being classified as "working time". In response to this the Court notes that in a situation such as that in the main proceedings, it is for the employer to put in place the necessary monitoring procedures to avoid any potential abuse by a worker in breaking a journey to engage in social activities (compare, *Tyco*, cited above, paragraphs 40 and 41).

79 The third element of the concept of "working time" in Article 2(1) of the Directive is that the worker must be working during that period of time. It is inherent to requiring a worker to be present at locations other than his fixed or habitual place of attendance that it denies the worker the ability to determine the distance of his commute (compare, Opinion of Advocate General Bot in *Tyco*, EU:C:2015:391, points 48 and 53, and the judgment in *Tyco*, cited above, paragraphs 43 to 46). It is, therefore, immaterial how frequently the employer specifies a place of attendance other than the fixed or habitual one, unless the effect is to transfer the employee's place of employment to a new fixed or habitual place of attendance.

80 Consequently, if a worker, such as the appellant, is required to undertake certain assignments away from his fixed or habitual place of attendance, travelling to and from that location must be considered an intrinsic aspect of his work. As a consequence, he must during the necessary travel time be considered to be "working", for the purposes of Article 2(1) of the Directive. It is immaterial whether such journeys take place outside the worker's normal working hours.

81 The respondent has argued that the inclusion of travel time in the concept of working time may lead to inexpedient results. However, including necessary travel time in the concept of working time is inevitable in order to protect workers' safety and health. As mentioned in recital 4 in the preamble to the Directive, that objective should not be subordinated to purely economic considerations.

82 However, the Directive allows for derogations from certain provisions. For example, Article 18 allows derogations in collective agreements, inter alia from Articles 3 and 5 on daily and weekly rest periods, on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate

protection. This would provide the employer with a degree of flexibility in complying with the requirements of the Directive. Nevertheless, Article 18 does not provide for any derogation regarding the definition of working time in Article 2(1) of the Directive.

83 In conclusion, the answer to the first and third questions referred must be that the necessary time spent travelling, outside normal working hours, by a worker, such as the appellant, to and/or from a location other than his fixed or habitual place of attendance in order to carry out his activity or duties in that other location, as required by his employer, constitutes "working time" within the meaning of Article 2 of the Directive. No intensity assessment is required of the amount of work performed while travelling. The frequency of such journeys is immaterial unless the effect is to transfer the worker's place of employment to a new fixed or habitual place of attendance.

84 In the light of the above, there is no need to answer the second question referred to the Court.

V Costs

85 The costs incurred by the Polish Government, ESA, and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties and the intervener to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by *Norges Høyesterett* hereby gives the following Advisory Opinion:

1. **The necessary time spent travelling, outside normal working hours, by a worker, such as the appellant, to and/or from a location other than his fixed or habitual place of attendance in order to carry out his activity or duties in that other location, as required by his employer, constitutes "working time" within the meaning of Article 2 of Directive 2003/88/EC.**

2. **No intensity assessment is required of the amount of work performed while travelling.**

3. **The frequency of such journeys is immaterial unless the effect is to transfer the worker's place of employment to a new fixed or habitual place of attendance.**

Carl Baudenbacher Per Christiansen Ása Ólafsdóttir

Delivered in open court in Luxembourg on 27 November 2017.

Gunnar Selvik
Registrar

Per Christiansen
Acting President