

Case C-435/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

13 July 2023

Referring court:

Okrazhen sad Smolyan (Bulgaria)

Date of the decision to refer:

12 July 2023

Appellant and defendant:

Glavna direktsia ‘Granichna politsia’ kam Ministerstvo na vatreshnite raboti

Respondent and applicant:

BO

Subject matter of the main proceedings

The Glavna direktsia ‘Granichna politsia’ kam Ministerstvo na vatreshnite raboti (‘Border Police’ Directorate-General of the Ministry of the Interior) has lodged before the referring court, the Okrazhen sad Smolyan (Regional Court, Smolyan), an appeal against a judgment of 7 March 2023 upholding the action brought by BO, a police officer with the abovementioned directorate-general, by which BO had sought an order requiring that directorate-general to pay the remuneration owed to him for night work he has performed.

Subject matter and legal basis of the request

Interpretation of EU law; Article 267 TFEU

Questions referred for a preliminary ruling

1. Are Article 12(a) and recital 8 of Directive 2003/88/EC and Articles 20 and 31 of the Charter of Fundamental Rights of the European Union to be interpreted as precluding national legislation (in this case, Article 187 of the *Zakon za Ministerstvoto na vatreshnite raboti* (Law on the Ministry of the Interior)) which, in not allowing the shorter length of night work as compared to that of day work in accordance with the general provisions governing private-sector workers to apply also to public-sector workers, such as police officers and firefighters performing shift and night work (civil servants within the meaning of Article 142(1) (1) of that Law), leads to a difference in treatment, indicated as follows, without that difference in treatment relating to a legally permitted aim, that is to say:

A group of public-sector workers entrusted with particularly important tasks to do with maintaining public order and protecting the population (in the present case, police officers and firefighters, pursuant to Article 142(1)(1) of the Law on the Ministry of the Interior, who perform shift and night work) is disadvantaged

(a) by comparison with another group of workers in the same public sector who are entrusted with the same tasks to do with maintaining public order and protecting the population but who do not perform any night shift work (in the present case, other civil servants for the purposes of Article 142(1)(1) of the Law on the Ministry of the Interior) and yet receive the same benefits (for example, additional remuneration for seniority, longer paid leave, earlier retirement, higher severance pay etc.) as the police officers and firefighters who perform night shift work;

(b) and by comparison with private-sector workers who perform shift and night work without receiving the same benefits, that being the case because they are not entrusted with the same particularly important tasks to do with maintaining public order and protecting the population, for which those benefits are granted to a whole group of public-sector workers (all civil servants within the meaning of Article 142(1)(1) of the Law on the Ministry of the Interior)?

2. Are Article 12(a) and recital 8 of Directive 2003/88/EC and Articles 20 and 31 of the Charter of Fundamental Rights of the European Union to be interpreted as precluding the application of binding national case-law (such as, in the present case, interpretative judgment No 1 of the General Assembly of the Civil Chamber of the *Varhoven kasatsionen sad na Republika Bulgaria* (Supreme Court of Cassation of the Republic of Bulgaria) of 15 March 2023 in Interpretative Case No 1/2020), if the application thereof would lead to a result incompatible with EU law, that is to say, to the difference in treatment described in the first question, which is not based on an objective and reasonable criterion, that is to say, it does not relate to a legally permitted aim and is not proportionate to that aim?

Provisions of European Union law and case-law relied on

Charter of Fundamental Rights of the European Union, Articles 20, 31 und 47

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, recitals 2, 4, 7, 8 and 10 and Article 12(a)

Judgments of the Court of Justice of 24 February 2022, *Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto'* (C-262/20, EU:C:2022:117; 'the judgment in Case C-262/20'); of 4 May 2023, *Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work)* (C-529/21 to C-536/21 and C-732/21 to C-738/21, EU:C:2023:374; 'the judgment in Joined Cases C-529/21 to C-536/21 and C-732/21 to C-738/21'); of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581); of 8 November 2016, *Ognyanov* (C-554/14, EU:C:2016:835); of 30 June 2022, *Profi Kredit Bulgaria (Offsetting ex officio in the event of an unfair term)* (C-170/21, EU:C:2022:518), and order of 17 January 2023, *TBI Bank* (C-379/21, EU:C:2023:29)

Provisions of national law and case-law relied on

Konstitutsia na Republika Bulgaria (Constitution of the Republic of Bulgaria), Article 16, Article 48(5) and Article 116(1)

Kodeks na truda (Labour Code), Articles 140, 152, 153 and 261 and Chapter Fifteen

Kodeks za sotsialno osiguryavane (Social Security Code), Article 69

Zakon za Ministerstvoto na vatreshnite raboti (Law on the Ministry of the Interior; 'the ZMVR'): Articles 2, 142, 178, 179, 181, 183, 187, 188, 189, 190, 234, 238 etc.

Zakon za sadebnata vlast (Law on the Judiciary), Articles 124 and 130

Zakon za chastnata ohranitelna deynost (Law on Private Security Firms), Articles 2 and 50

Naredbi na ministara na vatreshnite raboti za reda i organizatsiata i razpredelyaneto na rabotnoto vreme, za negovoto otchitane, za kompensiraneto na rabotata izvan redovnoto rabotno vreme, rezhima na dezhurstvo, vremeto za otdih i pochivkite na darzhavnite sluzhiteli v Ministerstvoto na vatreshnite raboti (Regulations of the Minister for the Interior on the allocation, organisation and distribution of working time, the recording of working time, compensation for work in excess of normal working hours, the regulation of on-call duty and recovery and rest periods for civil servants, of the Ministry of the Interior) of 2014, 2015, 2016, 2020 and 2022

Naredba za strukturata i organizatsiata na rabotnata zaplata (Regulation on the structure and organisation of wages) of 2007; ‘the NSORZ’), Article 8 and Article 9(2)

Varhoven kasatsionen sad na Republika Bulgaria (Supreme Court of Cassation of the Republic of Bulgaria; ‘the VKS’): interpretative judgment No 1 of the General Assembly of the Civil Chamber of 15 March 2023 in Interpretative Case No 1/2020

Succinct presentation of the facts and procedure in the main proceedings

- 1 BO is a civil servant within the meaning of Article 142(1)(1) of the ZMVR; he is employed by the ‘Border Police’ Directorate-General of the Ministry of the Interior and works as a senior police officer at the Zlatograd border police station.
- 2 He performs his work in shifts of twelve hours each which are calculated in time segments. In the period at issue, from 11 October 2019 to 30 September 2022, he performed night work equal to 1 272 hours in total.
- 3 BO submits that, for remuneration purposes, those night working hours should have been converted to day working hours by applying a factor of 1.143, as provided for in the case of private-sector workers. In that regard, since 2014 there has been a lacuna in the special rules contained in the ZMVR and its implementing provisions, which was intended to be closed by the subsidiary application of the relevant provision of general labour law, namely, Article 9(2) of the NSORZ. That provision states that, in the calculation of aggregated working time, night hours are to be converted to day hours by applying a factor equal to the ratio between the normal length of day work and of night work.
- 4 BO therefore brought before the court of first instance, the Rayonen sad Smolyan (District Court, Smolyan, Bulgaria), an action by which he requested in particular that the ‘Border Police’ Directorate-General of the Ministry of the Interior be ordered to pay him 1 886.10 Bulgarian leva (BGN), corresponding to unpaid remuneration for the night work performed by him in the period from 11 October 2019 to 30 September 2023, plus interest thereon.
- 5 The court of first instance upheld that action and found that, on account of the lacuna in the law, Article 9(2) of the NSORZ was to be applied on a subsidiary basis, as civil servants of the Ministry of the Interior who perform shift and night work would otherwise be the subject of an impermissible difference in treatment by comparison both with other civil servants and with contract staff and private-sector workers.
- 6 The ‘Border Police’ Directorate-General lodged an appeal against that judgment before the referring court.

The essential arguments of the parties in the main proceedings

- 7 By its appeal, the ['Border Police'] Directorate-General argues that there is no lacuna in the ZMVR. It contains no basis for converting night work to day work, since it lays down the same normal length for day work as for night work. The difference between the special rules applicable to the Ministry of the Interior and general labour law is attributable to the importance of the relationship with society, as characterised by the specific tasks performed by police officers and firefighters in the employ of the Ministry of the Interior.
- 8 In the light of the special nature of that relationship, no discriminatory treatment is present. It is true that civil servants of the Ministry of the Interior work under less favourable conditions and are subject to more onerous requirements than contract staff and private-sector workers, and other civil servants. However, they qualify for a number of compensatory mechanisms, additional material incentives and intangible benefits which are granted neither to private-sector workers and contract staff, including those contracted to the Ministry of the Interior, nor to other civil servants (for example, higher remuneration and a higher level of social protection in the form of overtime compensation, rest periods, leave and other benefits).
- 9 In its appeal, the Directorate-General further submits that that interpretation is fully consistent with the findings of the Court of Justice in the judgment in Case C-262/20.
- 10 In his response to the appeal, BO maintains his allegation of discrimination. In his submission, the interpretative judgment which has since been given by the VKS (in interpretative judgment No 1/2020) contradicts the findings of the Court of Justice in the judgment in Case C-262/20. He requests that a reference be made to the Court of Justice for a preliminary ruling.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 11 Over a period in excess of three years now, the Bulgarian district courts have been seised at first instance of hundreds of civil actions brought by shift-working police officers and firefighters with a view to obtaining orders requiring the competent directorates of the Ministry of the Interior to pay them additional remuneration for night work they have performed. In the period from the start of 2023 to 12 July 2023 alone, parties to the corresponding earlier proceedings lodged 142 appeals with the Regional Court, Smolyan against decisions given by the district courts. In view of the amounts in dispute, the decisions of the regional court are final and cannot be challenged by way of an appeal in cassation to the VKS.
- 12 In response to a request for a preliminary ruling made in a similar case by the Rayonen sad Lukovit (District Court, Lukovit) (C-262/20), the Court of Justice held that Directive 2003/88 does not require the adoption of national legislation providing that the normal length of night work for public-sector workers, such as

police officers and firefighters, must be shorter than the normal length of day work laid down for those workers, and that Articles 20 and 31 of the Charter do not preclude the normal length of night work fixed at seven hours in the national law of a Member State for workers in the private sector from not applying to public-sector workers, including police officers and firefighters, if that difference in treatment is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by that legislation, and it is proportionate to that aim.

- 13 In the light, inter alia, of that judgment of the Court of Justice, the VKS held in the abovementioned interpretative judgment that only the special ZMVR and the legal acts implementing it are applicable to remuneration for night work performed by officials of the Ministry of the Interior. According to the VKS, when adopting that law, the legislature took into account the adverse consequences of night work for officials of the Ministry of the Interior and provided for mechanisms that would compensate for those, such as, for example, an additional remuneration for seniority, longer paid leave, severance pay, a more favourable overtime pay scheme, exemption from the obligation to pay social security contributions, more favourable conditions for the acquisition of pension rights, and other similar benefits.
- 14 The referring court points out, however, that there is in fact no compensatory mechanism which was specifically introduced to compensate police officers and firefighters who perform night work for the abolition of the night allowance which had been granted to them prior to 2014 on the basis of provisions using the same method for converting night work to day work as is laid down in the NSORZ. All of the compensatory mechanisms mentioned by the VKS existed also prior to 2014.
- 15 The civil servants referred to in Article 142(1)(1) of the ZMVR, namely, police officers and firefighters such as BO, also include a large number of officials who do not perform shift and night work. In fact, it would appear from the information provided by the Ministry of the Interior in the present case that, in the years 2019, 2020, 2021 and 2022, on average, 65.20% of firefighters and police officers performed shift and night work, and 34.80% did not. At the same time, it is apparent from that information and an analysis of the legislation that the abovementioned benefits are granted to all civil servants within the meaning of Article 142(1)(1) of the ZMVR, not only to those who perform night work. Some of those benefits are also available to the civil servants referred to in Article 142(1)(2) of the ZMVR, that is to say, to civil servants of the Ministry of the Interior who are not police officers or firefighters, with some even being granted to all officials of the Ministry of the Interior, including those engaged under a contract of employment.
- 16 For the reasons given above, the abovementioned benefits cannot be described either as ‘compensatory mechanisms’ within the meaning of the interpretative judgment of the VKS or as ‘other protective measures’ within the meaning of

paragraph 51 of the judgment of the Court of Justice in Case C-262/20. They are, in fact, not specifically directed at civil servants who perform night shift work, and are likewise not granted on account of their night work and on the basis of the length of the latter, which is to say that they are not directly linked to the nature of night work.

- 17 Those benefits are clearly granted in the light of the special importance of the activities carried out by the Ministry of the Interior as defined in Article 2 of the ZMVR – protecting the rights and freedoms of citizens, combating crime, protecting national security, maintaining public order, preventing fires and protecting the population.
- 18 The reason why workers employed in the private sector do not receive the abovementioned benefits is that they are not entrusted with the performance of activities of special social importance, as described in Article 2 of the ZMVR, not that the benefits specifically serve as compensation for night work. Private-sector workers who perform night work receive remuneration for doing so which is calculated according to the methodology laid down in the NSORZ, that is to say, by converting night hours to day hours by applying a factor of 1.143 and adding a night work supplement.
- 19 In summary, it has to be concluded that police officers and firefighters who perform shift and night work qualify for benefits which are also granted to persons who are not shift workers or night workers. Those benefits are granted to them not because of their night work but because of the special tasks they perform as guardians of the rights and freedoms of citizens, as well as of public order and security. At the same time, police officers and firefighters such as the applicant in this case do not qualify for the methodology laid down in the NSORZ, which is itself available to private-sector workers, who, conversely, are not entitled to the benefits provided for in the ZMVR because they are not entrusted with the special tasks set out in that law.
- 20 Although there is therefore currently no way of appropriately compensating for the burden of night work borne by the applicant, and other police officers and firefighters who, like him, work shifts and nights, other than to apply the methodology set out in the NSORZ, that is not permitted by law or by the interpretative judgment of the VKS.
- 21 In paragraph 63 of the judgment in Joined Cases C-529/21 to C-536[21] and C-732/21 to C-738/21, the Court of Justice stated that it will be for the referring court to determine whether any difference in treatment is based on an objective and reasonable criterion, that is, whether the difference relates to a legally permitted aim pursued by the legislation being considered, and whether it is proportionate to that aim.
- 22 In the light of the examinations carried out in the present case, the referring court is convinced that the absence in the ZMVR and in the relevant regulations,

including the 2022 regulation currently in force, of express rules for a shorter length of night work as compared with day work is in fact attributable to the desire to save considerable financial resources.

- 23 This is because a higher proportion of police officers and fire fighters perform shift and night work (according to information from the Ministry [of the Interior], 65.20% on average in 2019, 2020, 2021 and 2022), and it is not only police officers and firefighters performing shift and night work who are in the same situation, but also, for example, civil servants performing shift and night work in the ‘Security’ Directorate-General at the Ministry of Justice and the civil servants of the ‘Penalty Enforcement’ Directorate-General. As was stated in the request for a preliminary ruling made by the District Court, Lukovit (Case C-262/20), even the report produced by the Ministry of the Interior in connection with the adoption of the 2016 regulation emphasised that, if the trade unions’ proposal concerning night work were accepted, additional financial resources would be required. Those, if calculated on the basis of the data available in July 2016, would amount to BGN 18 324 000 per year.
- 24 The explanatory memorandum to the Draft Law amending the 2020 ZMVR, which provides for the same regular length of day and night work in respect of police officers and firefighters, states that the amending law is intended ‘to establish uniformity in the application of the legislation governing night work and to close the lacuna in the special law’. In other words, the amendment was made with a view also to countering the case-law of those domestic courts which assume that the ZMVR contains a lacuna and therefore, in order to dispose of disputes similar to this one, apply the NSORZ by way of analogy and uphold the actions concerned.
- 25 According to the judgment of the Court of Justice in Case C-262/20, however, such grounds, including inter alia the saving of financial resources, cannot be an argument for a difference in treatment and do not seem to reflect a legally permitted aim that might justify such a difference in treatment.
- 26 Paragraph 79 of the judgment in Case C-262/20 states that the national court must interpret national law, to the greatest extent possible, in the light of the text and the purpose of the provision of national law applicable, taking into consideration the whole body of national law and applying the interpretative methods recognised by national law, with a view to ensuring that that provision is fully effective and to achieving an outcome consistent with the objective which it pursues.
- 27 If, therefore, the contested rules of the ZMVR and the relevant regulations are not to be applied because of their incompatibility with EU law, the national court might assume that a situation not provided for in the special law is present and apply the NSORZ on a subsidiary basis, as the applicant requests.

- 28 The referring court fears that the application of the interpretative judgment of the VKS, which is binding on it and on all courts, and which states that the NSORZ is not applicable on a subsidiary basis because there is no lacuna in the ZMVR, would lead to police officers and firefighters who perform night work being the subject of – disadvantageous – treatment which is different from that afforded to other police officers and firefighters who do not perform night work and to private-sector workers who do, without that difference in treatment being attributable to a reasonable and objective criterion, that is to say, to a legally permitted aim.
- 29 In the interpretative judgment of the VKS the difference in treatment is justified precisely by reference to a ‘legal ground’ within the meaning of paragraph 74 of the judgment of the Court of Justice in Case C-262/20. The VKS takes the view that ‘the legislature’s intention is to ensure that, irrespective of the time of day in which the working day falls, working time – whether by day or by night – is subject to a uniform length, namely “8 hours per day”, and that, ‘in drafting and adopting the [ZMVR], the legislature took into account the special nature of the employment relationship and the equality of citizens before the law, the adverse effects of night work performed by officials of the Ministry of the Interior being offset by appropriate compensatory mechanisms’.
- 30 In paragraph 76 of the judgment in Case C-262/20, however, the Court of Justice held that, subject to the determinations to be made by the referring court, such a legal ground ‘does not [...] appear to correspond to a legally permitted aim capable of justifying the difference in treatment at issue in the main proceedings’.
- 31 In the view of the referring court, the examinations carried out to date do not reveal anything that would permit a different conclusion. It is in fact the special nature of the employment relationship and the equality of citizens before the law that have not been taken adequately into account by the legislature, since the compensatory mechanisms in question, as stated above, are not in fact directly linked to the night work performed by officials of the Ministry of the Interior who work shifts.
- 32 The referring court therefore takes the view it should refer the questions set out above to the Court of Justice for a preliminary ruling.