

Tommaso Maserati, Sara Roccisano
Remuneration of “Grey Times”:
at the intersection between the Working Time Directive
and the Minimum Wage Directive*

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I. *Introduction*

This essay aims to analyse the relationship between working time and wages within both the EU and Italian legal frameworks. Traditionally, it has been assumed that there is a direct, proportional relationship between the number of hours worked and the remuneration received¹. However, this correlation has weakened – though not entirely disappeared, and certainly not for all categories of workers² – with the emergence of post-Taylorist production models, which treat hourly flexibility and labour cost reduction

* Although the work is the result of joint reflection, sections 1, 2 and 3 should be attributed to Tommaso Maserati, while sections 4, 5 and 6 to Sara Roccisano.

¹ For an historical reconstruction, see DE LUCA TAMAJO, *Il tempo nel rapporto di lavoro*, in *DLRI*, 1986, 31, p. 464.

² SUPLOT, *On-the-job time: time for agreement*, in *IJCL*, 1996, 12, p. 203.

as essential business requirements³. At the same time, the segmentation and differentiated value of time to employers has grown, particularly with the advent of new technologies⁴ that blur the boundaries between work and leisure⁵ through their “anywhere, anytime” functionality⁶.

Against this backdrop, it is worth considering whether a legal relationship still exists between the aforementioned concepts of *working time* and *wages*. In particular, it is necessary to assess whether the value of working time has been effectively disregarded for the purposes of remuneration, or whether a connection persists in which compensation is still granted in exchange for the worker’s time (and, if so, what form that remuneration takes).

The analysis will be conducted using a case study of one of the legal instruments involved in the flexibilization of time and remuneration, namely the “*on-call availability*” and/or “*stand-by duty*”. These segments are an example of ‘grey time’, i.e. time spent not actively working, but still at the employer’s disposal. The issue of remuneration arises here: will the employer be obliged to pay for this time? Does their classification as working time or rest period impact the answer to this question? The structure of the paper is as follows.

Section 2 analyses the EU legal notion and case law regarding “working time” and “rest periods”, in order to contextualise the so-called “grey times” (i.e. time segments lacking certain elements characterizing the notion of working time but presenting others, whose qualification is debated) in the light of the approaches (and overruling) that the Court of Justice of the European Union (C. Just.) adopted over time. Given the limited scope of the Working Time Directive (WTD), Section 3 will scrutinise whether its notions of “working time” and “rest period” are relevant to determine the *an* and *quantum* of compensation. This scrutiny will be carried out through the analysis of the most recent Italian case law on the matter, in which the Court seems to embrace the interpretation of CJUE on working time, while addressing the question of compensation.

³ VARDARO, *Tecnica, tecnologia e ideologia della tecnica nel diritto del lavoro*, in *PD*, 1986, 1, p. 90.

⁴ BARBIERI, *Dell’inidoneità del tempo nella qualificazione dei rapporti di lavoro*, in *LLI*, 2022, 1, p. 30.

⁵ GENIN, *Proposal for a Theoretical Framework for the Analysis of Time Porosity*, in *IJCL*, 2016, 3, p. 289

⁶ EUROFOUND, ILO, *Working anytime, anywhere: The effects on the world of work*, Publications Office of the European Union, 2017.

The following sections will focus on the function of working time as a parameter for commensurate wage within the European Directive on Adequate Minimum Wages and in the Italian legal system. This analysis will focus particularly on the concept of adequacy (Section 4). The most recent approaches of the Supreme Court of Cassation about proportionality and sufficiency of wage levels will be analysed in Section 5, in order to test the question underlying this study about the remuneration of grey times, when liable to be qualified as falling within the notion of working time in the light of the case law of the Court of Justice. The aim of the study is trying to understand whether this remuneration should be considered susceptible to the application of the principles of sufficiency and proportionality set by Article 36 of the Italian Constitution, according to which the worker has the right to a wage which must be proportionate to quality and quantity of work performed and, in any case, sufficient to guarantee a free and dignified existence. Section 6 concludes by providing a tentative answer this question.

2. *The EU ascent of Working Time Regulation*

For the purposes of this analysis, it is essential to examine the definition of working time as established within the EU legal and jurisprudential framework. The national legislations in this area – including the Italian legal system – have been harmonised through the adoption of Directive 2003/88/EC, which governs certain aspects of the organisation of working time and provides a legal definition of working time.

This regulatory intervention is grounded in the competences conferred upon the EU in the field of occupational health and safety, initially under Article 118a of the Treaty of Rome and currently under Article 153 TFEU⁷. It also seeks to give effect to the rights enshrined in Article 31(2) of the Charter of Fundamental Rights of the European Union (CFREU)⁸. This is significant not only in legitimising EU intervention

⁷ BARNARD, *Recent legislation. The Working Time Regulations 1998*, in *ILJ*, 1999, 1, p. 61; ALESSI, *Orario di lavoro e tutela della salute innanzi alla Corte di Giustizia*, in *DRI*, 1997, 2, p. 125.

⁸ GRAMANO, *Stand-by time through the Court of Justice's lens*, in *ELLJ*, 2022, 4, p. 578; FERRANTE, *Le nozioni di orario di lavoro e di riposo alla luce della più recente giurisprudenza della Corte di giustizia*, in AIMO, FENOGLIO, IZZI (eds.), *Studi in memoria di Massimo Roccella*, Esi, 2021, p. 765.

in this domain⁹, but also from an interpretative standpoint.¹⁰ The directive's teleological orientation – as articulated and reinforced by Article 31(2) of the Charter of Nice¹¹ – establishes an interpretive framework that supports the classification of so-called grey time as working time. This hermeneutic approach is a consistent feature of EU case law and will be explored further in subsequent sections, particularly in light of recent jurisprudential developments.

However, this foundational principle also appears to limit the directive's scope, excluding its application to areas beyond occupational health and safety – most notably, wage regulation. As the Court of Justice of the European Union (C. Just.) has repeatedly affirmed (see Section 2.3), the legal concepts defined in the Working Time Directive (WTD) bind Member States solely within the scope of the directive's legal basis under the Treaties.

The directive introduces (art. 2) a compendium of definitions (in fact meticulously reported within the Italian discipline in art. 1 d.lgs. 66/2003); in particular, the definition of “working time”, meaning “*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*”, and of “rest period”, meaning “*any period which is not working time*”, is relevant. The interpretation of these definitions has been significantly influenced by the C. Just. case law. The existence of times with unclear classification, the absence of a *tertium genus* between working time and rest, and the Court's continually reiterated binary structure of definitions have imposed on the C. Just. a work of “delimiting the boundaries” of working time¹², developed through at least three “phases”, briefly described below.

⁹ C. Just., *United Kingdom v. Council*, C-84/94, cfr. VON PRONDZYNSKI, *Council Directive 93/104/EC concerning certain aspects of the organization of working time*, in *ILJ*, 1994, 1, p. 92.

¹⁰ LECCESE, *Le tendenze attuali e l'evoluzione del diritto comunitario in materia di tempi di lavoro: progetti di riforma della direttiva europea e giurisprudenza della Corte di giustizia*, in VENEZIANI, BAVARO (eds.), *Le dimensioni giuridiche dei tempi del lavoro*, Cacucci, 2009, p. 331; RICCI, *Tempi di lavoro e tempi sociali. Profili di regolazione giuridica nel diritto interno e dell'UE*, Giuffrè, 2005, p. 148.

¹¹ RICCI, *La “scomposizione” della nozione di orario di lavoro nella recente giurisprudenza della Corte di giustizia*, in *RGL*, 2021, 1, p. 324.

¹² BELLOMO, ROCCHI, *Orario di lavoro, reperibilità, fruizione del tempo libero. La Corte di giustizia e il parziale superamento della sentenza Matzak del 2018*, in *RIDL*, 2021, 2, p. 336.

2.1. *The first phase: the SIMAP and Jaeger cases and the relevance of spatial constraint*

The initial rulings of the Court of Justice concerning the definition of working time were established in the landmark *SIMAP*¹³ and *Jaeger*¹⁴ cases. These decisions addressed the working conditions of hospital staff required to remain on standby within the hospital premises. The key legal question posed to the Court was whether such periods of physical presence – characterised by inactivity or even the possibility of sleeping – should be classified as working time.

These early cases provided the Court with the opportunity to lay down foundational principles for interpreting the concept of working time, which have been consistently reaffirmed in later jurisprudence. The Court established several core precedents: (a) the binary structure of the Directive’s system, which excludes the possibility of a third, intermediate category – requiring each time period to be classified either as working time or as a rest period; (b) the cumulative interpretation of the three definitional elements of working time (working, at the employer’s disposal, and performing one’s duties), with the third element afforded less interpretative weight; (c) the decisive role of physical presence at the workplace in qualifying a time period as working time. According to the Court, being required to remain at the workplace restricts a worker’s ability to dispose freely of their time, even if no actual work is performed. The mere fact of physical presence is thus sufficient to satisfy the directive’s definition, as it compresses the worker’s personal autonomy and leisure time.

Under this teleological interpretation, the intensity or frequency of actual work performed during such availability periods is irrelevant to their legal classification¹⁵.

These two judgments established a critical dichotomy between two forms of “grey” time: on-call availability (classified as a rest period) and

¹³ C.Just., October 3rd 2000, *Sindicato de Médicos de Asistencia Pública (SIMAP) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, C-303/98; see GUARISO, *Definizione di “tempo di lavoro” e consenso del dipendente alla prestazione di lavoro straordinario: due importanti precisazioni della Corte CE*, in *D&L*, 2001, 2, p. 355.

¹⁴ C. Just., September 9th 2003, *Landeshauptstadt Kiel v. Norbert Jaeger*, C-151/02.

¹⁵ VAN DRONGELEN, *The concept of “working time” in the Working Time Directive and the Dutch Working Time Act*, in *ELLJ*, 2012, 1, pp. 99-100; MARINELLI, *Orario di lavoro e periodo di riposo: un (potenziale) ripensamento della Corte di giustizia*, in *ADL*, 2018, 4-5, p. 1174

standby duty (classified as working time). This distinction has been consistently upheld in subsequent case law and is determined by the presence or absence of a spatial constraint within the traditional workplace¹⁶. It is precisely this constraint – namely, the requirement of physical presence – that becomes the focus of further developments in subsequent jurisprudence.

2.2. *The second phase: the Matzak case and the spatio-temporal constriction*

This interpretation has been partially expanded in light of the Matzak ruling. While the judgment formally reiterates prior EU case law, it introduces elements of discontinuity that are particularly relevant to the issue at hand. In Matzak, the Court appears to move away from the requirement of physical presence at a specific location as *the* decisive factor in determining the qualification of working time. In fact, it draws a parallel between the obligation to be present at the workplace and the imposition of spatio-temporal constraints, such as the requirement to be reachable and available within a very short timeframe, on the basis that both significantly limit a worker's ability to pursue personal activities (par. 63)¹⁷. As a result, while reaffirming both the binary structure of the Directive and the cumulative interpretation of the definitional criteria, the Court effectively elevates the importance of spatial and temporal constraints in assessing whether a period qualifies as rest¹⁸.

This interpretive shift – foreshadowed in earlier case law – is extended in Matzak beyond the confines of physical presence at the workplace, thereby abandoning the strict equivalence between the compression of rest and physical presence.

Some scholars who endorse this broader interpretive approach have noted a gradual attenuation in the significance of the three definitional elements (working, at the employer's disposal, and performing duties) for the purposes of legal classification, even though they continue to be formally

¹⁶ C. Just., 5th October 2004, from C-197/01 to C-403/01; C. Just., 1st December 2005, *Abdelkader Dellas et al. v. Premier ministre, Ministre des Affaires sociales, du Travail et de la Solidarité*, C-14/04.

¹⁷ MITRUS, *Potential implications of the Matzak judgment (quality of rest time, right to disconnect)*, in *ELLJ*, 2019, 4, p. 388.

¹⁸ RICCI, *La "scomposizione" della nozione di orario di lavoro nella recente giurisprudenza della Corte di giustizia*, in *RGL*, 2021, 1, p. 326.

referenced by the Court. In light of the case law discussed above, it can be argued that – though not explicitly reformulated – the third criterion has been indirectly reconstructed¹⁹. Consequently, while the tripartite definition remains in force, its practical application has narrowed, leading to a broader conception of working time. This evolution, in turn, limits the scope of organisational flexibility available to employers²⁰.

2.3. *The third phase: the Grand Chamber ruling and the constriction on free time*

In the wake of the landmark Matzak judgment, the Court of Justice took a further step in March 2021 through two Grand Chamber rulings²¹. On these occasions, the Court initially reaffirmed that physical presence at a designated location is sufficient for a period to be automatically classified as working time. However, in the absence of such a constraint, the possibility of classification as working time is not excluded. Instead, it falls to the national court to assess whether the constraints imposed during the relevant period significantly affect the worker’s ability to manage their time freely – while not actively performing professional duties – and to pursue personal interests (par. 45).

To assist in this evaluation, the Court identified specific indicators for assessing the degree of constraint or duress, such as: the amount of time available to the worker, during the standby period, to return to professional duties; and the average frequency and unpredictability of call-outs²².

By introducing these elements, the Court has brought significant flexibility to the legal concept of working time, signalling a clear evolution from previous case law. Notably, working time is now construed as the residual

¹⁹ FERRANTE, *Between health and salary: the incomplete regulation of working time in European law*, in *ELLJ*, 2019, 4, p. 379.

²⁰ GLOWACKA, *A little less autonomy? The future of working time flexibility and its limits*, in *ELLJ*, 2021, 2, p. 114.

²¹ C. Just., Grand Chamber, 9th March 2021, *DJ v. Radiotelevizija Slovenija*, C-344/19, and *RJ v Stadt Offenbach am Main*, C-580/19, both in *RIDL*, 2021, 2, commented by BELLOMO, ROCCHI, *Orario di lavoro, reperibilità, fruizione del tempo libero. La Corte di giustizia e il parziale superamento della sentenza Matzak del 2018*, in *RIDL*, 2021, 2, p. 309 ff.

²² C. Just. 9th September 2021, *XR v. Dopravní podnik hl. m. Prahy, akciová společnost*, C-107/19.

category – that is, time that cannot be considered rest²³. In this framework, it is the compression of rest that serves as the decisive indicator for identifying working time, rather than the other way around.

However, this more functional and context-sensitive approach also introduces a risk of divergent interpretations among national courts. This potential for legal fragmentation has drawn criticism from several legal scholars, who argue that the absence of clear thresholds could undermine legal certainty and the harmonising intent of the Directive²⁴.

In light of the broader jurisprudential development and the milestones reached through the Grand Chamber's rulings²⁵, three general hypotheses can now be identified: (a) Standby duty with an obligation to be physically present at the workplace (excluding homeworking): in this scenario, the time period is automatically presumed to constitute working time, without the need for further assessment. (b) On-call periods involving significant constraints (e.g., very short response times or frequent and unpredictable call-outs): if the worker is not required to remain at the workplace, it falls to the national court to assess, on a case-by-case basis, the intensity of the constraints imposed. If these are sufficiently burdensome as to impair the worker's ability to enjoy genuine rest, the time must be classified as working time. (c) On-call periods without intense constraints: in the absence of both a requirement to be physically present and any substantial limitations on the worker's freedom, the period must be classified as a rest period. However, it is important to note that even under hypothesis (c), the presence of certain obligations during rest periods does not render them irrelevant for the WTD. While these obligations do not justify the creation of a *tertium genus*²⁶, the Court of Justice has recognised that classifying such periods as rest does not absolve employers of their broader responsibilities – particularly those

²³ On the circularity of the interpretation of these notions, LECCESE, *Questioni in materia di tempi di lavoro nel SSN. Nuove prospettive dalla giurisprudenza della Corte di giustizia*, in RGL, 2023, 2, p. 236.

²⁴ MITRUS, *Defining working time versus rest time: An analysis of the recent C. Just. case law on stand-by time*, in ELLJ, 2023, 1, p. 42.

²⁵ GRAMANO, *La normativa europea alla prova della frammentazione del tempo di lavoro*, in ADL, 2022, 5, p. 939. See also ZAHN, *Does Stand-by Time Count as Working Time? The Court of Justice Gives Guidance in DJ v Radiotelevizija Slovenija and RJ v Stadt Offenbach am Main*, in EP, 2021, 1, p. 124.

²⁶ Critically, FERRARESI, *Problemi irrisolti dei tempi di disponibilità e reperibilità dei lavoratori*, in DRI, 2022, 2, p. 425.

stemming from Directive 89/391 on occupational health and safety. Notably, the Court acknowledges that standby periods, even when qualified as rest, may nevertheless generate psychological strain (par. par. 61–65)²⁷. While agreeing with this conclusion, it could be considered almost paradoxical that the ECJ, while formally designating certain periods as rest, simultaneously recognises that such time may impose a burden on the psycho-physical health of workers. So much so that one might argue that rest time, as currently defined, is not necessarily restful in substance.

The practical consequences of the Court of Justice’s approach become particularly evident in cases involving risks to, or actual harm suffered by, workers’ health. Where on-call shifts – formally classified as rest periods – are subsequently reclassified as working time, and this reclassification leads to a breach of the maximum limits on working time established by the Directive and national legislation, employers may incur various forms of liability. In such instances, employees may bring actions for damages, which under Italian law are presumed to be *in re ipsa* – that is, damage is presumed to exist where the unlawful conduct is established.

By contrast, where reclassification is invoked with the aim of obtaining remuneration for time segments redefined as working time, a different legal framework applies. As previously discussed, the definitional principles set out in Article 2 of Directive 2003/88/EC, as interpreted by the C. Just., do not extend to wage entitlements. The Directive was adopted under the legal basis of occupational health and safety, not wage regulation, and the Court has confirmed that its provisions do not create a direct entitlement to remuneration for time classified as working time, since the WTD does not govern remuneration, with the sole exception of provisions concerning paid annual leave²⁸. As a result, the directive does not prevent the application of national law, collective agreements, or employer decisions that distinguish

²⁷ C. Just., *DJ v. Radiotelevizija Slovenija*, C-344/19. See also FERRANTE, *L’orario di lavoro tra presente e futuro*, in *LLI*, 2022, 1, p. 124.

²⁸ C. Just., 9th March 2021, *DJ v. Radiotelevizija Slovenija*, C-344/19, par. 58; similarly: C. Just., Grand Chamber, 15th September 2021, *BK v. Republika Slovenija (Ministrstvo za obrambo)*, C-742/19, par. 98; C. Just., 9th September 2021, *XR v. Dopravní podnik hl. m. Prahy, akciová společnost*, C-107/19; C. Just., 10th September 2015, *CC.OO. v. Tyco Integrated Security SL and Tyco Integrated Fire Security Corporation Servicios SA*, C-266/14, par. 47–49; C. Just., 1st December 2005, *Abdelkader Dellas et al. v. Premier ministre, Ministre des Affaires sociales, du Travail et de la Solidarité*, C-14/04, par. 38–39; C. Just., 25th June 2011, *Nicușor Grigore v. Regia Națională a Pădurilor Romsilva - Direcția Silvică București*, C-258/10, par. 80–84.

between periods of actual work and periods of inactivity, even when both are classified as working time for the purposes of the directive. Accordingly, under EU law, it is permissible for two time segments, both qualifying as working time, to be compensated differently. Furthermore, the Court asserts that the designation as a rest period neither preclude nor impose the remuneration of those segments of availability, if national legislation so provides²⁹. In summary, while Member States remain free to determine the remuneration of workers covered by the directive in accordance with their own legal and contractual frameworks, they are not obliged to do so merely because a time segment falls within the definition of working time or rest period under Article 2 of the directive³⁰. The only substantive limitation appears to derive from the doctrine of *effet utile*. Under this principle, any differential remuneration scheme must not undermine the effectiveness of the directive's objectives—namely, the protection of workers' health and safety³¹. In this light, it could be argued that minimal or symbolic remuneration may compromise the directive's enforcement. Such payments may fail to deter employers from overburdening workers and may inadvertently encourage employees to extend their working hours in order to increase their income, thus conflicting with the directive's protective aims.

3. *Qualification and remuneration of “grey time” in the Italian legal system: case law and collective agreements*

In light of the C. Just. case law, a preliminary conclusion may be drawn: the reclassification of a given time segment as “working time” does not, in itself, entail an obligation for Member States to provide full remuneration for that period, nor necessarily to compensate it as overtime. It is nonetheless clear from the case law in question that some form of remuneration is always presumed – albeit potentially at a level inferior to that applicable

²⁹ C. Just., 9th March 2021, *DJ v. Radiotelevizija Slovenija*, C-344/19, par. 59; C. Just., 21st February 2018, *Ville de Nivelles v. Rudy Matzak*, C-518/15, par. 51.

³⁰ C. Just., 21st February 2018, *Ville de Nivelles v. Rudy Matzak*, C-518/15, par. 50.

³¹ C. Just., 11th January 2007, *Jan Vorel v. Nemocnice Český Krumlov*, C-437/05, par. 32. Cf. LECCESE, *Monitoring working time and Working Time Directive 2003/88/EC: A purposive approach*, in *ELLJ*, 2023, 1, p. 28; FERRARESI, *Disponibilità e reperibilità del lavoratore: il tertium genus dell'orario di lavoro*, in *RIDL*, 2008, 1, pp. 109–110.

to ordinary working time. Against this backdrop, it remains uncertain how national case law addresses situations involving the reclassification of time segments as “working time”, particularly given that the relevant EU Directive neither mandates nor prohibits the granting of equal pay in such cases.

The issue does not appear to arise where grey time is entirely unregulated by collective bargaining; it is sufficient, in this sense, to recall the consolidated Italian case law on the subject of “dressing times”. In such cases, the activity of dressing and undressing is regarded as qualitatively distinct from other work activities; however, its qualification as working time entails the application of “ordinary” remuneration, which may be increased to reflect overtime work if applicable³².

Rather, the interpreter’s primary concern lies in instances where collective bargaining agreements, while wrongly qualifying a period of availability as rest period, provide allowances lower than the ordinary wage. It is an established principle that collective bargaining cannot restrict the concept of working time as set out in the WTD and in Legislative Decree 66/2003. As a result, the qualification of those times as rest period, when in contrast with the WTD, could be declared null and void *in parte qua*.

Still, what about the allowances set by the collective agreement? While a substantial corpus of case law has hitherto aligned with prior ECJ rulings – emphasising that the classification of working time does not affect entitlement to full remuneration – two recent rulings by the Court of Cassation appear to chart a novel course.

In the first case, the Court acknowledged that a period of on-call time performed at the employer’s premises should be classified as ‘working time’, thereby overturning the previously contested ruling of the Court of Appeal. However, this partial reform did not result in the wage claims being upheld: the time segments in question were already compensated under a collective agreement by way of an indemnity (albeit lower than regular pay), and their reclassification, the Court argued, did not entail an obligation to pay them “in full”³³.

³² A considerable body of case law has developed on the subject; cfr. Cass., 22nd March 2022, n. 9306, in *De Jure*; see FERRANTE, *I tempi preparatori della prestazione lavorativa: una nozione “di confine”*, in *DRI*, 2022, 2, p. 461.

³³ Cass. no. 32418/2023; see ABBASCIANO, *Periodi di guardia, orario di lavoro e remunerazione: se il “sillogismo” è “monco”, quali tutele per i lavoratori?*, in *RIDL*, 2024, 1, p. 8; SCELSI, *Sulla remunerazione dei turni di guardia in una recente pronuncia di legittimità*, in *DLF*, 2023, 8, p. 6.

At first glance, the Court appears to reject the notion that reclassifying a period as working time has any bearing on remuneration, whenever collective bargaining agreements had already provided for compensation during that period. Its significance, however, should not be overstated. On the one hand, the requalification of hourly segments is arguably not neutral from the point of view of the health and safety of workers. The Court's silence on the subject is evidently attributable to the absence of a claim for damages, which would appear to be configurable precisely in such a requalification hypothesis³⁴. On the other hand, it appears that the appellant challenged the judgment on the basis that the reclassification of time as working time necessarily entailed full remuneration. In rejecting this claim, the Court of Cassation merely reaffirmed its prior rulings, in line with the aforementioned ECJ case law. What is more significant, however, is that the legitimacy of the allowance established by the collective agreement – specifically in light of Article 36(1) of the Constitution – does not appear to have been contested in terms of its adequacy and proportionality. However, it would appear that such an assessment may be the only viable avenue through which the remuneration of 'grey times' can be challenged, given its capacity not only to override collective bargaining provisions but also to transcend the classification of the hours concerned as working time or rest periods.

This conclusion aligns with the second decision of the Court of Cassation, previously referenced. In that case – concerning overnight stays in accommodation classified as rest periods and compensated with a nominal allowance under the collective agreement – the Court affirmed the possibility of departing from the agreement where, upon judicial review, it is found to be incompatible with the principles enshrined in Article 36(1) of the Constitution³⁵. And, as stated and as further explained in the next paragraph, this principle applies even when the collective agreement has been signed by the most representative trade unions. The relevancy of the possibilities and limitations of an assessment of the adequacy of grey times compensation set out in collective bargaining agreements is evident when one considers that national collective agreements on this matter (which are

³⁴ Cass., 14th July 2015, n. 14710; in on-call case not qualified as working time, the damage is not presumed and needs to be proved in its *am*: Cass. No. 18310/2011, in *LG*, 2011, 11, p. 1159

³⁵ Cass., 23rd April 2025, no. 10648.

more accessible and generalisable) tend to share two key features: (i) they intervene only in relation to time segments that are (self-)classified as rest periods; and (ii) they provide relatively low compensation, often calculated as a flat rate rather than being proportionate to the actual hours of service rendered³⁶.

The Court’s position – which is formally established but left to the court of second instance for application – appears consistent with the approach seen before and with C. Just. case law, since it seems that the reclassification of working time is not directly relevant, but rather indirectly so, functioning as an indicator of the degree of commitment required from the worker during those time segments. This, in turn, is significant for assessing the qualitative and quantitative proportionality of the compensation³⁷.

Therefore, it seems possible to offer a preliminary partial answer to the research question posed in this paper. Specifically, there appears to be a persistent link between working hours and remuneration within Italian legal system, to the extent that classifying a time segment as working hours triggers the application of Article 36, paragraph 1, of the Constitution. As a result, the increased hardship associated with such a classification is taken into account when applying the criteria set out in the aforementioned article, regardless of any potential differences in remuneration compared to periods of “actual” work. However, it is precisely this potential for differentiation – consistent with C. Just. case law and the proportionality requirement embedded in Article 36(1) of the Constitution – that gives rise to the

³⁶ In this regard, reference can be made to the CCNL Logistics (special part, section II), which provides for a minimum allowance of €25.82 gross for 12 monthly payments (art. 76); the CCNL Cooperative Sociali (Social Cooperatives), which provides for on-call availability ‘with a restriction on staying at the facility’, monthlyised at € 77.47 (art. 57) and on-call availability regulated at company/territory level with a gross indemnity of € 1.55 per hour (art. 58); and the CCNL Industria Metallmeccanica (Metalworking Industry), which in art. 6 (section four, title III) provides for a detailed regulation of on-call availability, also delegating to lower levels, committing companies to avoid any possible risk of being on-call. 58); the CCNL for the Mechanical Engineering Industry, which in Article 6 (section four, title III) provides for a detailed regulation of on-call availability, also delegating it to lower levels, committing companies to avoid staying at the workplace and providing for a response time of 30 minutes, recognising a compensation of an explicitly retributive nature on the basis of the level of classification, and excluding it from working hours.

³⁷ On the relevance of requalification on the compensation, LECCESE, *Questioni in materia di tempi di lavoro nel SSN. Nuove prospettive dalla giurisprudenza della Corte di giustizia*, in *RGL*, 2023, 2, p. 240.

question of what constitutes an adequate wage for “grey periods”, and what tools may be used to assess it.

4. *Adequate minimum wage directive and the role of working time*

To answer this question, an in-depth analysis of 2022/2041 European directive on adequate minimum wages may assist. The claim for adequacy of remuneration of working time is strongly stated not only in art. 36 of the Italian Constitution, but also in this act, definitively adopted on 19 October 2022, after the covid-19 emergency which has significantly worsened the economic distress already present within the Union³⁸. The act is part of a broader series of social policy initiatives, making a decisive shift from the original foundations of the European integration process. It pursues multiple objectives: alongside the specific goal of improving working conditions through increased access to minimum wages – whether established by law or by collective agreements – and their progressive increase, it also aims to address the phenomenon of wage dumping.

The Act is presently under review before the Court of Justice due to the appeal of annulment³⁹ brought by the Kingdom of Denmark⁴⁰ (with the support of Advocate General Emiliou⁴¹), claiming that EU exceeded

³⁸ EUROPEAN COMMISSION, *Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union*, 28th October 2020, p. 21. In its October 2020 document, the Commission took care to stress that ensuring a dignified life is essential to supporting a sustainable and inclusive recovery from the pandemic.

³⁹ Denmark applied to the Court primarily – the annulment of the entire Directive, and alternatively, the annulment of Article 4(2) alone, which concerns the promotion of collective bargaining.

⁴⁰ C. Just., 14th January 2025, *Kingdom of Denmark v. European Parliament and Council of the European Union*, C-19/23.

⁴¹ Opinion delivered on 14th January 2025. For a critical assessment of the Opinion, see COUNTOURIS, *Avoiding another “Viking and Laval” moment - a critical analysis of the AG opinion on the Adequate Minimum Wage Directive, Case C-19/23*, in *ELLJ*, 2025, 16, 2, p. 315; RATTI, *What is Minimum Wage Directive*, cit., p. 344 ff. *Contra*, especially on art. 5, see DELFINO, *Proposta di direttiva, tutela giuridica dei salari e nodi della contrattazione collettiva in Italia*, in *DRI*, 2021, I, p. 440. On the legal basis of the directive, see GARBEN, *Choosing a Tightrope Instead of a Rope Bridge - The Choice of Legal Basis for the AMW Directive*, in RATTI, BRAMESHUBER, PIETROGIOVANNI (eds.), *The Eu Directive on Adequate Minimum Wages*, Hart, 2024, p. 25 ff. See also SJÖDIN, *European minimum*

its competence: the legal basis of the Directive is found in Article 153(1)(b) TFEU, which establishes that the Union holds shared competence in the field of working conditions⁴², while Article 153(5) TFEU explicitly excludes Union competence in matters relating to pay⁴³. It should be noted, however, that the Court of Justice, in its settled case law (which was narrowly interpreted by the Advocate General in his Opinion), has made it clear that this exclusion constitutes an exception⁴⁴. As such, its scope must be interpreted restrictively, so as not to undermine the overall objectives of the Union and, more specifically, those set out in Article 153(1) and Article 151 TFEU⁴⁵.

wage: A Swedish perspective on EU's competence in social policy in the wake of the proposed directive on adequate minimum wages in the EU, in *ELLJ*, 2022, 2, p. 273 ff.

⁴² The identification of such a legal basis was strongly advocated by the ETUC (European Trade Union Confederation), see CLAUWAERT, *Legal arguments in favour of the ETUC proposal for a directive on Fair Minimum Wage and Collective Bargaining*, www.etuc.org. It describes it as a “very limiting basis”, suggesting the possibility of an interpretation of Article 153(5) TFEU whereby only that component of remuneration strictly linked to its compensatory function would fall outside the Union’s competences, while excluding from such limitation the social dimension of the wage obligation, thereby «expanding the scope of European solidarity». ZOPPOLI L., *Base giuridica e rilevanza della proposta di direttiva del Parlamento europeo e del Consiglio relativa a salari minimi adeguati nell'Unione europea*, in AIMO, FENOGLIO, IZZI (eds.), *Studi in memoria di Massimo Roccella*, Esi, 2023, pp. 357, 360 and 361. It is a “rather fragile” legal basis according to CALVELLINI, LOFFREDO, *Salari e copertura della contrattazione collettiva: dietro le apparenze molti dubbi*, in *RGL*, 2023, 4, p. 577.

⁴³ As well as the right to association, the right to strike, and the right to lockout, «in order not to crystallise the positions of winners e losers», TREU, *L'Europa sociale: problemi e prospettive*, in *DRI*, 2001, 3, p. 320. It denounces the striking «anomaly of European social law, which excludes the issue of wages from its competences, LOI, *La retribuzione: competenza esclusiva degli Stati membri?*, in LOY (ed.), *Lavoro, Europa, Diritti. In ricordo di Massimo Roccella*, Ediesse, 2012, p. 223.

⁴⁴ Beyond the rulings referenced in the next footnote, see also C. Just., 19th June 2014, da C-501/12 a C-506/12, C-540/12 and C-541/12, *Specht et. al.*, par. 33.

⁴⁵ It is precisely this need to safeguard the attainment of the objectives enshrined in the Union’s founding Treaties (since ensuring adequate wage within the Union also serves as a vehicle for the effective implementation of various principles developed at the EU level) that has led the Court of Justice to interpret the derogation in such a way that not every issue related to “remuneration” falls within the scope of the exclusion of shared competence with the aim of gradually expanding the scope of powers conferred upon the Union, see C. Just., 13th September 2007, C- 307/2005, *Del Cerro Alonso*, *ibidem*, in www.eur-lex.europa.eu, par. 39-41, in which the Court of Justice upheld the worker’s claim to benefit – on the basis of the prohibition of discrimination against fixed-term employees – from the same conditions granted to a permanent employee, even where this entailed the right to receive certain back payments of wages. See also C. Just., 15th April 2008, C-268/2006, *Impact*, in www.eur-lex.europa.eu, par. 121-126, still on the subject of the prohibition of discrimination against fixed-term employees and C. Just., 12th

There is no doubt that the adequacy of wages constitutes a component of the broader category of working conditions⁴⁶, on the assumption that remuneration is a key factor directly shaping employment conditions and indirectly contributing to the realisation of the Union's foundational principles. The objective of the Directive is therefore to ensure the adequacy of wages – not their uniformity across Member States – through the adoption of minimum requirements aimed at establishing a common ideal-typical model of minimum wage, while respecting national practices and supporting and strengthening collective bargaining⁴⁷.

What merits attention, first and foremost, is the delineation of the directive subjective scope, as the increasing use of non-standard contractual arrangements – characterized by the inclusion of only specific temporal segments within the contract's subject matter – is also shaped and driven by the broader dynamics outlined in the introductory section (par. 1). The Directive applies not only to workers who have an employment contract or employment relationship in accordance with national law, collective agreements, and the practices in force in each Member State, also taking into account the interpretation provided by the Court of Justice (Article 2)⁴⁸. In line with Regulation (EC) No. 593/2008 of the European Parliament and of the Council, the Directive is intended to be applied to both private and public sector workers. But, in addition to this, it is established that the act should also be covering domestic workers, on-call and intermittent workers, voucher-based workers, platform workers, interns and apprentices, and

November 1996, *United Kingdom v. Council*, C-84/94, cit.; see also the conclusion of the Advocate General Sanchez – Bordona of 28th May 2020 given in C. Just., 8th December 2020, C-620/18, *Hungary v. Parliament*. TREU, *La proposta sul salario minimo*, cit., p. 9.

⁴⁶ It has nevertheless been noted in the scholarly literature that, by considering the institution of the minimum wage as falling within the scope of working conditions “[t]he meaning of the subject of remuneration – and of the provision excluding it from the Union's competences – is substantially affected and limited, because the ‘condition’ represented by the ‘minimum wage’ is the first and most important element in determining remuneration, both in and of itself and because it indirectly, yet necessarily, influences the setting of wages above the minimum as well [...]”, PROIA, *La proposta di direttiva sull'adeguatezza dei salari minimi*, in *DRI*, 2021, 1, p. 27.

⁴⁷ Cfr. recital n. 12. Thus, fulfilling the Commission's “commendable” intention to create synergy between the directive and collective bargaining, v. BARBIERI, *Il salario minimo legale in Italia, dagli studi di Massimo Rocella alla proposta di direttiva e ai disegni di legge di questa legislatura*, in AIMO, FENOGLIO, IZZI (eds.), *Studi in memoria di Massimo Rocella*, Esi, 2021, p. 84.

⁴⁸ MENEGATTI, *Scope (Article 2)*, in RATTI, BRAMESHUBER, PIETROGIOVANNI, cit., p. 156 ff.

other atypical workers, as well as cases of false self-employment. Genuinely self-employed workers are excluded from the scope of the Directive (Recital 21), although the issue of vulnerable self-employed workers was specifically discussed during consultations with social partners⁴⁹.

As for the notion of “minimum wage” set out in the Directive, it is worth noting, first of all, that the act refrains from specifying which elements of remuneration should be taken into account for the purposes of this definition. This is likely due, at least in part, to the need not to exceed the competences conferred upon the Union⁵⁰. Art. 3⁵¹, par. 1, n. 1, defines it as «the minimum remuneration set by law or collective agreements that an employer, including in the public sector, is required to pay to workers for the work performed during a given period»⁵².

The definition thus reaffirms the role of working time as a parameter for the calculation of remuneration. It therefore appears that the Directive intends to exclude from the notion of minimum remuneration – which must meet the requirement of adequacy – any payments that are not strictly and directly linked to the performance of work within a defined period of time («the minimum remuneration [...] that an employer [...] is required to pay [...] for the work performed during a given period»). This interpretation is further supported by Recital 28 of the Directive, which states that minimum wages are considered adequate if they enable the recipient to enjoy «a decent standard of living based on *full-time employment*».

⁴⁹ See ETUC, *Reply of the European Trade Union Confederation*, cit., p. 12; BELLAVISTA, *La proposta di direttiva sui salari minimi adeguati. L'Europa sociale ad una svolta*, in *DRI*, 2021, 2, p. 429. See on that PROIA, *La proposta di direttiva*, cit., p. 40, who states that the highest percentage of working poor is found precisely among self-employees workers, to be understood, in all likelihood, as “false self-employed”, according to BARBIERI, cit., p. 87, note 54. See LASSANDARI, *Oltre la “grande dicotomia”? La povertà tra subordinazione e autonomia*, in *LD*, 2019, 1, pp. 92-95.

⁵⁰ As noted by PASCUCCI, *Il salario minimo tra la proposta di direttiva e i disegni di legge italiani*, in AIMO, FENOGLIO, IZZI (eds.), cit., p. 259.

⁵¹ See HOUWERZIJL, *Definitions (Article 3)*, in RATTI, BRAMESHUBER, PIETROGIOVANNI, cit., p. 169 ff.

⁵² The definition necessarily differs from that of remuneration provided in Directive (EU) 2023/970 on gender pay gap, which reiterates the notion of remuneration adopted in Directive 2006/54/EC. Article 2(1)(e) of the latter requires Member States to consider remuneration as “the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer”, adding that such consideration may be “complementary or variable”.

It is therefore reasonable to assume that, on the one hand, the Directive reinforces the principle of reciprocity between the core obligations in the employment contract (work performed versus remuneration), and, on the other, requires that adequacy pertains specifically to the minimum wage mandatorily paid to a worker for the work performed within a given time segment – more precisely, during working hours⁵³.

This claim raises several questions. For the purposes of this discussion, we will focus on the one that is most relevant in light of the notion of working time as developed by the Court of Justice of the European Union⁵⁴ and, in particular, we will seek to understand whether the minimum wage (as defined in Article 3(1)(1) of the Directive) also applies to so-called grey time – for which, as we saw before, collective agreements sometimes provide only minimal forms of compensation), and whether it must meet the requirement of adequacy and be subject to the application of the principles of proportionality and sufficiency. Before doing that, it is necessary to question the concept of adequacy as an essential characteristic of remuneration. In order to do this, we still need to address the directive on adequate minimum wages and its effect on the Italian legal system.

5. *Wage adequacy, proportionality and sufficiency in the rulings of Court of Cassation of October 2023*

Let us first of all examine whether the directive embraces a specific notion of adequacy and, if so, what criteria are to be used in assessing it. This very concept, according to some scholars, represents a “critical point” within the European legislative framework⁵⁵.

The preparatory works of the directive reveal that the notion of minimum wage adequacy, as conceived by the Commission, is grounded in two main assumptions: on the one hand, a wage is considered adequate if it is “fair” in relation to the overall wage distribution; on the other hand, if it enables its recipient to enjoy a decent standard of living, taking into account

⁵³ CASSÌ, *La retribuzione nel contratto di lavoro*, Giuffrè, 1954, p. 7 ff.; GUIDOTTI, *La retribuzione nel rapporto di lavoro*, Giuffrè, 1956, p. 100 ff.; TREU, *Onerosità e correttezza nel rapporto di lavoro*, Giuffrè, 1968, p. 44 ff.

⁵⁴ See *supra*, par. 1

⁵⁵ TREU, *cit.*, p. 12.

the broader economic conditions⁵⁶. While the assessment of fairness – based on the practices observed in different Member States – relies on comparative evaluation with additional elements, the second criterion is framed in more “absolute” terms. Nonetheless, these aspects are closely interrelated, as the very notion of a “decent standard of living” is itself defined through comparative processes⁵⁷. The Commission adopted two distinct indicators – later also incorporated into Article 5, which concerns the procedure for determining adequate statutory minimum wages – both of which are well-established at the international level, for the purpose of this assessment⁵⁸. The fairness of wage distribution is assessed by comparing the minimum wage with 60% of the gross median wage (the Kaitz index, used by the OECD) and/or with 50% of the gross average wage (an indicator employed by the European Committee of Social Rights in its interpretation of the European Social Charter)⁵⁹. These two variables are not considered to be alternative, but rather to constitute a «double threshold of decency»⁶⁰. The adequacy of the minimum wage in ensuring a decent standard of living is, by contrast, assessed by comparing the net minimum wage with the at-risk-of-poverty threshold (AROP) and with net average wages⁶¹.

This articulation of the concept of adequacy is also reflected in the final version of the directive. Indeed, minimum wages are considered adequate (again) when they are “fair in relation to the wage distribution in the

⁵⁶ LO FARO, *L’iniziativa della Commissione per il salario minimo europeo tra coraggio e temerarietà*, in *LD*, 2020, p. 549, refers to it as “substantive notion”.

⁵⁷ See EUROPEAN COMMISSION, *Impact assessment*, cit., p. 2 e COM(2020) 682 final, 28th October 2020, p. 2.

⁵⁸ Particularly noteworthy is the interpretation proposed by RATTI, *La riduzione della povertà lavorativa nella direttiva sui salari minimi adeguati*, in *VTDL*, October 2022, Extraordinary number, p. 44 ff., which analyses the notion of adequacy precisely in light of the criteria set out in this article, concluding that wages are adequate when they are regularly updated and indexed, as well as when they are fair in relation to the wage distribution of the country in question (cf. recital No. 29). See also DELFINO, *Lecture*, 7th December 2023, Seminar “*Salario minimo e Costituzione*”, Bologna, 2023.

⁵⁹ See BAVARO, *The Legal Institutions of Industrial Relations on Wage-setting*, in RATTI, BRAMESHUBER, PIETROGIOVANNI, cit., p. 67, who observes that the concept of adequacy in the directive suffers from an underlying ambiguity – should it refer to the market value of labour, or to the monetary value necessary to ensure a decent standard of living? – which, however, makes it impossible, for the purposes of its determination, to disregard collective bargaining outcomes (as opposed to statutory minimum wage levels).

⁶⁰ CONTOURIS, *L’Europa sociale al bivio*, in *RGL*, 2024, 1, p. 128.

⁶¹ EUROPEAN COMMISSION, *Impact assessment*, cit., p. 3.

relevant Member State” and when they enable workers “to have a decent standard of living based on full-time employment”. Such adequacy must be assessed and determined by each Member State, taking into account national socioeconomic conditions. For this purpose, consideration should be given to purchasing power, national long-term productivity levels and developments, wage levels, and their distribution and growth (see Recital 28). It is worth noting, first of all, that Recital 28 sets out a twofold condition: not only must wage adequacy be assessed on the basis of macroeconomic data, but it must also fulfil the requirement of ensuring a decent standard of living. This highlights a conceptual parallel between Recital 28 of the directive and Article 36 of the Italian Constitution.

Among the tools that a Member State may use to assess wage adequacy is, *inter alia*, a basket of goods and services priced in real terms, from which the cost of living can be derived “with a view to achieving a decent standard of living”. Within this basket, however, consideration should be given not only to goods and services that meet the most basic needs – such as food, housing, and clothing – but also to those related to education, social inclusion, and cultural participation (Recital 28, second paragraph). In addition, certain nationally developed indicators may be employed, as well as comparisons between net minimum wages and the poverty threshold, or with the purchasing power of minimum wages. It must be noted, however, that these are merely indicative and illustrative guidelines⁶², and not binding – contrary to what had been advocated in some quarters⁶³. Nonetheless, they underscore the necessity of grounding wage determination in clear and appropriate benchmarks, capable of standing up to scrutiny in terms of adequacy.

What is certain is that even some of the parameters set out in the European directive were referred to by the Italian Supreme Court of Cassation in a series of rulings issued in October 2023 for assessing adequacy of remuneration⁶⁴. These references were made to guide judges in objectifying the

⁶² MENEGATTI, *Il salario minimo nel quadro europeo e comparato. A proposito della proposta di direttiva relativa a salari minimi adeguati nell’Unione europea*, in *DRI*, 2021, 1, p. 57, observes that making certain parameters – such as the poverty threshold – binding would likely have resulted in encroaching upon the notion of remuneration, with respect to which the Union does not have competence.

⁶³ BELLAVISTA, *cit.*, p. 427.

⁶⁴ The Court of Cassation overturned decisions of the Courts of Appeal that had reject-

equitable power granted to them by law to determine the worker’s remuneration following a finding of invalidity of the relevant contractual clause – even when such a clause originates from “qualified” collective bargaining⁶⁵.

According to the prevailing interpretation of the combined provisions of Articles 1419(2) and 2099 of the Italian Civil Code, it is a well-established principle in case law that, when the wage treatment provided to the worker is found to be unlawful, the judge may supplement (or “hetero-integrate”) the individual employment contract by imposing on the employer the obligation to pay a wage deemed consistent with the principles of proportionality and adequacy.

This mechanism of judicial determination of remuneration traces back to a jurisprudential interpretation originating in the 1950s, when actions by workers alleging remuneration lower than that provided for in the collective agreements were brought before Courts. Upon acknowledging the immediate horizontal effect of Article 36 of the Constitution, waiting for statutory minimum wage or for legally binding collective agreements⁶⁶ Courts began to employ the wage levels set in collective agreements as standard of reference.

This case law has been challenged as we witnessed the emergence within industrial relations practice of collective agreements signed by representative trade unions that foresee remuneration which are *manifestly* inadequate.

This scenario – albeit rare – is exactly the one from which the rulings of the Court of Cassation, which for the first time embodied the concepts

ed workers’ claims in judgments nos. 27769, 27711, and 27713 of 2nd October 2023, and upheld appellate decisions that had granted the claims in judgments nos. 28320, 28321, and 28323 of 10th October 2023. See also LASSANDARI, *La suprema Corte e il contratto collettivo: alla ricerca dell’equa retribuzione*, in RGL, 2023, 4, p. 531 ff.; DELFINO, *La recente giurisprudenza della Cassazione in materia di salario minimo, ovvero alla ricerca della soglia perduta*, in this journal, 2023, p. 548 ff. See also TOMASSETTI, *Contrasting Ideas of Justice in the Law-Collective Bargaining Nexus: The Case of Wage Settlement and Litigation*, in TOMASSETTI, BUGADA, FORSYTH (eds.), *The Law and Collective Bargaining. Sources and Patterns of Regulation in the Modern World of Work*, Hart, 2025, p. 53 ff.

⁶⁵ The leading judgment that paved the way for this line of case law, although not the first on the subject, is represented by Trib. Torino, 9 agosto 2019, n. 1128, in DRI, 2020, p. 848, with a commentary by CENTAMORE, *I minimi retributivi del CCNL confederale Vigilanza privata, sezione Servizi fiduciari, violano l’art. 36 Cost.: un caso singolare di dumping contrattuale e una sentenza controversa del Tribunale di Torino*.

⁶⁶ Nowadays, Italy is one of the few countries in Europe which has not statutory minimum wage nor legally binding collective agreements.

of adequacy of remuneration autonomously from the provisions of collective bargaining. These rulings concerned the remuneration established in a collective agreement (expired on 31 December 2015 but remained in force for almost eight years) signed by two of the most representative Italian trade unions, amounting to €930.00 gross per month⁶⁷. The provision regarding remuneration was hence declared null and void for being in contrast with Article 36 of the Italian Constitution.

In reaching such a declaration, the Court of Cassation deemed it appropriate to employ certain parameters capable of serving as statistical evidence for assessing whether the remuneration was inconsistent with constitutional requirements. In particular, the wage treatment was compared, on the one hand, with the absolute poverty threshold developed by ISTAT, which represents the monetary value, at current prices, of a basket of goods and services considered essential, in the Italian context and for a household with specific characteristics, to achieve a minimally acceptable standard of living. This basket is composed of three macro-categories (food, housing, and residual expenditures), whose monetary value is not calculated at the absolute minimum price, but rather at the minimum price accessible to all households, taking into account the characteristics of supply in different territorial contexts. In ISTAT's surveys, absolute poverty is distinguished from relative poverty: households are classified as absolutely poor if their monthly expenditure is equal to or lower than the value of the absolute poverty threshold; they are considered "relatively poor", instead, if their consumption expenditure falls below a conventional relative poverty threshold (the so-called poverty line). While absolute poverty classifies households based on their ability to acquire a basket of essential goods, relative poverty is instead linked to inequality in the distribution of consumption expenditure⁶⁸.

In addition to this threshold, further statistical evidence used to assess the inadequacy of the wage treatment provided includes the amounts disbursed under the ordinary wage guarantee fund (Cassa Integrazione Guadagni Ordinaria), the Citizenship Income (Reddito di Cittadinanza), the unemployment benefit (NASpI), and the income threshold for access to

⁶⁷ The monthly amount corresponds to a gross hourly wage of €5.37, based on a standard 40-hour workweek.

⁶⁸ ISTAT, *Le statistiche dell'Istat sulla povertà. Anno 2021. I maggiori consumi non compensano l'inflazione. Stabile la povertà assoluta*, Istat Statistiche Report, 15th June 2022, *Glossario*; ISTAT, *Le statistiche dell'ISTAT sulla povertà. Anno 2021*, *istat.it*, pp. 9–11.

disability pensions. The key point to highlight here is that, with regard to these parameters, the Court clarified that these are «forms of income support which refer, however, to the availability of minimum amounts merely sufficient to ensure the recipient’s survival, but not suitable to support an assessment of the adequacy and proportionality of wage»⁶⁹. This is significant, as it confirms that the remuneration under scrutiny was found unlawful primarily because it failed to meet even the threshold of adequacy as required by the constitutional principle of sufficiency – which, even in the literal wording of the provision («[...] in any case sufficient [...]»), stands at a quantitatively lower level than that of proportionality.

Finally, equally decisive was the comparison between the wage under review and the minimum remuneration levels established by other national collective labour agreements for tasks similar to those covered by the section of the collective agreement under scrutiny⁷⁰. The discrepancy that emerged – reaching up to 30% – was sufficient to cast doubt on the proportionality of the remuneration in relation to the quantity and quality of the work performed⁷¹.

The true element of novelty contained in the rulings under comment lies, on the one hand, in the fact that the clause struck down by the Judges

⁶⁹ Cass., no. 27769/2023, cit., par 23.2, and Cass., no. 28320/2023, par. 1.13; TARQUINI, *La giurisprudenza di fronte alla crisi del contratto collettivo come parametro della retribuzione proporzionata e sufficiente: nuovi percorsi di applicazione diretta dell’art. 36 Cost.*, in ALBI (eds.), *Salario minimo e salario Giusto*, Giappichelli, 2023, p. 56.

⁷⁰ This refers to the National Collective Labour Agreement (c.c.n.l.) for the Multiservice sector, which, under Article 10, includes in Level II “workers who carry out supervision of premises,” exemplifying roles such as “doorman, custodian, guard, unarmed surveillance,” as well as “general workers assigned to reception duties”; the National Collective Labour Agreement for employees of building owners, which, under Article 15, assigns Category DI to “workers engaged in surveillance activities carried out on a non-intermittent basis within buildings primarily used for commercial purposes or in residential properties and/or complexes”; and the National Collective Labour Agreement for employees of companies in the Tertiary, Distribution and Services sectors, which, under Article 100, classifies custodians, ushers, and doormen at Level VI.

⁷¹ In case law, the comparison is mostly carried out by examining the contractual items that make up the so-called constitutional minimum wage: basic pay, thirteenth-month salary, and cost-of-living allowance (indennità di contingenza). This approach aligns with the jurisprudential orientation according to which fair remuneration – used as a benchmark for adjustment pursuant to Article 36, paragraph 1, of the Constitution – does not comprise all the elements that contribute to the overall remuneration package. See Cass., 27th January 2021, No. 1756; 20th January 2021, No. 944; 25th June 2020, No. 12624, available in *DeJure*.

was included in an agreement signed by parties possessing a characteristic that the legal system itself sometimes identifies as a guarantee of the quality of the employee's economic and regulatory treatment: namely, the higher level of comparative representativeness⁷². However, it is submitted that what is commendable is not so much the outcome of the decisions, but rather the interpretative process that led to the formulation of the principle of law or to the confirmation of the judgments issued by the Courts of Appeal⁷³. Scholars have argued that such landmark jurisprudence marked a significant shift from a *procedural* to a *substantive* idea of justice in wage settlement and litigation, whereby substantive justice refers to judicial scrutiny of compliance with the constitutional principle of just remuneration, while procedural justice relies on collective bargaining provisions as fair parameters, provided that such provisions are set in collective agreements concluded by representative trade unions and employers' federations⁷⁴.

The Court of Cassation has, in fact, clarified that the judge enjoys «broad discretion in determining fair remuneration» within an assessment that is «entrusted to the trial judge»⁷⁵. In implementation of Article 36 of the Constitution, the judge may, in fact, «refer for comparative purposes to the wage treatment established in other collective agreements from related sectors or for similar tasks». The Court of Cassation further adds that «the concepts of sufficiency and proportionality are aimed at ensuring for the worker a life that is not merely free from poverty, but one that is dignified»⁷⁶ and that «in the assessment of adequate minimum remuneration pursuant to Article 36 of the Constitution, within the scope of the powers granted under Article 2099, paragraph two, of the Civil Code, the judge may also refer to economic and statistical indicators, including those suggested by

⁷² But see ICHINO, *Se è il giudice a stabilire il salario minimo*, in *Lavoce.info*, 6th October 2023; BRONZINI, *Il contributo della Corte di cassazione per risolvere il tema dei "salari indecenti"*, in *LDE*, 2023, 2, p. 2; PASCUCCI, *La recente giurisprudenza di legittimità sul salario proporzionato e sufficiente e i parametri per la sua determinazione*, in *QRGL*, 2024, 10, *passim*. On the topic, see also DELFINO, *Salario legale, contrattazione collettiva e concorrenza*, Esi, 2019.

⁷³ Cfr. PASCUCCI, *La recente giurisprudenza*, cit., p. 28. Forse inevitabile al fine di adeguamento dell'orientamento, v. LASSANDARI, *Salario minimo e Costituzione. Intervento al seminario di studi organizzato dall'Università di Bologna*, 7th December 2023.

⁷⁴ TOMASSETTI, *Contrasting Ideas*, cit., *passim*.

⁷⁵ Cass., nn. 27769 e 27711/2023, cit., points 20–21.

⁷⁶ Cass., no. 27769/2023, cit., par. 23.2; Cass., no. 27769/2023, cit., point 11.

Directive (EU) 2022/2041»⁷⁷, «by virtue of the integration of the Italian legal system within the European and international framework»⁷⁸.

The principles of proportionality and sufficiency of remuneration, as enshrined in Article 36 of the Italian Constitution, are, as clarified by the Court of Cassation⁷⁹, inseparably connected; they complement and reinforce each other, both constituting essential elements of the contractual cause and mutually correcting one another. Thus, there may be cases in which remuneration, though apparently sufficient, is not proportionate to the work performed, and cases in which remuneration, though seemingly proportionate, is not sufficient. In either of these scenarios, the clause (being null and void)⁸⁰, must be corrected, as it renders the contract incapable of fulfilling its purpose⁸¹. Furthermore, the Court of Cassation specifies that, due to the binding force of the right to fair remuneration stemming directly from Article 36 of the Constitution, the only burden placed on the worker is to prove «the amount of the remuneration» and «the object of the assessment, namely the work actually performed»⁸².

Having established that any contractual clause relating to remuneration may be subject to judicial review to assess its conformity with the legal order, we can now address our main question, redefining it: to what extent the principles concerning adequacy of remuneration may be applied to the wage provided for in collective agreements applicable to “grey times”? As the C. Just. taught while defining the concept of working time, the answer to this question depends on the object of the obligation and on the nature of the remunerative counter-performance, as we will see in the following paragraph.

⁷⁷ Cass., no. 27769/2023, par. 24 ff.

⁷⁸ Cass., no. 28320/2023, par. 1.14; Cass., no. 27769/2023, par. 11 ff.

⁷⁹ Cass., 2nd October 2023, no. 27769.

⁸⁰ See Cass., 4th May 1961, no. 1004. BELLOMO, *Retribuzione sufficiente e autonomia collettiva*, Giappichelli, 2002, p. 79; it defines them as two «symbiotic principles» COLAPIETRO, *Commento all'art. 36*, in BIFULCO, CELOTTO, OLIVETTI (eds.), *Commentario alla Costituzione*, 1, Utet, 2006, p. 745.

⁸¹ From this perspective, ZOPPOLI L., *La corresponsività nel contratto di lavoro*, Esi, 1991, *passim*.

⁸² All quotations are taken from Cass., no. 27713/2023, par. 17.

6. *Final remarks: what remuneration for grey times?*

Legal scholarship has debated the legal nature of all those payments made to workers as compensation for their availability during waiting periods, as provided for in certain non-standard forms of employment⁸³. The debate has arisen due to the absence of an actual work performance during such periods – as in the case of on-call work and employment under temporary work agencies.

The decisive factor in determining whether such payments qualify as remuneration – thus triggering the applicability of the principles set out in Article 36 of the Constitution – lies, according to some scholars, in the employer's ability to exercise, during these time segments, the powers granted to them by law, thereby becoming a creditor of a work performance involving a *facere*. In other words, «the mere absence of a tangible performance does not seem sufficient to justify excluding workers in a state of 'availability' from the application of Article 36 of the Constitution»⁸⁴.

According to other scholars, however, this conclusion is not acceptable, as Article 36 of the Constitution presupposes the existence of “work” understood as a specific *facere*. Therefore, for the purpose of determining the amount of such payments, Article 36 would either not be applicable at all, or – alternatively – only the criterion of sufficiency would apply. In this latter interpretation, the service in question would still possess a remunerative nature, but with special characteristics that would justify a balancing of the constitutional principles set out in Article 36⁸⁵.

⁸³ PALLADINI, *I principi costituzionali in materia di retribuzione e la loro applicazione giurisprudenziale*, in GRAGNOLI, PALLADINI (eds.), *La retribuzione*, Wolters Kluwer, 2012, esp. p. 56 ff.

⁸⁴ PALLADINI, *cit.*, p. 64; GAROFALO, *La legge delega sul mercato del lavoro: prime osservazioni*, in RGL, 2003, 2, p. 371; PASCUCCI, *Giusta retribuzione e contratti di lavoro: Verso un salario minimo legale?*, Franco Angeli, 2018, p. 77. See also M.T. CARINCI, *La fornitura di lavoro altrui. Interposizione. Comando. Lavoro temporaneo. Lavoro negli appalti*, in SCHLESINGER (eds.), *Il Codice civile. Commentario*, Giuffrè, 2000, p. 341; BANO, *Art. 22*, in GRAGNOLI, PERULLI (eds.), *La riforma del mercato del lavoro e i nuovi modelli contrattuali*, Cedam, 2004, p. 347. *Contra*, MISCIONE, *Retribuzione e rapporti di lavoro flessibile*, in GRAGNOLI, PALLADINI (eds.), *cit.*, p. 676. Doubting it, BELLOMO, *Art. 36*, in AMOROSO, DI CERBO, MARESCA (eds.), *Diritto del lavoro. La Costituzione, il Codice civile e le leggi speciali*, 2017, Giuffrè, p. 221.

⁸⁵ CIUCCIOVINO, *La disciplina dei rapporti di lavoro*, in M.T. CARINCI, CESTER, *Somministrazione, comando, appalto, trasferimento d'azienda*, 2004, Ipsoa, p. 83; GOTTARDI, *Lavoro intermittente*, in GRAGNOLI, PERULLI (eds.), *La riforma del mercato del lavoro e i nuovi modelli contrattuali*, Cedam, 2004, p. 489; if we're not mistaken, SPEZIALE, *La prestazione di lavoro temporaneo e il trattamento*

In cases involving so-called grey time that may be classified as working time in light of the interpretation provided by the Court of Justice, there should remain no doubt as to the remunerative nature of the payments made to compensate for such periods.

From this, it follows that both constitutional principles governing remuneration should apply – if for no other reason than the fact that the rigidity of the contractual type reasonably excludes the possibility of envisaging remunerative counter-performances detached from both constitutional parameters.

Therefore, remuneration paid for services performed during time segments that qualify as working time – pursuant to the principles enshrined in Article 36 of the Constitution, which, as previously discussed, are mutually corrective – must be both proportionate and sufficient.

The fact that proportionality, in terms of the quality of the work performed, may be subject – within the framework of collective bargaining – to adjustments based on the content-related differences of the tasks carried out (especially with regard to highly specialised roles), is a further element confirming the remunerative nature of the payment. This entails all the corresponding consequences, including judicial review of the provisions negotiated by collective agents, and the judge’s power to determine remuneration equitably in the event of a declaration of nullity. And this is the consequence of the enforcement of both the European directive and art. 36 of Italian Constitution: in the event that collective agreements provide for “grey times” a remuneration lower than the standard one, an adequacy assessment is required, performed through objective criteria.

Some doubts remain, finally, regarding the applicability of these principles to those payments made for time segments that cannot be classified as working time. As it has been noted, even in cases where the worker is not required to be physically present at the workplace but must remain on-call, there is nonetheless a restriction of free time – albeit less significant than in other scenarios, yet still present⁸⁶, to the point that some scholars have interpreted it as «an extension of working time regulation»⁸⁷. In this case, we

retributivo, in LISO, CARABELLI (eds.), *Il lavoro temporaneo. Commento alla legge n. 196/1997*, Franco Angeli, 2004, p. 302. On a different basis, see FERRARO, *Diritto dei contratti di lavoro*, il Mulino, 2011, p. 349.

⁸⁶ ALESSI, *Disponibilità, attesa e contratto di lavoro*, in *Biblioteca '20 Maggio'*, 2011, I, p. 232

⁸⁷ OCCHINO, *Il tempo libero nel diritto del lavoro*, Giappichelli, 2010, p. 207.

believe that, as a preliminary matter, the issue concerning the legal nature of the payment made must be resolved, as it necessarily depends on the actual constraints imposed on the worker. Even in situations where these activities may not, strictly speaking, have a remunerative nature, we concur with those scholars who maintain that the allowances granted must nonetheless comply with the principle of sufficiency⁸⁸, which must also be given due weight in light of the interpretation offered by the Constitutional Court regarding non-working time⁸⁹.

⁸⁸ LEVI, *Contratto di lavoro intermittente e disponibilità del lavoratore*, in *DL*, 2006, p. 386 ff.; GOTTARDI, *cit.*, p. 489; ALESSI, *cit.*, 241.

⁸⁹ C. Cost., 11th May 1992, no. 210.

Abstract

This paper explores the evolving legal landscape surrounding the remuneration of “grey time” – periods of on-call or stand-by duty – within both EU and Italian frameworks. It critically examines the jurisprudence of the European Court of Justice, which progressively redefined “working time” through spatial and temporal constraints, affecting how such periods are legally classified. The paper also connects these developments to the EU Directive on Adequate Minimum Wages, arguing that wage adequacy concerns working time. It further discusses the role that recent Italian Court of Cassation rulings invoking constitutional principles of proportionality and sufficiency in wage, on one hand, and a ruling by the same Court regarding the qualification of grey. The study concludes that compensation for legally classified working time must meet both sufficiency and proportionality requirements, potentially opening space for judicial review of collective agreements.

Keywords

Working time, Grey times, Wage, Proportionality, Sufficiency.

