



Brussels, 26.4.2017
SWD(2017) 204 final

COMMISSION STAFF WORKING DOCUMENT

**Detailed report on the implementation by Member States of Directive 2003/88/EC
concerning certain aspects of the organisation of working time**

Accompanying the document

**Report from the Commission to the European Parliament, the Council and the
European Economic and Social Committee**

**Report on the implementation by Member States of Directive 2003/88/EC concerning
certain aspects of the organisation of working time**

{COM(2017) 254 final}

I.	Introduction	3
II.	The scope of the Directive.....	3
	A. Material scope	3
	B. The application of the Directive — per worker or per contract	4
III.	Definition of working time.....	6
	A. Definition of working time.....	6
	B. On-call time.....	7
IV.	Rest periods	9
	A. Breaks.....	9
	B. Daily rest	11
	C. Weekly rest.....	11
V.	Limits to weekly working time	13
	A. Maximum weekly working time	13
	B. Reference period.....	14
VI.	Paid annual leave.....	16
	A. The entitlement to minimum 4 weeks paid leave	16
	B. Acquiring and exercising rights when the worker starts his/her employment.....	17
	C. Acquiring rights during sick leave and carrying over leave entitlements which cannot be exercised because they coincide in time with periods of sick leave.....	18
	D. Pay.....	19
	E. Right to paid leave upon termination of the employment contract	20
VII.	Protection of night and shift workers	21
	A. Definitions	21
	1. ‘Night time’	21
	2. ‘Night worker’	22
	3. ‘Shift work’ and ‘shift worker’.....	23
	B. Limits to night work.....	23
	1. Eight-hour normal work on average.....	23
	2. Eight-hour absolute limit for work involving special hazards or heavy strain.....	24
	C. Protection of night workers and shift workers.....	25
	1. Health assessment before assignment to night work and at regular intervals	26
	2. Right to transfer to day work.....	27
	3. Guarantees for certain categories of night workers	27
	4. Notification of regular use of night workers	28
	5. Safety and health protection for night workers and shift workers.....	28
	6. Obligations regarding organisation of work patterns	29
VIII.	Derogations	29

A.	Derogation for ‘autonomous workers’ (Article 17(1) of the Directive).....	30
B.	Derogations requiring the worker to be afforded equivalent periods of compensatory rest.....	31
1.	Derogations in cases provided for in Article 17(3) and (4).....	32
2.	Derogations through collective agreements	34
C.	Opt-out	35
1.	The use of the opt-out derogation.....	36
2.	Protective measures	37
IX.	Social partners’ evaluations.....	38
A.	Trade unions’ views	38
1.	Overall views.....	39
2.	Evaluation of transposition.....	39
3.	Social partnership	40
B.	Employers’ views.....	40
1.	Overall views.....	40
2.	Evaluation of transposition.....	40
3.	Social partnership	41
C.	Member States’ views	42
X.	Monitoring and enforcement at national level.....	43
XI.	Conclusions	44

I. Introduction

This detailed report is an annex to the main report¹ to the European Parliament, the Council and the European Economic and Social Committee on Member States' implementation of Directive 2003/88/EC concerning certain aspects of the organisation of working time² ('the Directive' or 'the Working Time Directive'). The requirement to submit an implementation report is laid down in Article 24 of the Directive.

Under Article 24, Member States are required to communicate their transposition measures and report every 5 years to the Commission on the practical implementation of the Directive, indicating the views of the two sides of industry at national level. The Commission then submits to the European Parliament, the Council and the European Economic and Social Committee a report³ on the application of the Directive, which takes account of the national reports, and of Articles 22 (the 'opt-out') and 23 (the non-regression principle).

This annex presents the results of the examination in greater detail than in the report to the European institutions, which focuses on the main trends.

In parallel with the implementation report, the Commission has adopted an interpretative communication⁴ on the Working Time Directive aimed at bringing legal clarity and certainty when applying the Directive. The goal is to make implementation of this key piece of EU labour law more effective. Together with the interpretative communication, this detailed report contributes to identifying the right areas for future cooperation with Member States and enforcement activities.

This report sets out to provide an overview of how Member States have implemented the Directive and to highlight the main problems. It does not provide an exhaustive account of all national implementation measures. In particular, this report does not prejudge the stance which the Commission may take in connection with any infringement procedure on the compatibility of such measures with Community law.

II. The scope of the Directive

A. Material scope

Article 1(3) of the Directive states that it '*shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC*'. Article 2(1) of Directive

¹ Report on the implementation of the Working Time Directive, COM(2017) 254

² Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9–19.

³ Under Article 24(3), the Commission has to report 'every five years from 23 November 1996.' The Commission's last reports on the Working Time Directive were in 2000 referring to Council Directive 1993/104/EC COM(2000) 787 final (overall transposition), 2003 COM(2003) 843 final (re-examination of various provisions, as required by Articles 19 and 22.1 of Directive 1993/104/EC) and 2010 COM (2010) 802 final (overall transposition and application).

⁴ Communication from the Commission, Interpretative Communication from the Commission on 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, C(2017) 2601.

89/391/EEC, the Framework Health and Safety Directive, states that it ‘*shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.)*’.

From the available information it can be concluded that the Directive has generally been transposed in both the public and the private sectors. In some Member States public sector workers are covered by the same working time rules as private sector workers. In other Member States, different sets of rules have been adopted that govern the public and the private sector separately, with additional specific provisions applicable to particular sectors.

In some cases, it is unclear which rules apply to specific sectors where specific legislation, rules or collective agreements apply in addition to the general legal framework on working time.

However, in a number of Member States, certain sectors or categories of workers remain excluded from the scope of the transposing legislation. In the public sector this is most commonly the case for the armed forces, police, and other security forces, and also for civil protection services such as public service firefighters and prison staff⁵. In several instances Member States have entirely or partially excluded domestic workers from their transposing legislation⁶. Exclusions are also in place for categories such as workers in educational institutions, the judiciary, archaeological sites, libraries and museums⁷.

Such exclusions are not consistent with the requirements of the Working Time Directive, unless transposition of the Directive’s provisions is ensured by collective agreements.

In recent years the Commission has seen persistent non-compliance issues related to workers in public services, in particular for police forces, armed forces and health personnel, concerning several aspects of the Working Time Directive (maximum working time, limits to night work, derogations from rest and annual leave).

B. The application of the Directive — per worker or per contract

The Working Time Directive establishes minimum requirements for ‘workers’. However, it does not explicitly state whether its provisions set absolute limits in case of concurrent contracts with one or more employer(s) or if they apply to each employment relationship

⁵ Ireland (The Organisation of Working Time Act number 20 Part I no. 3 para. (1) An Garda Síochána (police), armed forces); Ireland (The Organisation of Working Time Act number 20 Part I no. 3 para. (3b) and the Organisation of Working Time (Exemption of Civil Protection Services) Regulations (S.I. No 52/1998) ia. fire fighters, prison staff and marine emergency personnel; Cyprus (The Working Time Law of 2002 Art. 4 (armed forces); Italy (Legislative Decree 66/2003 Article 2 (police and armed forces, the judiciary, penitentiary, public security and civil protection services are all excluded if their duties impose particular demands and a Ministerial Decree so provides).

⁶Belgium (Labour Code of 16 March 1971 Article 3); Greece (Presidential Decree No 88/1999 as amended by Presidential Decree No 79/2005 Article 1); Luxembourg (Labour Code Article L. 211-2); Sweden (The Act 1982:673 on Working Hours Section 2. The Working Time in Domestic Work Act (1970:943) applies to domestic work, but is not mentioned as a transposition measure by the authorities and does not transpose all the requirements of the Directive; United Kingdom (The Working Time Regulations 1998 Part III Regulation 19).

⁷ Italy (Legislative Decree 66/2003 Article 2).

separately. The Court has not yet had to rule on this point. As indicated in previous reports⁸, the Commission considers that, in the light of the Directive's objective to improve the health and safety of workers, the limits on average weekly working time and daily and weekly rest should as far as possible, apply per worker. Taking into account the need to ensure that the health and safety objective of the Working Time Directive is given full effect, Member States' legislation should provide for appropriate mechanisms for monitoring and enforcement.

The situation differs markedly between Member States and a polarisation around the two different interpretations exists.

Bulgaria, Estonia, Germany, Ireland, Greece, France, Croatia, Italy, Cyprus, Lithuania, Luxembourg, the Netherlands, Austria, Slovenia and the United Kingdom apply the Directive on a 'per-worker' basis, mostly under express legal provisions to that effect.

Conversely, the Czech Republic, Denmark, Spain, Latvia, Hungary Malta, Poland, Portugal Romania and Slovakia apply the Directive 'per-contract'.

In Belgium, Finland and Sweden, the Directive applies per worker where there is more than one contract with the same employer but per contract in situations where the worker has more than one contract with different employers.

Different systems are used to verify that the cumulated number of hours do not exceed the limits to working time. In Luxembourg the worker is required to notify the Labour Inspectorate, who may then be informed by social security institutions of the necessary data to monitor compliance. Workers in Lithuania are obliged to present a certificate from his/her first employer to his/her second, who must then perform the necessary check.

In France, workers cumulating several employment contracts are subject to the maximum weekly working time and can be penalised if they exceed that duration without having obtained a derogation through the official channels. France also stipulates that only work carried out as a 'salié' counts towards that limit, similarly to what is presented in the Interpretative Communication.

In Germany, the employer is obliged to determine the total working hours of his/her workers. It seems that employees are under an obligation to inform their employer(s) of other work contracts and that the responsibility for minimum rest periods and maximum working time then lies with the employers (in particular the second employer and subsequent employers).

In the UK, the employer has the obligation to 'take all reasonable steps' to verify that a worker does not exceed the working time limit and, if this is the case or is suspected to be the case, to make arrangements to protect the worker's health and safety (via an individual opt-out, reducing hours).

⁸ Report from the Commission on the State of Implementation of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, COM(2000) 787 final; Report from the Commission on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time and accompanying document, COM(2010) 802 final and SEC(2010) 1611 final.

Under the Croatian rules, when concluding a part-time employment contract, the worker has to inform the employer about part-time employment relationships concluded with other employer(s). In such situations, a part-time worker is also only allowed to work with several employers for over the standard 40-hour week if (s)he has the written consent of the employers with whom (s)he has already concluded an employment contract.

III. Definition of working time

A. Definition of working time

Article 2(1) defines ‘working time’ as ‘*any period during which the worker is working (‘at work’, in some linguistic versions), at the employer’s disposal and carrying out his activities or duties, in accordance with national laws and/or practice*’. It is settled case-law that on-call time where workers are required to remain present at the workplace must be regarded in its entirety as working time, regardless of whether they actually perform tasks during this period.

In many Member States, the formal definition of working time does not appear to give rise to problems of transposition.

Some Member States, including Denmark, Ireland, Greece, Italy and Slovenia, have introduced in their legislation a definition of working time close to the formulation used in the Directive. The situation is similar in other Member States where the definition includes mention of the performance of work or tasks, of the fact of being at the disposal of the employer and of being at the working place or another place determined by the employer. This is the case in Croatia⁹ and Romania (while allowing for exceptions).

In other Member States, the definition of working time only mentions one or two of the three criteria. In some countries, namely Belgium, France, Luxembourg and Poland, national provisions focus on the fact that the worker is at the disposal of the employer. In Bulgaria, the Czech Republic and Portugal the focus is rather on the obligation to perform work or tasks. In Latvia and Slovakia there is no reference to being at the workplace or another place determined by the employer.

In other Member States the definition does not mention the more specific elements of the definition in the Directive. Germany defines working time (Article 2(1) *Arbeitszeitgesetz*) only as the period between the beginning and the end of work, excluding breaks. In Spain, Article 34(5) of the General Workers’ Statute indicates that working time is to be calculated in such a way as to ensure that the worker is in the workplace both at the start and the end of the day worked. In Austria, the definition of working time (Section 2 of the AZG) covers the time from start to the end of the working day, excluding (rest) breaks.

⁹ Where working time is defined as time in which the worker is obliged to be at work, at the employer’s disposal to carry out his/her duties in accordance with the employer’s instructions, at his/her working place or another place determined by the employer.

According to the information available to the Commission generally the *practice* in the Member States is in line with the general definition in the Directive. There are, however, some cases where the legal definitions could be clearer so as to give the public better information as to what constitutes working time.

B. On-call time

Most Member States do not have specific legal provisions defining the status of ‘on-call’ work.

‘On-call time’ refers to periods where a worker is required to remain at the workplace or another place determined by the employer, ready to carry out his or her duties if requested to do so. According to the rulings of the Court of Justice of the European Union (CJEU), all on-call time at the workplace must be fully counted as working time for the purposes of the Directive. This principle applies both to periods where the worker is working in response to a call (known as ‘*active*’ on-call time), and to periods where he or she is allowed to rest while waiting for a call (known as ‘*inactive*’ on-call time), provided that he or she remains at the workplace.

Where specific reference to on-call work is made in national legislation, this is generally consistent with the CJEU interpretation. Furthermore courts have generally introduced the case-law of the CJEU in practice.

The Commission still notes some inconsistencies over the requirement to treat on-call time as working time, but compliance among the Member States is improving.

On-call time is still not fully counted as working time for doctors in the public health sector in Greece and there are persisting problems with the practical implementation of the limitations on maximum weekly working hours. However, work is ongoing to remedy the situation.

For social care workers in Ireland there is still an issue over the counting of on-call time and thus over compliance with maximum working time, but here as well work is ongoing to bring the situation into line with the Directive.

In Slovenia legal acts regulating the police, judges, armed forces and civil servants¹⁰ still expressly provide that inactive periods during on-call time at the workplace are not to be treated as working time.

On-call time at the workplace does not appear to be fully counted as working time for several groups of workers in public service in Slovakia, including inter alia members of the police force, the prison wardens corps, the fire fighting and rescuing corps and customs officers¹¹.

¹⁰ The Police Organisation and Work Act (Official Gazette of Slovenia, No 15/13, 11/14, 86/15, 77/16) Article 71; The Judicial Service Act (Official Gazette of Slovenia, No 94/07 official consolidated text, 91/09, 33/11,63/13,95/14,95/14 ZUPPJS15, 17/15); the Defence Act Article 97e (Official Gazette of the RS, No. 103/04, 95/16-consolidated text No.8); the Collective Agreement for Public Sector (Official Gazette of Slovenia, No 57/08, 23/09, 19/09, 89/10, 40/12, 46/13, 95/14, 91/16) Article 46.

In Belgium the King has the legal power to derogate from the definition of working time for transport enterprises, transport activities and in essentially intermittent occupations, but can only act at the request of the Joint Committee of the branch of industry in question. Boarding schools and certain residential care establishments in the French and German communities and in the Wallonia region¹² are covered by a decree stating that a three-hour rest period between 20:00 and 06:00 is not to be counted as working time if the worker is provided with a suitable place to rest.

According to a new Collective Agreement for Municipal Physicians in Finland¹³ such doctors are obliged to perform on-call work (or emergency duty, *'päivystys'* in Finnish) at the workplace in addition to the regular working time of 38 hours 15 minutes averaged over 52 weeks. This on-call work is not counted as working time. The employees are only paid an on-call compensation.

Article 151-5 of the Polish Labour Code states that on-call duty defined as being available outside normal working hours to perform the work, either in the work establishment, or in another place specified by the employer, is not to be included in working time if no work was carried out by the worker during that time. Inactive periods, however, do not affect the worker's rest periods, and must result in compensatory rest or, if that is impossible, in financial compensation. It is, however, not clear if these periods are included in the maximum working time.

In Denmark the Executive Order on Daily and Weekly Rest Periods Section 19 allows the social partners to derogate from certain provisions of the Executive Order by collective agreements. The social partners can agree that the rest period can be placed during on-call duty. Social partners in the health sector have agreed that passive hours of on-call duty at the work place count as rest time and that if the worker has not performed active work during a consecutive period of 11 hours (or 8 if agreed) a new period of service may, with some restrictions, take place¹⁴. The Commission does not have clear information whether these passive periods of on-call time are included in the maximum working time.

¹¹ Act No. 73/1998 Coll. on civil service of members of the Police Force, of the Slovak Intelligence Service, of the Prison Wardens and Judiciary Guards Corps of the Slovak Republic and of the Railway Police; Act No. 200/1998 Coll. on civil service of customs officers, Act No. 154/2001 Coll. on prosecutors and legal trainees of the prosecution, Act No. 315/2001 Coll. on the Fire Fighting and Rescuing Corps.

¹² Royal Decree of 26 May 2002 concerning the hours of work of workers employed in institutions and services of the Joint Subcommittee on Education and Housing of the French Community, the Walloon Region and the German-speaking Community (C.P. 319.02).

¹³ KT-Local Government Employers and the Negotiation Organisation for Professionals in the Public Sector (JUKO) 31 May 2016.

¹⁴ The Executive Order No 324 of 23 May 2002 on Daily and Weekly Rest Periods Section 19, Collective agreement on working time for health personnel employed by the regions annex 5, Commented agreement on daily and weekly rest time for the health personnel section 4 (ia. nurses, bio analysts, physiotherapists), Collective agreement for doctors employed in the regions section 29

IV. Rest periods

The Working Time Directive provides for three types of minimum rest periods¹⁵ (as well as paid annual leave, discussed in Chapter VI). The CJEU has emphasised that these minimum rest requirements ‘*constitute rules of Community social law of particular importance from which every worker must benefit as a minimum requirement necessary to ensure protection of his safety and health... .*’¹⁶

A. Breaks

Article 4 provides for a *rest break during the working day*, without specifying its length:

‘Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation.’

This provision appears in general to have been satisfactorily transposed.

In accordance with Article 4, most Member States set out minimum provisions for the length and timing of a rest break during the working day in the absence of a different or more detailed provision under a collective agreement or between employers’ and workers’ representatives.

Member States’ legislative provisions establish minimum breaks ranging from 10 minutes¹⁷ up to 1 hour¹⁸. The length of the break is set at for example 15 minutes¹⁹, 20 minutes²⁰ or 30 minutes²¹, 30 minutes being the most common length. Some Member States have also introduced a maximum break of 2 hours²².

The main additional points on which provisions vary between Member States are:

- whether the break is designated for taking food as well as rest;
- whether it is to be counted as working time²³ or as rest time²⁴;
- whether it is specified that the employee is free to leave the workstation or the workplace during the rest;

¹⁵ Different rules apply for two specified groups of workers: mobile workers (Article 20) and workers on seagoing fishing vessels (Article 21).

¹⁶ Judgment of 7 September 2006, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, C-484/04, ECLI:EU:C:2006:526, para 38; Judgment of 14 October 2010, *Union syndicale Solidaires Isère v Premier ministre and Others*, C-428/09, ECLI:EU:C:2010:612, para 36.

¹⁷ Italy.

¹⁸ Portugal, Finland.

¹⁹ Cyprus, Greece, Spain (private sector), Belgium (private sector), Malta, Poland.

²⁰ France, Hungary, United Kingdom.

²¹ Bulgaria, Austria, Czech Republic, Estonia, Croatia, Germany, Belgium (public sector), Spain (public sector and armed forces), Ireland, Lithuania, Netherlands, Slovenia, Slovakia.

²² Lithuania, Portugal.

²³ Croatia, Poland.

²⁴ Bulgaria, Estonia, Lithuania, Slovenia, Slovakia.

- the timing²⁵ (most commonly not at the beginning or end of working time);
- the possibility to split the break into shorter periods²⁶;
- whether exceptions are provided (some Member States allow a shorter minimal break, which must still be long enough to allow the worker to eat, in limited circumstances).

Importantly, a number of Member States have established more protective provisions as regards the length of the working day for which workers are entitled to rest breaks²⁷ or as to additional or longer breaks to which workers are entitled if their working day goes beyond 6 hours²⁸.

However, some Member States do not set a minimum duration or other detailed terms for the rest break by law. Instead the legislation lays down only more general terms that the break must be ‘on such a scale that the purpose of the break is reached, that its timing is determined according to the normal rules at the work place’²⁹, that it must be ‘adapted to the nature of the activity exercised’³⁰, or that the number of breaks, the duration of these breaks and their timing must be satisfactory³¹. In Romania, the Labour Code states that the breaks must be in accordance with the terms of the applicable collective employment contract or with the terms of the employer’s internal rules³². In these countries, employers are empowered to determine the detailed terms applying to breaks, as long as the provisions in the legislation and applicable collective agreements are respected.

The Directive allows collective agreements to establish the duration and other terms applying to the break, but as the Member States have a responsibility to ensure that all workers have the terms governing rest breaks laid down in collective agreements or legislation, the lack of precise terms in legislation may constitute a breach of the Directive. Furthermore the provisions in national law transposing the Directive may not leave the duration and terms applying to rest breaks to be defined by individual agreements between the worker and the employer concerned or by the employer alone.

In Denmark and Sweden, collective agreements are very common. Whereas in Denmark most sectoral collective agreements determine the terms applying to breaks, this does not seem to be the case in Sweden. It is not clear to what extent the terms applying to breaks are determined in collective agreements at the local level.

In Romania the number of collective agreements has decreased in recent years. As a result, today the duration and the terms under which the lunch break is granted are most often set in

²⁵ Slovenia (not in the first and last hour of the working day), Ireland (not at the end of the working day), Cyprus (not at the start or end of the working day).

²⁶ Netherlands (the break can be split into periods of 15 minutes), Austria (the break can be split into two periods of 15 minutes or three of 10).

²⁷ Sweden (5 hours), Netherlands (5.5 hours), Ireland (4.5 hours).

²⁸ Hungary (additional 25 minutes for working days of over 9 hours), Netherlands (break of 45 minutes for working days of over 10 hours), Finland (additional 30 minutes after 8 hours of work where the working time exceeds 10 hours in a day), Germany (break of 45 minutes for working days of over 9 hours).

²⁹ Denmark (Statutory Act No 896 of 2004 on the implementation of parts of the Working Time Directive section 3).

³⁰ Luxembourg (The Labour Code Art. L. 211-16).

³¹ Sweden (The Swedish Working Hours Act (1982:673) Section 15).

³² Romania (The Labour Code (Law No 53/2003) Article 134).

the internal rules of the employer. Some collective agreements have more detailed provisions about breaks whereas others do not.

In Luxembourg, some collective agreements provide more detailed rules on the rest breaks.

B. Daily rest

Article 3 of the Directive provides for a *minimum daily rest* of 11 consecutive hours:

'Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.'

This core requirement appears to have been satisfactorily transposed into national law by Member States for most sectors. However there are, some unclarities for sectors or groups of workers which are, as described in Chapter II A, not included or exempted from the national working time legislation. Furthermore the act applying to members of the regular staff in the Hungarian army provides only for a period of 8 hours daily rest during on-call duty and continuous duty³³.

Most Member States require a minimum of 11 consecutive hours of rest, as imposed by the Directive³⁴. However some Member States go further by requiring a minimum rest of 12 consecutive hours³⁵.

Some issues on the use of derogations and exclusions in certain Member States are also considered in Chapter VIII.

C. Weekly rest

Article 5 provides that:

'Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.

If objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied.'

In other words, Article 5 provides for a minimum 35-hour continuous rest period for every period of 7 days, which may only be reduced to 24 hours if objectively justified. Article 16(a)

³³ Act CCV of 2012 on the Legal Status of Soldiers (Hjt.) Article 101.

³⁴ Belgium, Cyprus, Czech Republic (change in 2013 from 12 to 11 hours), Denmark, Germany — at the end of the working day, Estonia, Ireland, Greece (change in 2012 from 12 to 11 hours), Spain (Guardia civil and police), France, Italy, Lithuania, Luxembourg, Hungary, Malta, Netherlands, Austria, Poland, Portugal, Finland, Sweden, United Kingdom.

³⁵ Bulgaria, Spain (private sector), Croatia, Latvia, Romania, Slovenia (but only 11 hours if the working time is irregularly distributed or temporarily redistributed), Slovakia.

of the Directive allows Member States to lay down a reference period of up to 14 days for the purpose of granting this weekly rest.

This provision has been transposed into national law by the majority of Member States. While around half of the Member States stick to the minimum requirements set out in the Directive³⁶, a number of Member States go beyond the minimum and provide workers with 36³⁷, 42³⁸, 44³⁹ or 48⁴⁰ hours of rest per week.

Some Member States also establish additional rules such as a requirement to grant weekly rest as far as possible simultaneously for all employees⁴¹ or whenever possible on the same day for workers of the same household⁴².

Also, the Directive no longer has a requirement for the weekly rest to fall preferably on Sundays, although it remains the ‘normal’ weekly rest day in many Member States⁴³.

The possibility for weekly rest to be reduced to 24 hours for objective reasons is transposed in several Member States⁴⁴. In addition, a number of Member States make use of the flexibility to allow for an average weekly rest over a reference period of two weeks⁴⁵.

A few Member States appear to have transposed the requirement for weekly rest incorrectly in some respects, e.g. because the requirement is not transposed for a certain sector⁴⁶, or by providing for the use of a 24-hour rest period without the presence of concrete objective reasons⁴⁷. Furthermore, unclarities remain for sectors or groups of workers which are, as described in Chapter II A, not included or exempted from the national working time legislation. The use of derogations and exclusions in certain Member States is also considered in Chapter VIII.

³⁶ Belgium (public sector), Cyprus, Czech Republic, Denmark, Ireland, Greece, France, Italy, Malta, Poland, Portugal, Finland, Slovenia (24+12 for regular working hours and 11 hours for irregular working hours), United Kingdom.

³⁷ Spain (private sector), Croatia, Netherlands, Austria, Sweden.

³⁸ Latvia.

³⁹ Luxembourg.

⁴⁰ Bulgaria, Estonia, Hungary (the 48 hours of weekly rest may also be split into two non-consecutive weekly rest days), Romania, Slovakia, Spain (Guardia civil and police).

⁴¹ Denmark.

⁴² Portugal.

⁴³ Belgium (private sector), Bulgaria, Denmark, Germany, Ireland, Greece, France, Croatia, Italy, Luxembourg, Austria, Portugal, Romania, Slovakia.

⁴⁴ Bulgaria, Greece, Ireland, Croatia, Austria, Poland, Slovenia, Finland, United Kingdom.

⁴⁵ Belgium (public sector), Cyprus, Ireland, Spain (private sector), Italy, Malta, Netherlands, Finland, United Kingdom.

⁴⁶ Spain (civil servants).

⁴⁷ Belgium, Slovenia (health sector).

V. Limits to weekly working time

A. Maximum weekly working time

Article 6 of the Working Time Directive provides that:

'Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

(a) the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

(b) the average working time for each seven-day period, including overtime, does not exceed 48 hours.'

The methods for regulating maximum weekly working time vary greatly between the Member States, but in general the requirement that weekly working time must not exceed an average of 48 hours per week seems to have been satisfactorily transposed.

Most EU Member States limit maximum average weekly working time to 48 hours⁴⁸. In some cases this is indicated by setting a normal working time (usually 40 hours) and a limit to overtime (usually of 8 hours)⁴⁹.

Some Member States have set lower limits, allowing in some cases for derogations: Belgium has set the maximum weekly working time at 40 hours (but 38 for public service, including the armed forces and the police, and 48 for doctors, dentists and veterinarians); Spain and Slovakia have also set the maximum weekly working at 40 hours.

Under EU law, the limit of 48 hours maximum weekly working time has to include overtime. This is explicit in national legislation in Greece, Croatia, Italy, Lithuania, Hungary, Poland, Portugal, Romania, Slovakia, Sweden and the UK.

Most EU Member States indicate additional limits to overtime: these include specific cases in which it can be performed, procedures for its request and refusal, and an annual limit to overtime which is either additional to or substitutes the weekly working time limit.

Since 2010 several countries have clarified their transposition measures and improved their compliance with the requirements of the Directive on maximum working time. Spain has

⁴⁸ Denmark, Estonia, Ireland, Greece, Italy, Cyprus, Lithuania, Luxembourg, Hungary, Malta, Netherlands, Poland, Portugal, Romania, Sweden, United Kingdom.

⁴⁹ Czech Republic (40 hours of maximum weekly working time +8 hours maximum of overtime work per week in average, but not counting overtime balanced by equivalent compensatory leave), Latvia (40 hours of maximum weekly working time +8 hours maximum of overtime work per week), Finland (40 hours of maximum weekly working time excluding overtime, which is limited to 138 hours per 4 months period and 250 hours per calendar year).

introduced new regulations limiting the working time for the Guardia Civil⁵⁰. France has adopted a number of decrees in order to introduce the thresholds and ceilings of the Working Time Directive for professions where what is called the ‘equivalence system’ is used. One of the changes that Italy has made to its transposition of derogations for doctors in the public health service is to place restrictions on maximum working time for this category of workers⁵¹. Latvia has slightly reduced the limit on overtime work in order to comply with the Directive⁵².

The Directive’s restrictions on maximum working time (among others) have still not been satisfactorily transposed by Ireland for social care workers nor by Greece as regards doctors in public health services, but work is ongoing to remedy the situation.

The Bulgarian Labour Code Article 142 provides for a weekly working time of up to 56 hours where a system of average calculation of the weekly working time has been established.

Also Bulgaria does not limit the use of compulsory overtime for national defence forces, for emergency response, for urgent restoration of public utilities or transport or for the provision of medical assistance⁵³.

Furthermore, some unclarities remain for sectors or groups of workers which are, as described in Chapter II A, not included or exempted from the national working time legislation.

B. Reference period

Weekly working time (for the purposes of the limit in Article 6) is to be calculated by taking the average over a reference period. Member States may lay down a reference period but this should not be longer than 4 months.⁵⁴

Indeed, the normal reference period for calculating the maximum weekly working time is 4 months⁵⁵ or 16⁵⁶ (or 17⁵⁷) weeks in most Member States.

In some cases more protective limits have been set: in Belgium 3 months (outside the public service) or 13 weeks (for doctors, dentists and veterinarians)⁵⁸, 4 weeks in Slovakia (for evenly distributed working time) and 12 weeks in France⁵⁹.

⁵⁰ General Order No 11 of 23 December 2014 laying down the duty systems and the working and duty hours of Civil Guard staff and repealing General Order No 4/2010.

⁵¹ Law 161 of 30 October 2014 Article 14.

⁵² The Labour Law of 2001 Section 136.5.

⁵³ Labour Code Article 146.3.

⁵⁴ Article 16 (b) of the Directive.

⁵⁵ Belgium, for public service, Denmark, Estonia, Ireland, Croatia, Italy, Cyprus, Lithuania (in case of summary recording of working time schemes), Poland, Portugal, Romania, Slovakia (in case of uneven distribution of working time) and Finland (for overtime).

⁵⁶ Netherlands.

⁵⁷ Malta, Austria, United Kingdom.

⁵⁸ Under Law 12 of December 2010 setting a maximum weekly working time of 48 hours in average over a period of 13 weeks.

A reference period of up to 6 months may be adopted as a derogation:

- 1) by laws, regulations or administrative provisions, collective agreements, agreements between the two sides of industry in the situations specified in Article 17(3); or
- 2) outside the situations specified in Article 17(3), only by collective agreement or agreement of the two sides of industry.

This derogation has been implemented in Cyprus⁶⁰, the Czech Republic⁶¹, Estonia⁶², Ireland⁶³, Spain⁶⁴, Croatia⁶⁵, Italy, Austria, Portugal, Romania and the UK.

It seems that the four-month limit is exceeded without being limited to the activities mentioned in Article 17(3) of the Directive in Germany⁶⁶, in Bulgaria⁶⁷ and in Slovenia⁶⁸, where in all cases it is set at 6 months, and in Spain, where it is set at 12 months⁶⁹.

Additionally, Member States may, as long as they comply with the general principles on the safety and health of workers, allow collective agreements or agreements between the two sides of industry to set reference periods not exceeding 12 months, ‘for objective or technical reasons or reasons concerning the organisation of work’.

In many cases, the national legal framework allows collective agreements or agreements between the two sides of industry to set reference periods not exceeding 12 months. However, it is unclear if this is only ‘for objective or technical reasons or reasons concerning the organisation of work’ and whether such agreements have to comply with the general principles on the safety and health of workers.

This is the case in Belgium, the Czech Republic⁷⁰, Denmark, Germany⁷¹, Estonia⁷², Ireland⁷³, Latvia⁷⁴, Malta⁷⁵, Austria⁷⁶, Portugal⁷⁷ and the UK⁷⁸.

In other cases the national legal framework allows collective agreements or agreements between the two sides of industry to set reference periods not exceeding 12 months ‘for

⁵⁹ The Labour Code Article L3121-36 Maximum working time is as a main rule limited to 44 hours averaged over a 12 weeks reference period.

⁶⁰ Organisation of Working Time Law 63(I)/2002 (6 months).

⁶¹ Law No 294/2008 (26 weeks for health service professionals working in certain 24-hour health services).

⁶² The Employment Contract Act of 17 December 2008 Article 171 (security guards).

⁶³ (6 months).

⁶⁴ Law No 55/2003 Article 48 for the health sector.

⁶⁵ By collective agreement.

⁶⁶ Working Time Act Articles 7(8) and 14.

⁶⁷ The Labour Code Art. 142, The Civil Servants Act Art. 49.

⁶⁸ The ZDR-1 Article 144.3.

⁶⁹ The Labour Code Article 34.2.

⁷⁰ Labour Code No 262/2006 Articles 83(1) and 93(4).

⁷¹ The Working Time Act Article 7(8).

⁷² Employment Contract Act of 17 December 2008 Article 46(2).

⁷³ Organisation of Working Time Act 1997 Sections 15 and 24.

⁷⁴ Labour Law Section 140(3) and (4).

⁷⁵ Organisation of Working Time Regulations of 2003 (Subsidiary legislation 452.87) Reg. 18.

⁷⁶ Working Hours Act 461/1969 (AZG) Section 9 (4) technical or work organisation reasons mentioned.

⁷⁷ Labour Code No 99/2003 of 27 August 2003 Article 207.

⁷⁸ Working Time Regulations 1998 Regulation 23.

objective or technical reasons or reasons concerning the organisation of work' only. However, it remains unclear whether such agreements have to comply with the general principles on the safety and health of workers. This is the case in Cyprus, Italy and Slovakia.

Under the Directive Article 16b, the minimum paid annual leave under Article 7 and periods of sick leave are not included or are neutral in calculating the average.

This is clearly indicated only in a minority of Member States: Ireland, Greece, Croatia, Italy, Portugal and the UK. Romanian legislation stipulates that the duration of the paid annual leave and periods of suspension of the individual employment contract are not to be taken into account.

VI. Paid annual leave

A. The entitlement to minimum 4 weeks paid leave

Article 7 entitles every worker to paid annual leave of at least 4 weeks.

All Member States explicitly provide for a right to at least 4 weeks' annual paid leave. A number of Member States provide for a minimum period of paid annual leave which, depending on the number of days in the working week in the different Member States, may exceed 4 weeks; for example:

22 days: Portugal

24 days: Belgium, Germany

25 days : Denmark, France, Luxembourg, Sweden

28 days: Estonia, UK

30 days: Spain, Austria, Finland

Consequently the right to at least 4 weeks paid annual leave has been satisfactorily transposed into national law in all the Member States. In several Member States the days of leave to which the employee is entitled increase with the employee's age or period of service⁷⁹.

Specific groups such as civil servants, teachers⁸⁰ and personnel in the armed forces may also enjoy longer annual leave periods⁸¹. In many Member States, collective agreements provide more favourable rights to annual leave.

⁷⁹ Hungary (extra days for age and children), Poland (26 days for workers employed more than 10 years), Finland (extra days for central government officials with more than 15 years of service).

⁸⁰ Bulgaria.

⁸¹ Greece (civil servants), Bulgaria (teachers and army personnel).

B. Acquiring and exercising rights when the worker starts his/her employment

Under CJEU case-law⁸² it is not compatible with the Directive for a Member State to impose a minimum (qualifying) period of uninterrupted work for the same employer which a worker must complete before he or she can begin to *acquire* rights to annual leave.

Qualification periods for *exercising* annual leave entitlements (for actually taking the leave acquired) are a slightly different situation. The Court acknowledged in *BECTU* that Article 7(1) allowed Member States to set some conditions on how workers exercise the rights they had acquired and clarified this by saying that the *Member States* could organise the manner in which workers may take the annual leave to which they are entitled *during the early weeks of their employment*⁸³. However, the reference to the ‘*early weeks of employment*’ suggests that the Court is limiting Member States to a relatively short qualification period before a worker can exercise their rights to paid annual leave.

Many Member States provide that the right to paid annual leave may be acquired *pro rata temporis* (i.e. at the rate for the time worked) during the first year of employment⁸⁴. In these Member States the worker will then be entitled to exercise the leave acquired accordingly as laid down in the national rules for exercising annual leave rights.

In Slovenia the worker obtains the right to annual leave (4 weeks) by entering into the employment relationship. By contrast, in Germany and Austria workers are entitled to full leave entitlements after 6 months of employment.

Some Member States do, however, impose conditions on the exercising of paid annual leave in the first year of employment by laying down 6-8 month qualification periods before leave entitlements can be exercised⁸⁵.

A few Member States⁸⁶ have systems in which the right to annual leave *with pay* is acquired based on the earnings of the worker in a qualification year which precedes the year in which the paid annual leave can be taken (‘the holiday year’). The worker is entitled to time off in the holiday year, but without pay. These rules may result in a delay of more than a year in allowing workers to take their accrued paid annual leave entitlements. This seems to go beyond organising the manner in which workers may take their annual leave during the early weeks of their employment.

⁸² Judgment of 26 June 2001, *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, C-173/99, ECLI:EU:C:2001:356, para.64; Judgment of 10 September 2009, *Francisco Vicente Pereda v Madrid Movilidad SA*, C-277/08, ECLI:EU:C:2009:542, para 19; Judgment of 20 January 2009, *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund and Stringer and Others v Her Majesty's Revenue and Customs*, joined cases C-350/06 and C-520/06, ECLI:EU:C:2009:18, para 28. .

⁸³ Judgment in case C-173/99, *op. cit.*, para 61.

⁸⁴ Czech Republic, Estonia, Greece, Malta, Netherlands, Poland, Portugal, Slovenia, Slovakia, Finland, United Kingdom.

⁸⁵ Bulgaria (the Labour Code Article 155(2) - 8 months), Estonia (the Employment Contracts Act § 68 (4) - 6 months).

⁸⁶ Denmark, Finland, Sweden

C. Acquiring rights during sick leave and carrying over leave entitlements which cannot be exercised because they coincide in time with periods of sick leave

The Court held in the rulings *Schultz-Hoff and Stringer*, *Dominguez* and *Heimann* that a worker who is unable to work due to illness remains entitled to paid annual leave in respect of the period of sick leave⁸⁷.

The Court has also held that:

- in the case of a worker who has been on sick leave for the whole or part of the leave year and has not actually had the opportunity to exercise his/her right to paid annual leave, the right to paid annual leave cannot be extinguished at the end of the reference period⁸⁸; but
- the worker concerned should be allowed to carry it over, by scheduling it if necessary, outside the reference period for annual leave⁸⁹.

Member States may limit the duration during which paid annual leave can be carried over, but the Court has also framed that possibility by ruling that ‘*any carry-over period must be substantially longer than the reference period in respect of which it is granted*⁹⁰’. A carry-over period of 15 months has been accepted by the Court⁹¹.

Many Member States have amended their legislation on acquiring and carrying over annual leave in the context of sick leave and maternity leave⁹².

However, most Member States do not have explicit legal provisions on this point. Some state that the worker is entitled to acquire paid annual leave entitlements when on sick leave. This is the case for Belgium, Ireland, Greece, Latvia, Hungary, the Netherlands, Romania, Finland and Sweden. Some of these Member States apply a maximum period of acquisition⁹³ whereas others do not have such a time limit⁹⁴.

⁸⁷ Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, paras. 36-43; Judgment of 24 January 2012, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, C-282/10, ECLI:EU:C:2012:33, para. 20; Judgment of 8 November 2012, *Alexander Heimann and Konstantin Toltschin v Kaiser GmbH*, joined cases C-229/11 and C-230/11, ECLI:EU:C:2012:693..

⁸⁸ Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, paras. 38-49; Judgment in case C-277/08, *op. cit.*, para 19.

⁸⁹ Judgment of 21 June 2012, *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Federación de Asociaciones Sindicales (FASGA) and Others*, C-78/11, ECLI:EU:C:2012:372, para 23; Judgment in case C-277/08, *op. cit.*, para 23.

⁹⁰ Judgment of 22 November 2011, *KHS AG v Winfried Schulte*, C-214/10, ECLI:EU:C:2011:761., para 38-40.

⁹¹ Judgment in case C-214/10, *op.cit.*, para 38-40.

⁹² Denmark, Spain, Ireland, Hungary, Netherlands, Romania, Slovenia.

⁹³ Belgium (Arrêté royal of 30 March 1967 Article 16, 12 months; Greece ‘a relatively short illness’; Finland (Annual Holidays Act 162/2005, 75 days), Sweden (Annual Leave Act SFS 1977:480 Section 17, 180 days),.

⁹⁴ Hungary, Latvia, Romania.

Many Member States also have provisions which entitle the worker to carry over or postpone acquired periods of annual leave when the leave coincides with a period of sick leave^{95, 96}. In France and the UK there is case-law laying down a certain carry-over period.

About half of the Member States which regulate this aspect of the right to paid annual leave apply some sort of maximum carry-over period, but there is a great variety in the length of this period⁹⁷. The other Member States do not have a maximum limit⁹⁸. In several countries the period before the entitlement to leave with pay is lost is not substantially longer than 12 months, which appears excessively short.

In case C-342/01 Merino Gomez⁹⁹, the CJEU concluded that a worker must be able to take her annual leave during a period other than the period of her maternity leave. Some Member States have explicit provisions which entitle workers to carry over periods of annual leave which would otherwise take place at the same time as the employee's maternity or paternity leave¹⁰⁰.

D. Pay

In its judgment in *Robinson-Steele*, the Court stated that '*for the duration of annual leave within the meaning of the Directive, remuneration must be maintained. In other words, workers must receive their normal remuneration for that period of rest*¹⁰¹.'

In its judgments in *Williams*¹⁰² and in *Lock*¹⁰³ the Court set out its view as regards which components of pay are to be included when calculation the pay during annual leave.

⁹⁵ Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Hungary, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovenia, Finland, Sweden.

⁹⁶ For some Member States this right may imply the recognition of a period of sick leave as a period of acquiring annual leave, but the Commission does not yet have clear information on this.

⁹⁷ Bulgaria (The Labour Code Article 177 - 2 years from the end of the year for which it is granted), Denmark (Consolidated Act 202 of 2013 on Holidays Article 13.5 - in the following holiday year); Estonia (The Employment Contract Act of 17 December 2008 Article 68 - within 1 year as of the end of the calendar year for which the holiday is calculated); Lithuania (The Labour Code of 4.6.2002 Article 174 - in the next annual leave year); Hungary (by 30 June of the following calendar year or by the end of the calendar year in which the worker returned to work if it was not possible to use it before); Netherlands (Civil Code Article 7:642 - 5 years if the employee was not able to use the leave due to sickness); Slovenia (Employment Relationships Act (No.21/2013) Article 162 - by 31 December of the following year); Finland (Annual Holidays Act 162/2005 Article 26, a postponed summer holiday may be granted during the same calendar year after the holiday season, and a postponed winter holiday by the end of the following calendar year).

⁹⁸ Czech Republic, Germany, Ireland, Latvia, Luxembourg, Sweden.

⁹⁹ Judgment of 18 March 2004, *María Paz Merino Gómez v Continental Industrias del Caucho SA*, C-342/01, ECLI:EU:C:2004:160.

¹⁰⁰ France, Croatia, Spain, Austria, Slovakia, Finland.

¹⁰¹ Judgment of 16 March 2006, *C. D. Robinson-Steele v R. D. Retail Services Ltd and Michael Jason Clarke v Frank Staddon Ltd and J. C. Caulfield and Others v Hanson Clay Products Ltd, joined cases C-131/04 and C-257/04*, ECLI:EU:C:2006:177. , para 50; similarly Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, , para 61.

¹⁰² Judgment of 15 September 2011, *Williams and Others v British Airways plc.*, C-155/10, ECLI:EU:C:2011:588.

¹⁰³ Judgment of 22 May 2014, *Z.J.R. Lock v British Gas Trading Limited*, C-539/12, ECLI:EU:C:2014:351.

In *Williams* the Court stated that the worker ‘*is entitled, during his annual leave, not only to the maintenance of his basic salary, but also, first, to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status.*’ (Para. 31)

‘*By contrast, the components of the worker’s total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the tasks which the worker is required to carry out under his/her contract of employment, such as costs connected with the time that commercial airline pilots have to spend away from their base, need not be taken into account in the calculation of the payment to be made during annual leave.*’ (Para. 25)

In *Lock* the Court concluded that a commission which varied with the worker’s number of sales had to be included when calculating the payment during annual leave.

The legislation in all Member States entitles the worker to receive his/her ‘average pay’, ‘normal weekly rate’, ‘average monthly remuneration’ or similar.

The legislation in several Member States is specific that the worker is entitled to receive both fixed and variable elements of salary¹⁰⁴ or to receive benefits in kind¹⁰⁵.

The reference period used as the basis for the calculation varies greatly. Some Member States use the entire year preceding the holiday year or the last 12 months before annual leave¹⁰⁶. Some use a period of 1-3 months prior to the start of the holiday¹⁰⁷. Sweden and Finland apply different methods according to the type of salary of the worker (fixed weekly or monthly or varying).

On pay, the legislation in the Member States is by and large compatible with the Directive.

E. Right to paid leave upon termination of the employment contract

Article 7(2) states that the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

All the Member States provide for an entitlement to a payment in lieu when the employment relationship ends without annual leave being taken. About half of the Member States’ legislation contains explicit provisions that this is the *only* case in which it is permissible to award the worker a payment in lieu, often citing the Directive itself¹⁰⁸. The Commission does

¹⁰⁴ Belgium, Denmark, France, Hungary, Poland, Romania, Finland, Sweden.

¹⁰⁵ Germany, Ireland, France, Hungary.

¹⁰⁶ Belgium, France, Sweden (ia. if the remuneration has variable components), Poland (if the remuneration has varied considerably).

¹⁰⁷ Bulgaria (1 month), Germany (13 weeks), Luxembourg, Hungary (3 months), Poland (when the remuneration has not varied considerably), Romania (3 months).

¹⁰⁸ Denmark, Estonia, Greece, Italy, Cyprus, Latvia, Lithuania, Malta, Austria, Romania, Slovakia, United Kingdom.

not have information as to whether the other Member States allow payments in lieu to be used in other situations.

VII. Protection of night and shift workers

A. Definitions

1. 'Night time'

Article 2(3) of the Directive defines *'night time'* as *'any period of not less than seven hours, as defined by national law, and which must include in any case the period between midnight and 5 a.m.'*

In this respect, all Member States have transposed the core 'night time' period between midnight and 5 am. Some limit their national definitions to the minimum 7 hours required by the Directive, with the start of night time varying between 22:00¹⁰⁹, 23:00¹¹⁰ and midnight¹¹¹, and ending at 05:00, 06:00 or 07:00. On the other hand, most Member States¹¹² define working time as an eight-hour period and the vast majority of those doing so stipulate that night time starts at 22:00 and ends at 06:00. Finally, two Member States provide for a nine-hour period¹¹³ and two define night time as a 10-hour period¹¹⁴.

In most Member States, different definitions of night time can be agreed through collective agreements but the Directive requires that the period concerned must consist of at least 7 hours and that it includes the period between 00:00 and 05:00.

The Commission notes two issues with how this provision has been transposed in Italian and Dutch legislation. Italian law does not provide for a definition of night time but delegates this responsibility to collective agreements under the conditions imposed by the Directive (minimum of 7 hours including the period between 00:00 and 05:00)¹¹⁵. Dutch law defines night time as the period between midnight and 06:00, i.e. shorter than the minimum seven-hour period imposed by the Directive¹¹⁶.

¹⁰⁹ Denmark, Austria.

¹¹⁰ Ireland.

¹¹¹ Cyprus, Germany (except for bakery workers for whom it is between 22:00 and 05:00), Slovenia (except for shift work for which it is between 22:00 and 07:00), Finland, United Kingdom.

¹¹² Bulgaria, Czech Republic, Estonia, Greece, Spain (except in the health sector where night time is between 23:00 and 07:00), Croatia (except in agriculture, where night time is between 22:00 and 05:00), Latvia, Lithuania, Luxembourg (except in the hotel and restaurant sector, where night time is between 23:00 and 06:00), Hungary, Malta, Romania, Slovakia, Sweden.

¹¹³ Portugal, where night time is from 22:00 and until 07.00, and France, where it runs from 21:00 to 06:00 (except for the public sector, where it is from 22:00 until 05.00).

¹¹⁴ Belgium (between 20:00 to 06:00) and Poland (between 21:00 and 07:00).

¹¹⁵ Legislative Decree 66/2003 Article 1.

¹¹⁶ Working Hours Act of 23 November 1995 Article 1:7 letter d.

2. 'Night worker'

Article 2(4) of the Directive defines '*night worker*' as:

'on the one hand, any worker who during night time works at least three hours of his daily working time as a normal course; and ... on the other hand, any worker who is likely during night time to work a certain proportion of his annual working time, as defined... by national legislation, following consultation with the two sides of industry, or by collective agreements or agreements between the two sides of industry at national or regional level.'

The Directive is not entirely clear on whether the two criteria for qualifying as a night worker are cumulative or alternative, but case-law¹¹⁷ suggests that they are alternative.

It appears that Ireland applies cumulative conditions and thus requires that to be considered a night worker, the workers concerned must carry out at least 3 hours of their daily working time during night time *and* that the number of hours worked at night must reach 50 % of the total number of hours¹¹⁸. This would be a too limited definition.

All other Member States treat the criteria as alternative, sometimes with the more protective provision that the entire shift during which a certain amount of night work was performed must be counted as night work.

In terms of definitions under the first criterion, in most Member States a worker must work at least 3 hours of his/her daily working time during night time to be considered as 'a night worker'¹¹⁹. Some Member States qualify as night workers those who regularly work at least 3 hours at night¹²⁰. However, in Germany a night worker is one who normally works for 2 hours during night time or where he/she works in rotating shifts during which night work is normally carried out. France qualifies as night workers those who work at least twice per week for at least 3 hours at night. In Hungary or Austria any worker working 'regularly' at night counts as a night worker, without any minimum duration. In Belgium, a night worker carries out night work with no minimum duration and the law does not seem to require any particular regularity.

The second criterion refers to any worker who is likely during night time to work a 'certain proportion of his annual working time' defined either by legislation or by collective agreement. Most Member States fix the proportion by law, sometimes allowing derogations by collective agreement. One Member State¹²¹ does not fix the proportion by law and leaves it entirely up to collective agreements. As to the other Member States, they define the proportion in varying ways:

¹¹⁷ Judgment of 3 October 2000, *Sindicato of Médicos of Asistencia Pública (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, C-303/98, ECLI:EU:C:2000:528, para. 37.

¹¹⁸ Organisation of Working Time Act, 1997 Section 16.

¹¹⁹ Bulgaria, Czech Republic, Estonia, Greece Spain Croatia, Italy, Cyprus, Lithuania, Luxembourg, Malta Poland, Portugal, Romania, Slovenia, Sweden, United Kingdom.

¹²⁰ Bulgaria (employees who work in shifts qualify as night workers where one shift includes at least 3 hours of night work), Denmark, Slovakia.

¹²¹ United Kingdom (Working Time Regulations 1998 Regulation 2).

- at least an average of three hours of his working time within 24 consecutive hours at least once a week within a reference period of 26 weeks: Czech Republic
- at least 48 days per year: Germany, Austria
- at least 3 hours per day for 80 days: Italy
- at least equivalent to 3 hours per day: Portugal
- at least 270 hours per year: France
- at least 300 hours per year: Denmark
- at least 500 hours per year: Slovakia
- at least 726 hours per year: Greece and Cyprus ¹²²
- at least a quarter of annual working time: Lithuania, Luxembourg, Poland
- at least 30 % of monthly working time: Romania
- at least a third of annual working time: Estonia, Spain, Croatia, Sweden
- at least half of annual working time: Malta

3. 'Shift work' and 'shift worker'

A shift worker is defined by the Directive as *'any worker whose work schedule is part of 'shift work'*. 'Shift work' is defined by Article 2(5) as: *'any method of organising work in shifts whereby workers succeed each other at the same work station according to a certain pattern, including a rotating pattern, and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks'*.

The concepts of shift work and of shift worker have been correctly transposed in Belgium, Cyprus, the Czech Republic, Greece, Croatia, Hungary, Latvia, Malta, Poland, Portugal, Spain, Italy, Romania, Slovakia and the UK. In a number of other Member States,¹²³ the definition contained in the Directive has not been clearly transposed.

B. Limits to night work

1. Eight-hour normal work on average

Article 8(a) requires that the normal hours of work for night workers do not exceed an average of 8 hours per 24-hour period. According to Article 16(c) the reference period for the application of this limit is to be defined after consultation with the two sides of industry or in collective agreements.

It is logical that the reference period applicable for night work should be substantially shorter than that used for the maximum working week, given the Directive's objective to lay down minimum health and safety requirements and the need to ensure the provision on night work

¹²² In both Member States, all hours of any period of work lasting 7 consecutive hours and including at least 3 hours during night time in Cyprus and during the period 24:00 to 05:00 in Greece are counted as night hours for the purpose of qualifying workers as night workers, regardless of the start/end of the shift.

¹²³ Bulgaria, Germany, Estonia, Ireland, France, Lithuania, Luxembourg, Netherlands, Austria, Slovenia, Sweden.

remains effective. Indeed, establishing the same reference periods for both provisions would *de facto* render the night work provision pointless since compliance with the average 48-hour working week and the 24-hour weekly rest period would automatically ensure that the daily working time is 8 hours on average. The reference in Recital 6 to the principles of the International Labour Organisation supports this interpretation.

Member States transposed the eight-hour average limit on the work of night workers with reference periods varying from 1 week¹²⁴ to 4 months¹²⁵. Some Member States set 15 days¹²⁶, 1 month¹²⁷, 2 months¹²⁸ or 3 months¹²⁹ as reference periods while one Member State left it entirely to collective agreements¹³⁰.

A number of Member States do not apply specific limitations to the average working time of night workers, but only set a *general* limit of 8 hours and a general reference period for a maximum working time of 4 months¹³¹. A reference period of 4 months is in any case too long to ensure effective protection for night workers.

Some Member States set higher levels of protection either by imposing a shorter (seven-hour) limit on normal night work hours¹³² or by imposing an absolute limit of 8 hours of work for all night workers¹³³.

2. Eight-hour absolute limit for work involving special hazards or heavy strain

Most Member States¹³⁴ have transposed this provision appropriately either through specific provisions or by laying down a general absolute limit for all workers carrying out night work. Some Member States apply this absolute limit more broadly, for example by adding shift workers or continuous activities¹³⁵, or work that risks reducing the vigilance of a night worker, i.e. monotonous work or work requiring sustained concentration¹³⁶.

¹²⁴ Estonia, Greece (longer reference period possible through collective agreement), Luxembourg, Portugal (longer reference period possible through collective bargaining where a flexitime system applies, or else by law).

¹²⁵ Denmark (Act No 896 of 2004 on the implementation of parts of the Working Time Directive Section 5); Croatia (Labour Act No 93/14 Article 69); Malta (collective agreement or 17 weeks); Netherlands (Working Hours Act of 23 November 1995 Section 5:8); Slovakia (Act No 311/2001 The Labour Code Article 98); Sweden (Working Hours Act SFS 1982:673 Section 13a); Slovenia (The Employment Relationships Act (No 21/2013) Article 152); United Kingdom (Working Time Regulations 1998 Reg. 6).

¹²⁶ Spain (possible extension to 4 months in certain sectors of activity by collective agreement).

¹²⁷ Cyprus, Lithuania.

¹²⁸ Ireland.

¹²⁹ Belgium, Romania.

¹³⁰ Italy.

¹³¹ Hungary, Poland and Finland.

¹³² Bulgaria, Latvia.

¹³³ France, Austria.

¹³⁴ Belgium, Bulgaria, Cyprus, Denmark, Estonia (general absolute limit), Ireland, Greece, Spain, France (general absolute limit), Croatia, Latvia, Lithuania (although staff carrying out on-call or standby time appear to be excluded from the limit), Luxembourg, Hungary, Malta, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden, United Kingdom.

¹³⁵ Belgium.

¹³⁶ Luxembourg, Portugal.

Three Member States appear not to have transposed this provision of the Directive¹³⁷ and one allows for certain exceptions which are not provided for in the Directive for this kind of work¹³⁸.

Some Member States do not define work involving special hazards or heavy physical or mental strain¹³⁹. Other Member States define it in law or regulations¹⁴⁰, by collective agreement¹⁴¹ or by the employer, often with the cooperation of workers' representatives and as part of compulsory risk assessments¹⁴². Since hazardous work is allowed to be defined by national legislation and/or practice or by collective agreements, this does not breach the Directive. However, the variety in the definitions and criteria applied by the Member States may have the effect of varying the level of protection under this provision.

C. Protection of night workers and shift workers

Under Article 9 of the Directive (from which no derogations are permitted), Member States must take the necessary measures to ensure the following protection for 'night workers':

- a free health assessment before being assigned to night work;
- free health assessments, at regular intervals, while doing night work;
- '*whenever possible*', a transfer to '*day work to which they are suited*', if the night worker is '*suffering from health problems recognised as being connected with the fact that they perform night work*'.

The health assessments must comply with medical confidentiality, and may be conducted within the national health system (Article 9).

Article 10 of the Directive provides that '*Member States may make the work of certain categories of night workers subject to particular guarantees, in the case of workers who incur risks to their safety and health linked to night-time working*'.

Under Article 11 of the Directive, Member States must also '*take the necessary measures to ensure that an employer who regularly uses night workers informs the competent authorities, if they so request*'.

Article 12 requires Member States to take the measures necessary to ensure that '*(a) night workers and shift workers have safety and health protection appropriate to the nature of their work;*' and '*(b) appropriate protection and prevention services or facilities with regard to the safety and health of night workers and shift workers are equivalent to those applicable to other workers and are available at all times*'.

¹³⁷ Germany, Italy, Netherlands.

¹³⁸ Czech Republic (Labour Code section 94(1)).

¹³⁹ Lithuania, Romania.

¹⁴⁰ Belgium, Cyprus, Denmark, Luxembourg, Hungary, Austria, Portugal.

¹⁴¹ Belgium, Cyprus, Spain, Malta, United Kingdom.

¹⁴² Belgium, Cyprus, Ireland, Spain, Greece, Croatia, Malta, Poland, Slovenia, Finland.

Article 13 requires Member States to ‘*take the measures necessary to ensure that an employer who intends to organise work according to a certain pattern takes account of the general principle of adapting work to the worker, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate, depending on the type of activity, and on safety and health requirements, especially as regards breaks during working time.*’ This article does not refer only to night workers or shift workers, but to workers generally.

1. Health assessment before assignment to night work and at regular intervals

The entitlement to a free health assessment before the assignment of a worker to night work, and at regular intervals after that, has in general been satisfactorily transposed. In the Netherlands and Italy, however, the national law does not appear to require a health assessment before the assignment to night work.

About half of the Member States do not specify in their transposing legislation how frequently health assessments should take place¹⁴³. However, many Member States do have such a provision in place: the intervals at which health assessments have to be carried out range from every 6 months in France to every 6 years in Sweden. The Czech Republic, Portugal and Slovakia require such health examinations at least once per year, Latvia, Austria and Italy every 2 years and Belgium, Denmark, Estonia, Germany and Croatia every 3 years. In some of those Member States, the intervals at which the medical examinations are to be carried out are also shortened to 1 year or 3 years, for example, for workers above the age of 50¹⁴⁴ or for workers having worked for over 10 years at night¹⁴⁵. In Slovenia and Romania requirements on regularity are laid down in national regulations, but the Commission does not have information on these.

Additional health examinations are possible in some Member States at any time during the course of the assignment for certain workers including pregnant or breastfeeding women¹⁴⁶ or for all workers¹⁴⁷, sometimes upon request of the worker’s general practitioner¹⁴⁸.

Some Member States provide for a medical assessment that is specific for night workers, while others rely on a general scheme that entails health checks for all workers. It is not always clear how such medical examinations are carried out and how it is ensured that they are free of charge¹⁴⁹. Other Member States provide by law that the assessments are free¹⁵⁰ or that the expenses are to be paid by the employer¹⁵¹.

¹⁴³ Bulgaria, Cyprus, Ireland, Greece, Spain, Lithuania, Hungary, Malta, Netherlands, Poland, Romania,, Finland, United Kingdom.

¹⁴⁴ Belgium, Germany, Sweden, Latvia, Austria.

¹⁴⁵ Austria.

¹⁴⁶ Slovakia.

¹⁴⁷ France.

¹⁴⁸ Croatia.

¹⁴⁹ Austria, Luxembourg.

¹⁵⁰ Portugal, Cyprus, Ireland, Greece, Hungary.

¹⁵¹ Slovakia, Latvia, Italy, Germany, Bulgaria.

Confidentiality is often enshrined in the national law¹⁵² but is interpreted in varying ways.

2. Right to transfer to day work

This entitlement has, in general, been satisfactorily transposed, except in Poland where it does not appear to have been transposed.

Among Member States, the strength of the right to transfer to day work varies: while in some Member States workers must be allowed such a transfer as far as possible¹⁵³, others require that the worker be reassigned¹⁵⁴.

Several Member States also establish more protective provisions which allow certain workers to ask for transfers to day work in situations other than health problems connected with night work. This notably concerns:

- workers aged over 55 and who have worked at least 20 years in night work occupations in Belgium;
- workers whose household includes a child under the age of 12 in Germany and Austria;
- pregnant workers¹⁵⁵, sometimes limited to cases where the work would affect the worker's health and safety or that of the baby¹⁵⁶.

3. Guarantees for certain categories of night workers

The range of guarantees imposed by Member States is quite diverse but mainly concerns younger workers and pregnant workers. In many cases, these special guarantees also reflect specific provisions under other EU directives such as the Directive on the protection of young people at work (94/33/EC) or the Directive on pregnant and breastfeeding workers (92/85/EEC).

These specific guarantees include bans on night work for young workers¹⁵⁷ or on night work by pregnant workers¹⁵⁸. In the latter case, the ban can be lifted in some Member States if the worker gives her consent.

Additional guarantees in some Member States require the consent of the worker for night work in situations where the worker cares for young children¹⁵⁹ or for a disabled child, regardless of the child's age¹⁶⁰.

¹⁵² Bulgaria, Ireland, Greece, Hungary, United Kingdom.

¹⁵³ Denmark, Italy, Portugal, United Kingdom.

¹⁵⁴ Czech Republic, Germany, Croatia.

¹⁵⁵ Czech Republic, France, Luxembourg.

¹⁵⁶ Ireland.

¹⁵⁷ Bulgaria, Czech Republic, Estonia, France, Croatia, Italy, Lithuania, Poland, Romania, Slovenia.

¹⁵⁸ Bulgaria, Italy, Poland, Latvia, Lithuania.

¹⁵⁹ Under the age of 6 in Bulgaria, of 4 in Poland and of 3 in Italy, Hungary, Latvia and Lithuania.

¹⁶⁰ Bulgaria, Italy, Lithuania.

4. Notification of regular use of night workers

From the information available, the legislation of a majority of Member States is in line with the requirements of Article 11¹⁶¹. Some Member States require employers to provide a notification on the regular use of night workers regardless of whether or not the national authorities have requested it¹⁶². Member States' legislation may also require employers to provide notification about further aspects such as number of hours worked and the measures taken to ensure safe and healthy working conditions¹⁶³.

In other Member States, the specific requirement to provide notification that night workers are being used does not appear to have been transposed. However, in Denmark, Estonia, Latvia, Lithuania and Sweden it appears that employers are obliged to provide information about the regular use of night workers if the national authorities request it. It is the Commission's view that provisions of national law imposing a general obligation on employers to communicate information on their workers, working time and work organisation may correspond to the requirement for notification.

The situation in France is unclear, as no information obligation appears to have been established, although occupational medicine services are consulted prior to the start of any night work. Furthermore, in Ireland, Italy and Portugal, there do not appear to be any specific arrangements for informing the authorities, but we cannot rule out the possibility that general provisions obliging the employer to provide this information apply.

5. Safety and health protection for night workers and shift workers

Many Member States have general legislation on workers' health and safety which also applies to night and/or shift workers. It is difficult to assess whether these schemes ensure the appropriate protection of workers' health and safety while also taking account of the nature of their work.

In addition, some Member States lay down specific provisions on night and/or shift workers or shift workers such as the following:

- the obligation to provide them with hot food and refreshments¹⁶⁴;
- the prohibition on working two successive shifts¹⁶⁵;
- the obligation to establish their working hours following occupational science research on humane working conditions¹⁶⁶ or after a risk assessment¹⁶⁷.

Some Member States have incorporated into their legislation the second aspect of Article 12, namely the requirement that the appropriate protection and prevention services or facilities

¹⁶¹ Belgium, Bulgaria, Denmark, Estonia, Cyprus, Latvia, Lithuania, Greece, Spain, Luxembourg, Hungary, Malta, Romania, Slovenia, Slovakia, Finland, Sweden, United Kingdom.

¹⁶² Cyprus, Spain, Romania.

¹⁶³ Bulgaria.

¹⁶⁴ Bulgaria, Czech Republic.

¹⁶⁵ Bulgaria, Lithuania.

¹⁶⁶ Germany.

¹⁶⁷ Ireland, France.

with regard to the safety and health of night workers and shift workers are equivalent to those applicable to other workers and are available at all times¹⁶⁸.

6. Obligations regarding organisation of work patterns

A few Member States have introduced specific legislative provisions taking up the wording of Article 12 and thus imposing a general obligation on employers to take into account the general principle of adapting work to the worker, with a view in particular to alleviating monotonous work and work at a predetermined work-rate¹⁶⁹. On the other hand, many Member States include similar provisions in their general legislation on the health and safety of workers¹⁷⁰. In some Member States national legislation also lays down concrete measures to implement these general obligations. These include:

- obligations to organise work in a way which minimises work strain;
- extra rest breaks in the case of monotonous work or work at a predetermined rate¹⁷¹;
- prohibitions on carrying out two successive shifts¹⁷²;
- carrying out risk assessments¹⁷³;
- organising consultations with trade unions or labour inspectorates¹⁷⁴.

VIII. Derogations

The Working Time Directive allows Member States to establish certain derogations. These are described in the present chapter. The transposition of these derogations into national law is also optional, but for employers to use them, the derogations must be validly transposed into the national legal order.

As most of the rights developed in the Directive are also protected under Article 31 of the Charter of Fundamental Rights, it is important to stress that in this context, Article 52 also applies and provides that '*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*'.

Also, the CJEU has clarified that the derogations must be interpreted '*in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected*¹⁷⁵'.

¹⁶⁸ Greece, Cyprus, Croatia, Italy, Portugal, Slovakia, United Kingdom.

¹⁶⁹ Cyprus, Czech Republic, Greece, Spain.

¹⁷⁰ Poland, Portugal, Romania, Slovenia, Slovakia, Sweden, United Kingdom.

¹⁷¹ Czech Republic, Estonia, United Kingdom.

¹⁷² Bulgaria, Lithuania.

¹⁷³ France, Malta.

¹⁷⁴ France (on establishing continuous shift work), Slovakia.

¹⁷⁵ Judgment of 9 September 2003, *Landeshauptstadt Kiel v Norbert Jaeger*, C-151/02, ECLI:EU:C:2003:437, para. 89; Judgment of 21 October 2010, *Antonino Accardo and Others v Comune di Torino*, C-227/09,

A. Derogation for ‘autonomous workers’ (Article 17(1) of the Directive)

Article 17(1) allows Member States to derogate from the provisions on daily and weekly rests, breaks, maximum weekly working time, length of night work and reference periods ‘*where, on account of the specific characteristics of the activity concerned, the duration of working time is not measured and/or predetermined or can be determined by the workers themselves*’. This applies particularly in cases such as managing executives with autonomous decision taking powers but also for family workers or workers officiating at religious ceremonies in churches and religious communities.

As regards the definition of workers, some Member States have transposed the wording of the Directive and the examples presented in it directly¹⁷⁶. Other Member States have used the same wording but added some aspects such as the exact extent to which a worker can be considered as a family worker¹⁷⁷ or a managing executive¹⁷⁸.

The precise extent of the derogation concerning autonomous workers has raised problems in transposition by Member States. National laws vary widely both on the notion of what constitute ‘autonomous workers’ and on the extent of the derogations allowed for such workers.

In the Member States where further detail is introduced concerning the notion of ‘managing executives’, these concern, first, a criterion related to the worker’s capacity to take decisions and to manage the employer’s operations¹⁷⁹ including, for example, the capacity to autonomously conclude legal acts in the name and on behalf of the employer¹⁸⁰; and second (less common), a criterion relating to the worker’s remuneration¹⁸¹ and implying that the workers concerned receive much higher remuneration than other employees in the company or sector.

In addition to the definition of the workers concerned by this derogation, a limited number of Member States have established additional conditions such as requiring the employer to inform the works council about contracts concluded with ‘managing executives¹⁸²’, and requiring a specific written agreement to be signed between the worker and his/her employer.¹⁸³

Derogations based on Article 17(1) must be justified by the characteristics of the activity, implying that the duration of working time is not measured and/or predetermined or that the duration of the working time can be determined by the workers themselves.

ECLI:EU:C:2010:624, para. 58; Judgment of 14 October 2010, *Union syndicale Solidaires Isère v Premier ministre and Others*, C-428/09, ECLI:EU:C:2010:612, para. 40.

¹⁷⁶ Cyprus, Italy, Finland.

¹⁷⁷ Ireland, Luxembourg, Malta.

¹⁷⁸ Croatia, Luxembourg.

¹⁷⁹ Croatia, France, Luxembourg, Poland, Slovenia.

¹⁸⁰ Croatia, Slovenia.

¹⁸¹ France, Luxembourg.

¹⁸² Croatia.

¹⁸³ Portugal.

In certain cases Member States do not include all the criteria of Article 17(1) in their national definitions.

For example, some legislative texts exempt the categories of worker set out below without explicitly stating that the exemption applies when the worker's working time is not measured/ predetermined or can be decided by the worker himself:

- a worker working from home¹⁸⁴;
- a worker earning three times the minimum wage¹⁸⁵;
- one who fills a position of considerable importance or trust and whose salary reaches seven times the mandatory minimum wage¹⁸⁶;
- one who has an administrative function¹⁸⁷.

These provisions do not guarantee that the Directive's criteria are fulfilled.

Some Member States have adopted more detailed legislation as to the workers concerned and define exactly who is covered by the derogation, such as chief physicians, heads of public services¹⁸⁸, judges and public prosecutors¹⁸⁹ or certain commanding officers in police forces¹⁹⁰. Although these groups of workers may be expected to have the necessary freedom as regards their working time, compliance with the Directive will always depend on whether the basic requirements in the first phrase of Article 17(1) are fulfilled.

B. Derogations requiring the worker to be afforded equivalent periods of compensatory rest

The Directive allows for four limited derogations:

Derogations to the provisions on breaks, daily and weekly rest periods, night work and reference periods:

- in a range of activities or situations listed in Article 17(3) defined by collective agreement, agreement between the two sides of industry, or national laws or regulations; and
- in any type of activity or situation under Article 18 defined by collective agreement or agreement between the two sides of industry at national or regional level (or where these players so decide by the two sides of industry at a lower level or by the two sides of industry at the appropriate collective level,).

¹⁸⁴ Luxembourg (the Labour Code Article L.211-3).

¹⁸⁵ Netherlands (the Working Time Decree of 4 December 1995 Article 2.1:1).

¹⁸⁶ Hungary (Act I of 2012 on the Labour Code Sections 208 and 209).

¹⁸⁷ Portugal (Law No 7/2009, of 12 February (the Labour Code) Article 18a).

¹⁸⁸ Germany.

¹⁸⁹ Hungary.

¹⁹⁰ Spain.

Derogations to the provisions on breaks, daily and weekly rest periods:

- for shift work, where the worker is changing shift and cannot take daily or weekly rest between the end of one shift and the start of another, under Article 17(4)(a); and
- for work split up over the day, such as activities of cleaning staff, under Article 17(4)(b).

All of these derogations are expressly dependent on meeting the condition that the workers concerned *'are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible for objective reasons to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection'*.

In the *Jaeger* case¹⁹¹, the CJEU emphasised the health and safety implications of missing minimum rest periods and held that compensatory rest for missed daily rest periods must follow immediately after the working time it is supposed to counteract, and must consist of time where the worker is free to pursue his/her own interests. The Court also commented that it was only in *'entirely exceptional'* circumstances, where granting equivalent compensatory rest is *'impossible for objective reasons'*, that appropriate protection could be permissible as an alternative.

As indicated in the interpretative communication, the Commission understands that compensation for missed weekly rest periods does not need to be granted *'immediately'* but within a timeframe that ensures that the worker can benefit from regular rest in order to protect his/her safety and health. This also results from the fact that the regular alternation of work and rest periods is already ensured through daily or compensatory rest periods.

1. Derogations in cases provided for in Article 17(3) and (4)

Member States have generally transposed these derogations and made use of them.

As to the sectors and activities concerned, the Member States have often adopted the list of activities present in the Directive itself.

Nevertheless, the national laws of a number of Member States appear to exceed the derogations allowed under the Directive in various ways.

Some Member States are not imposing any requirement for equivalent compensatory rest for the worker concerned, for example.

¹⁹¹Judgment of 9 September 2003, *Landeshauptstadt Kiel v Norbert Jaeger*, C-151/02, ECLI:EU:C:2003:437..

- by allowing rest to be missed without equivalent compensatory rest in urgent situations or to avoid a serious impact on commercial functioning¹⁹²,
- by allowing missed rest to be compensated financially¹⁹³;
- by not imposing such a requirement for certain sectors or shift work¹⁹⁴;
- by relying on other kinds of protective measures¹⁹⁵;
- by not providing for a compensatory rest period which is equivalent to the shortening of the rest period¹⁹⁶.

There are also two cases where the approach taken by Member States is too extensive as regards the sectors concerned, for example where they have allowed a more general exception for sectors with specific characteristics or the provision of services to the population¹⁹⁷.

As to the question of the timing of the compensatory rest for missed daily rest (as clarified by the CJEU case-law outlined above), some Member States provide for the daily rest to be granted ‘immediately’¹⁹⁸ or through an extension of the following rest period¹⁹⁹, or by requiring that if a shorter daily rest period is applied, the total duration of two consecutive daily rest periods must be at least 22 hours²⁰⁰. These ways of ensuring compensatory rest all comply with the Directive.

However compliance in many Member States does not appear clear on this point:

- in some Member States, there appear to be no or unclear provisions on the timing of compensatory rest²⁰¹;
- in many Member States a timeframe for granting compensatory rest periods is set but the compensatory rest period does not follow immediately after the working time it is supposed to counteract. The equivalent compensation for missed parts of daily rest is

¹⁹²Belgium (Labour Code of 16 March 1971 Section VI Article 38)

¹⁹³France (L.3132-5 Labour Code); France (D-3131-2 Labour Code); France (Decree n°2000-815 25 August 2000 relating to working time in the state public sector Article 3; Finland (Working Hours Act 605/1996 Section 32).

¹⁹⁴France (Decree n°2000-815 25 August 2000 relating to working time in the state public sector Article 3); Hungary (Act LXXXIV of 2003 on Certain Measures for Health Care Workers (Eütv), Act CCV of 2012 on the Legal Status of Soldiers (Hjt.); Netherlands (The Working Time Decree of 4 December 1995 chapter 5); Romania (Labour Code Article 135, Order of the Health Minister No 870/2004 if insufficient number of certain doctors in a hospital).

¹⁹⁵Germany (the Working Time Act Articles 7(2a)

¹⁹⁶Germany (the Working Time Act Articles 7(9).

¹⁹⁷Bulgaria (The Labour Code Article 154a — but the competence has only been used for certain transport activities); Czech Republic (Act No 262/2004 the Labour Code section 92).

¹⁹⁸Estonia, Spain (Guardia civil), Croatia, Poland.

¹⁹⁹Czech Republic,.

²⁰⁰Hungary (Act I of 2012 the Labour Code Article 104 Sub. 4 as amended by Act LXVII of 2016 on the establishment of the Hungarian budget for 2017).

²⁰¹Germany (for missed daily rest periods in sectors where standby duty is used), Latvia (Labour code Art. 140), Spain, Cyprus, Italy, Luxembourg, Malta, Portugal, Romania (Order of the Health Minister No 870/2004) Sweden.

provided within periods ranging from 14 days to 6 months in certain activities or sectors²⁰²;

- there are also several examples of national legislation which allow the equivalent compensation for missed parts of weekly rest to be granted between 6 weeks and 6 months after the missed rest²⁰³.

A number of Member States have adopted more protective provisions by:

- establishing limits to how much the rest period may be reduced²⁰⁴;
- limiting the ways in which the derogations can be used, for example by requiring derogations to be agreed in a collective agreement or in an agreement between the worker and the employer or making the granting of derogations conditional on obtaining approval from the labour inspection authorities²⁰⁵.

2. Derogations through collective agreements

Despite limited information on the situation as to collective agreements in the Member States, it appears that most Member States implement derogations from the Directive under collective agreements, as allowed under Article 18²⁰⁶.

²⁰² Belgium (Law of 14 December 2000 for the Public Sector Article 7, 14 days for activities in which the workers' place of work and place of residence are distant from one another as well as for security and surveillance activities); Czech Republic (Act No 262/2006 the Labour Code sections 90a and 92, 3 weeks for seasonal work in agriculture); Germany (The Working Time Act of 6 June 1994 Article 5.2, 4 weeks for hospitals, care and support of people, restaurants, transport, agriculture), (The Working Time Act of 6 June 1994 Article 5.3 – within a reasonable period in hospitals, and care and support for people); Spain (Law 55/2003 of 16 December 2003 of the Framework Statute for Statutory Workers in the Health Service Article 54, within 3 months in the healthcare sector); Austria (The Civil Servant Employment Act No 33/1979 Section 48a, within 14 days for civil servants); Austria (Law 461/1969 on Working Hours Section 12, within 10 days in the private sector); Slovenia (The Employment Relationships Act (ERA-1) 2013 Article 158, up to 6 months by a branch collective agreement pertaining to activities where the nature of work requires permanent presence or the continuous provision of work); Slovenia (Medical Practitioners Act No 72/06-ZZdrS UPB3 Article 41d, Health Services Act No 23/05 – ZZdej UPB 2), up to 2 months for the health sector; Slovakia (Act No 311/2001 The Labour Code Section 92.2, within 30 days for continuous operations, urgent agricultural work, etc.); Finland (The Working Hours Act 605/1996 section 29, within 30 days for change of shift, split work over the day, distance from the workplace, seasonal work, security guards, etc.).

²⁰³ Czech Republic (Act No 262/2006 the Labour Code sections 90a and 92, 6 weeks for seasonal work in agriculture); Slovenia (The Employment Relationships Act (ERA-1) 2013 Article 158, up to 6 months by a branch collective agreement pertaining to activities where the nature of work requires permanent presence or the continuous provision of work); Slovenia (Medical Practitioners Act No 72/06-ZZdrS UPB 3) Article 41d, Health Services Act No 23/05 – ZZdej UPB2 – up to 2 months for the health sector); Slovakia (Act No 311/2001 The Labour Code Section 93.5, within 4 months); Finland (The Working Hours Act 605/1996 section 32, within 3 months).

²⁰⁴ Germany (daily rest periods of at least 10 hours in most sectors where derogation is allowed or up to half of the rest period in sectors where standby duty is used), Estonia (minimum rest of 6 hours in every 24), France (minimum of 2 weekly rests per month), Croatia (daily rest of at least 10 hours if derogated from by law and 8 hours where the derogation arises from a collective agreement), Hungary (minimum 8 hours daily rest for members of the regular staff of the army and armed forces), Czech Republic (daily rest of at least 8 hours).

²⁰⁵ Estonia, France, Cyprus, Luxembourg, Slovenia, Slovakia.

²⁰⁶ Notably including Denmark, Germany, Ireland, Greece, Italy, Hungary, Luxembourg, Malta, Romania, Sweden, United Kingdom.

The requirement of compensatory rest is generally appropriately transposed.

However, similarly to derogations under Article 17(3) and (4), uncertainties remain as to compliance with the Court's ruling on the timing of compensatory rest²⁰⁷. Germany explicitly allows the timing of compensatory rest for a partial reduction in daily rest which is agreed in a collective agreement to be set by the collective agreement itself²⁰⁸ whereas the Directive requires that compensatory rest must be afforded immediately after the working time it is supposed to make up for.

Some Member States have put limits on the extent to which these derogations can be used:

- limits on the number of hours by which daily rest periods can be reduced²⁰⁹;
- limits on the activities for which the collective agreements can allow derogations from certain provisions²¹⁰;
- limits on the types of collective agreements which can implement such derogations²¹¹.

C. Opt-out

Under Article 22 of the Directive, a Member State has the option not to apply the maximum limit to weekly working time if the general principles for the protection of the safety and health of workers are still respected, and provided it takes the necessary measures to ensure that:

'(a) no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in Article 16(b)²¹², unless he has first obtained the worker's agreement to perform such work;

(b) no worker is subjected to any detriment by his/her employer because he is not willing to give his/her agreement to perform such work;

(c) the employer keeps up-to-date records of all workers who carry out such work;

(d) the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours;

(e) the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period.'

²⁰⁷ Denmark, Greece, Malta, Austria, Romania, United Kingdom.

²⁰⁸ Germany (The Working Time Act of 6 June 1994 Article 7.1).

²⁰⁹ Germany (reduction of the daily rest is limited to 2 hours for all jobs), Austria (reduction to 8 hours of daily rest).

²¹⁰ Germany (depending on the activities or sectors concerned the extent of the possible derogations is variable), Greece (limited to certain sectors or types of activities).

²¹¹ Ireland (collective agreements approved by the Labour Court can extend the reference period to 12 months).

²¹² 4 months under Article 16b of the Directive. 6 months where derogations pursuant to Article 19 are applied for activities mentioned in Article 17 (3) or Article 18. 12 months if agreed in a collective agreement pursuant to Article 19.

1. The use of the opt-out derogation

In the years leading up to the 2010 implementation report there had been a considerable increase in the use in Member States of the Article 22 derogation, also known as the ‘opt-out’. The picture is now more stable.

The five Member States (Bulgaria, Cyprus, Estonia, Malta and the UK) allowing use of the opt-out irrespective of sector still apply the opt-out in this manner. There do not seem to have been any major changes to the conditions for using the opt-out in these Member States.

The 11 Member States (Belgium, the Czech Republic, Germany, Spain, France, Latvia, Hungary, the Netherlands, Poland, Slovenia and Slovakia) that in 2010 applied or were about to introduce a limited opt-out for jobs which make extensive use of on-call time, such as health or emergency services have kept this approach.

The accession of Croatia in 2013 meant that a further Member State was applying the opt-out in the healthcare sector. The Croatian Healthcare Act²¹³ stipulates that the maximum number of working hours in a week including when on duty and when performing on-call work must not exceed 48 hours. Where work-related exceptional circumstances arise, the maximum number of working hours per week including when on duty and when performing on-call work may exceed 48 hours provided workers give their prior consent in writing.

Under Croatia’s Labour Act Article 67, working hours may also exceed 48 hours per week, but not 56²¹⁴, provided that this has been agreed by collective agreement and the worker concerned has given the employer a statement of consent, agreeing to work the hours referred to. This provision has a general scope. Unevenly distributed (irregular) work patterns in a period where the hours worked are longer than regular full-time or part-time working hours may last no more than 4 months unless otherwise agreed by collective agreement, in which case that period must not exceed 6 months.

Since the *Krankenanstalten-Arbeitszeitgesetz* (Section 4 KA-AKZ) was amended in 2014 Austria also provides for the use of the opt-out in the healthcare sector, but this derogation is in force only for a limited period of time. Up until 31 December 2017 individual workers may consent to work up to a weekly working time of 60 hours averaged over 17 weeks. Until 30 June 2021 the worker may consent to an average of 55 hours.

There do not seem to have been any major developments on the conditions laid down for the use of the opt-out in the Member States applying this derogation.

Consequently, 18 Member States now provide for the use of the opt-out. The 10 which do not are Denmark, Ireland, Greece, Italy, Lithuania, Luxembourg, Portugal, Romania, Finland and Sweden.

²¹³ The Healthcare Act (NN No 150/08, 71/10, 139/10, 22/11, 84/11, 154/11, 12/12, 35/12, 70/12, 144/12, 82/13, 159/13 and 22/14).

²¹⁴ 60 hours if the employer is operating a seasonal schedule.

2. Protective measures

The implementing legislation in the Member States which allow the performance of more than 48 hours per week on average are with one exception clear that this requires consent from the individual worker. The implementing laws or regulations are, however, not necessarily explicit that this consent needs to be given in advance. Additionally many Member States require that the consent needs to be in writing²¹⁵.

According to the information available to the Commission, 15 out of 18 Member States have a clear transposition of the requirements laid down in Article 22(1)(c)-(e)²¹⁶. The Commission has found that 13 out of 18 Member States have transposed measures to ensure that there is no detrimental treatment of workers who refuse to opt-out²¹⁷. Under Hungarian legislation, workers in stand-by jobs²¹⁸ are allowed to work up to 72 hours a week. The law prohibits dismissing a worker on the sole ground of not agreeing to such an ‘opt-out’²¹⁹. However, this is not sufficient protection against ‘any detriment’ as required by Article 22(1)(b) of the Directive as this notion also comprises other kinds of negative reactions.

The Directive does not provide explicitly for a right to withdraw the worker’s consent. This would, however, appear to follow from Article 22, in the light of the Court’s comments in the *Pfeiffer* judgment²²⁰.

The Bulgarian Labour Code Article 142 provides for a weekly working time of up to 56 hours where a system of average calculation of the weekly working time has been established without requiring the consent of the individual worker. In cases of average calculation the Regulation of Working Time, Rest Periods and Leave Article 9a obliges employers to keep records of the personal work schedules for at least three years after the end of the concerned period. However the condition that the individual worker must give his or her consent has not been implemented.

Several Member States have explicit legislation which entitles the worker to withdraw his or her consent within a certain notice period²²¹. The most commonly used notice period is 1 month, but the starting point and length of this period vary greatly.

²¹⁵ Belgium, Bulgaria, Germany, Estonia, Spain, Croatia (in healthcare), Cyprus, Latvia, Malta, Netherlands, Poland, United Kingdom.

²¹⁶ Belgium, Bulgaria (as regards the opt-provision laid down in the Labour Code Article 113), Czech Republic, Germany, Estonia, France, Croatia, Cyprus, Latvia, Hungary, Malta, Poland, Slovenia, Slovakia, United Kingdom.

²¹⁷ Belgium, Bulgaria, Germany, Estonia, France, Croatia (for seasonal work only), Cyprus, Latvia, Malta, Poland, Slovenia, Slovakia, United Kingdom.

²¹⁸ Act I of 2012 on the Labour Code Article 91 and 99.3 ‘Stand by jobs’ are jobs in which no work is performed at least one third of the regular working time or the work performed is significantly less strenuous and less demanding than commonly required for a regular job.

²¹⁹ Act I of 2012 on the Labour Code Article 66.

²²⁰ Judgment of 5 October 2004, *Bernhard Pfeiffer, Wilhelm Roith, Süß Albert, Mr Michael Winter, Klaus, Mr Nestvogel Roswitha Zeller and Matthias Döbele v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, C-397/01 to C-403/01, ECLI:EU:C:2004:584, para. 82.

²²¹ Belgium (1 month), Czech Republic (immediate effect during the first 12 weeks after signing, then 2 months), Germany (6 months), Estonia (2 weeks), Hungary (15 days), Malta (between 7 days and 3 months depending on the agreement between the worker and the employer), Poland (1 month), Slovakia (1 month), UK (between 7 days and 3 months depending on the agreement between the worker and the employer).

There are no explicit maximum limits on the number of working hours which can be allowed under Article 22. However, the Directive states that the general principles for the protection of the safety and health of workers must be respected. As the Directive does not allow for derogations from daily and weekly rest without compensatory rest, the requirements for rest will in any case limit the working hours allowed.

Some 10 out of 18 Member States which apply the opt-out have in place some sort of explicit maximum limit on working hours over the limit of 48 per week²²².

According to the information available to the Commission, five Member States have explicit provisions which require the employer to record the working hours of workers who have chosen to opt out²²³. The recording of working hours may, however, also follow from general legislation which applies to all workers.

In addition, some Member States apply other kinds of protective measures. For example, in the Czech Republic and Latvia the worker's consent must be renewed after 52 weeks or 4 months respectively.

Member States are generally complying with the requirements directly stated in the Directive on explicit consent from the worker, and on recordkeeping and information to the authorities about workers who work more than 48 hours a week on average. Some countries, however, seem to lack a clear transposition of the requirement to prohibit detrimental treatment of workers who refuse to consent.

Many Member States do not require the actual working hours of workers who opt out to be recorded or set an upper limit on the working hours of these workers. In these cases it is not clearly demonstrated that the use of the opt-out derogation complies with the general principles of protecting the workers' safety and health.

IX. Social partners' evaluations

A. Trade unions' views

In the consultation on the practical implementation of the Working Time Directive, the Commission received answers from the following European-level trade unions: the European Trade Union Confederation (ETUC), the European Confederation of Independent Trade

²²² Belgium (60 hours on average and max 72 hours in a single week), Czech Republic (the additional overtime is limited to a maximum of 8 additional hours per week or 12 additional hours, for rescue service healthcare, averaged over a period of not more than 26 weeks or up to 52 weeks, if a collective agreement so provides), Estonia (not more 52 hours per week over a reference period of 4 months), Spain (may not exceed the normal 48-hour limit by more than 150 hours in total per year (equivalent to a total working time of slightly over 51 hours per week, if averaged over 12 months)), Croatia (working hours may exceed 48 hours per week but as a main rule not 56 per week), Latvia (not more than 60 hours a week or 240 hours per month), Hungary (voluntary overtime for healthcare workers may not exceed 12 hours a week, calculated as the average of the overtime hours (the 'bank of hours') or 24 hours a week where the overtime consists entirely of emergency medical duty), Netherlands (maximum 60 hours per week), Austria (60/55 hours averaged over 17 weeks), Slovakia (max. 56 hours per week averaged over 4 months).

²²³ Belgium, Germany, France, Cyprus, Latvia.

Unions (CESI), the CEC European Managers and Eurocadres. It also received input from national-level organisations.

1. Overall views

The ETUC is of the opinion that the practical application of the Directive does not meet its objectives to protect and improve workers' health and safety. ETUC points out that the opt-out is undermining the Directive's aim, because working long hours is damaging workers' health. ETUC states that a multitude of research shows the detrimental effect of long and irregular working hours, and of night and shift work,

ETUC also argues that the derogation for autonomous workers has led to a structural opt-out, as the amount of professional and managerial staff is increasing in the EU. Workers can be 'promoted' to professional and managerial staff in order to evade coverage of working-time legislation. Furthermore, ETUC states that since the Directive does not make it clear that rules apply per worker and not per contract, this results in many workers working far more than the 48 hour limit.

2. Evaluation of transposition

The ETUC is of the opinion that the Working Time Directive has not been transposed in a satisfactory way in the different Member States. ETUC states that in most Member States national legislation infringes the Directive as interpreted by the CJEU, but national lawmakers are taking no action on this and not adapting national legislation to the CJEU rulings. ETUC calls on the Commission to be more active in ensuring that national legislation complies with the Directive and to launch infringement procedures to achieve this goal.

The most critical problems concern:

- on-call time not being counted as working time;
- compensatory rest not being taken directly after a shift;
- the reference periods being extended to 12 months by legislation rather than collective agreements;
- the use of the opt-out;
- the derogation for autonomous workers.

The view that the Directive has not been transposed in a satisfactory way in the different Member States is shared by Eurocadres, which argues that the most obvious problems concern on-call time and the derogation for professionals and managers.

The trade unions both at national and European level otherwise point to specific instances of non-compliance in the different national legislations. The Commission took these matters into consideration when preparing this report.

3. Social partnership

ETUC states that in most Member States the trade union organisations were involved when the Directive was transposed.

The possibility given by the Directive to deal with working-time issues through collective bargaining is widely used throughout Europe. This provides a basis in EU legislation for working time to be regulated in a more detailed manner that is closer to the needs of workers and employers. The possibility to have derogations is crucial in an ever-evolving labour market.

B. Employers' views

In the consultation on the practical implementation of the Working Time Directive the Commission received answers from the following European-level employers' organisations: Business Europe, the Council of European Employers of Metal, Engineering and Technology-based Industries (CEEMET), Eurocommerce²²⁴, the European Federation of Cleaning Industries (EFCI), the Performing Arts Employers' Associations League Europe (PEARLE). It also received input from national-level organisations.

1. Overall views

There is general and strong agreement among employers' organizations that while the practical application of the Directive meets the objective of protecting the health and safety of workers, it does not provide the necessary flexibility to adapt the working time arrangements to the needs of employers and workers.

2. Evaluation of transposition

The main problems of application raised by employer organisations were:

1) national laws that were seen as stricter than what the Directive requires and not making enough use of available derogations

This constrains working-time flexibility and hampers the competitiveness of companies. This problem is particularly mentioned by BusinessEurope, employer organisations in Belgium, Ireland, Luxembourg, Poland and Portugal and PEARLE.

Some cite the Directive's non-regression clause as a factor in this, which has meant that national legislation on working time predating the EU Directive could not be amended to bring it to the level of the EU Directive.

2) significant problems in the practical application of the *SIMAP-Jaeger* judgments on on-call time and compensatory rest and also the judgments on annual leave in the context of sick leave.

²²⁴ Eurocommerce provided input on necessary changes to the Directive.

The member federations of BusinessEurope point to insufficient flexibility regarding application of the provisions on on-call time and compensatory rest. According to the employer organisations this has serious consequences across EU Member States not only for the health and care sector, but also in transport and other industrial activities, for example where in-company fire brigades exist or other safety-related services have to be provided continuously. Considering inactive periods at the workplace during on-call duty as working time also raises costs for many sectors, for example because it creates the need for increased manpower.

This view is shared by CEEMET and is emphasised by employer organisations in Ireland, Spain, Portugal, Sweden and the UK.

Some Belgian member federations and employer organisations in Sweden highlight that the complexity of the national regulations implementing the Directive causes legal uncertainty for companies.

BusinessEurope reports that their member federations generally consider that from a legal point of view the Working Time Directive has been transposed in a satisfactory way in their respective countries. Some member federations point to problems of non-compliance with the Directive regarding on-call time and provisions on compensatory rest in certain public and private sectors.

3. Social partnership

BusinessEurope member federations in general consider that they have been sufficiently consulted and involved by national authorities over transposition of the Directive. However, some of them highlight that more attention could be paid to legal imperfections in the Directive.

PEARLE shares this view, but calls for a shift within Member States to pay attention to the concerns of sectors with a smaller workforce and/or economic output, as certain decisions may have significant effects on the functioning of such sectors.

For most member federations of BusinessEurope, the possibilities to derogate using collective agreements or agreements concluded between the two sides of industry are seen as positive, as they allow some flexibility and the possibility to find effective solutions for workers and employers. Where these possibilities are used at national level, it is often across a variety of sectors.

The possibility to extend the reference period for calculating weekly working time from 4 to 12 months by collective agreement is cited as an example of good practice by some member federations. However, others point out that the Directive is too restrictive as it makes the use of this possibility conditional on obtaining collective agreement, making it difficult for some companies to use it. This concerns in particular SMEs, where workers are often not unionised, and companies which have difficulties in negotiating collective agreements with trade unions or no possibility to do so.

C. Member States' views

The Member States were asked to report on any evaluation work carried out under their authority and to indicate what the main conclusions were on the socioeconomic impact of the transposing measures. At the time when information was collected (i.e. between July 2014 and January 2015) only the UK had carried out a specific and broader evaluation of the effects of measures transposing requirements and derogations of the Directive.

The main evaluation activities carried out by the UK were done through the 'Social and Employment Policy Balance of Competences Report' and also by a separate review carried out by the Department for Business, Innovation and Skills (BIS).

The evaluation:

- did not provide clear conclusions as to whether there is a link between the introduction of the Working Time Directive and workplace health and safety in the UK.
- sees the reduction in the number of employees working in excess of 48 hours by 15 % between 1997 and 2013 as part of a wider international trend towards reduced working hours, but also states that the evidence of the review suggests that the introduction of the Working Time Regulations has had some small additional effect in reducing long working hours in the UK.
- considers the introduction of the minimum annual leave provisions to be a possible contribution to an increase in annual leave entitlements above the minimum since 1998. However, it is considered unlikely that the regulations are solely responsible for this increase.
- refers to findings of a taskforce chaired by the Royal College of Surgeons²²⁵ that while the reduction in hours worked has reduced fatigue, the implementation of the Working Time Directive in the National Health Service has caused major challenges for certain specialities, both in terms of delivering patient care and postgraduate training.
- finds that CJEU rulings which entitle workers to reschedule any period of leave which coincides with a period of sickness and, if necessary, carry leave over into subsequent leave years, is operationally difficult and creates confusion for employers and workers alike and increased costs for employers.
- at the same time finds broad acceptance (although not necessarily support) for most of the core provisions in the Directive.

The Member States were not particularly asked to state their views on the positive and negative impacts of the Directive for this report. However, the positive impacts or aspects mentioned are:

- the generally greater degree of safety and health for workers²²⁶;
- a greater awareness among workers about the importance of labour protection²²⁷;

²²⁵ Report of the Independent Working Time Regulations Taskforce to the Department Of Health, The Implementation of the Working Time Directive, and its impact on the NHS and Health Professionals (March 2014).

²²⁶ Czech Republic.

- an emphasis on a maximum 48 hours work per week²²⁸;
- that the Directive is generally working well as a framework for the organisation of working time²²⁹;
- that the Directive made it possible to:
 - o establish a mechanism for constructive dialogue with social partners²³⁰;
 - o increase the level of protection of workers and provision for a work/life balance²³¹;
 - o allow a relatively large leeway for reaching an agreement on working time issues²³².

Among the problems mentioned were:

- the inclusion of on-call time in working time²³³;
- the difficulty in ensuring compliance due to the lack of a requirement in the Directive to document working hours;
- difficulty in ensuring that there is a sufficient number of physicians to provide health care while complying with requirements of the Directive²³⁴.

Only a few problems of interpretation were mentioned. These included:

- the relationship between the Directive and specific directives issued under Article 14;
- matters related to breaks;
- the understanding of the concept ‘each seven day period’;
- the definition of working time when applied to new forms of employment.

X. Monitoring and enforcement at national level

National authorities’ reporting on monitoring and implementation of the Directive indicates that labour inspectorates are the main bodies with authority to monitor and enforce the correct application of national rules transposing the Directive.

In some cases the monitoring differs in the public sector or in specific sectors.

Other bodies mentioned in addition to labour inspectorates include labour courts, industrial arbitration tribunals and civil courts as well as Labour Councils. In some instances Member States underlined that monitoring is mainly done by the employer, or the worker. The role of workers’ representatives and works councils was also underlined in several submissions.

We do not have enough information to compare the adequacy and effectiveness of enforcement based on the information provided by national authorities on labour

²²⁷ Germany.

²²⁸ Czech Republic, Malta.

²²⁹ Denmark.

²³⁰ Italy.

²³¹ Romania, Slovakia.

²³² Sweden.

²³³ Czech Republic, Denmark.

²³⁴ Slovakia.

inspectors' tasks, functions and mandate, on their capacity to request changes in working practices and to impose fines and penalties, on their staff and on their reporting mechanisms.

Social partners' views

BusinessEurope member federations are generally satisfied with the monitoring and enforcement of the Directive in their respective countries. PEARLE also considers the enforcement and monitoring of the Directive at national level to be satisfactory.

Member federations highlight that monitoring subjects companies to many administrative requirements, in particular onerous recordkeeping. Others point out that fines could be lower.

Some member federations highlight that the complexity of the national regulations implementing the Directive causes legal uncertainty for companies.

Both ETUC and Eurocadres expressed dissatisfaction with enforcement at national level. Weak enforcement was especially emphasised by national trade unions in the Netherlands, Austria and the UK.

The Confederation of Professionals in Denmark (FTF) states that in areas in which working time is regulated via collective agreements and where the rules are monitored and enforced by the social partners, this works entirely satisfactorily. However, in areas without collective agreements, where the enforcement of the Directive is left solely to public authorities, there is not the same protection of employees' rights.

XI. Conclusions

Overall views

- In general terms, the large majority of workers in the EU are covered by working time rules that respect EU legislation. In many cases national rules afford greater protection than what is required under the Directive.
- The compliance of Member States' legislation with the requirements of the Directive is improving. For example, many countries have amended their legislation on annual leave, in particular on the acquisition and carry-over of annual leave for people on sick leave or maternity/parental leave. Also, several countries have amended their legislation on the maximum working time of specific groups of workers.
- Many problems of transposition remain. Incorrect transposition over the use of derogations from daily and weekly rest is the most common problem of transposition.
- The Member States are still divided in terms of whether they apply the Directive's limits on working time for each individual worker or for each employment relationship/contract. A majority apply the limits per worker.

Scope

- Certain sectors or categories of workers are excluded from the scope of the legislation transposing the requirements of the Directive. In the public sector this is most common for the armed forces, police and civil protection services. As for the private sector, several Member States exclude domestic workers.
- In recent years the Commission has seen persistent non-compliance issues on maximum working time, limits to night work, and derogations from rest and annual leave for workers in public services, in particular as regards police forces, armed forces and health personnel.

Definition of working time

- Generally the practice in the Member States is in accordance with the general definition set out in the Directive. There are, however, some cases where the legal definitions could have been clearer and thus given the public better information about what constitutes working time.
- Compliance among Member States is improving, but there are still inconsistencies over the requirement to treat on-call time as working time; mainly for health and social care personnel, police and armed forces.

Breaks and rests

- The Directive's core requirements on breaks, a daily rest of 11 hours and weekly rest of 24+11 hours are generally satisfactorily transposed. The remaining issues mainly relate to the use of derogations from these requirements.

Maximum working hours of 48 hours over a period of 4 months

- There are still inconsistencies in the limitations on maximum working time for specific groups of workers (mainly health personnel and armed forces), but compliance among the Member States is improving.
- In some Member States the four-month reference period for working time is exceeded without being limited to the activities for which Article 17(3) of the Directive allows derogations.

Paid annual leave

- All Member States explicitly provide for a right to at least 4 weeks' annual paid leave.

- The most common problems are on the acquisition of annual leave during the first year of employment and also on the worker's right to acquire annual leave when on sick leave and to keep the acquired leave rights for a sufficiently long period.
- As regards pay, Member States' legislation is by and large compatible with the Directive.
- All the Member States provide for an entitlement to a payment in lieu when the employment relationship ends without annual leave being taken.

Night work

- Member States transpose the eight-hour average limit as regards the work of night workers, with reference periods varying from 1 week to 4 months.
- A number of Member States do not apply specific limitations on the average working time of night workers, but set only a *general* limit of 8 hours and a general reference period for a maximum working time of 4 months. A reference period of 4 months is in any case too long to ensure effective protection for night workers.
- Three Member States appear not to have transposed the eight-hour absolute limit for work involving special hazards or heavy strain, while one allows for certain exceptions for this kind of work which are not provided for in the Directive.
- The entitlement to a free health assessment before the assignment of a worker to night work, and at regular intervals after that, appears in general to have been satisfactorily transposed. This is also the case for the requirement to ensure that night workers who are 'suffering from health problems recognised as being connected with the fact that they perform night work' can be transferred to day work whenever possible.

Derogation for 'autonomous workers' (Article 17(1) of the Directive)

- In certain cases Member States do not include all the criteria of Article 17(1a) in their national definitions. For example some legislative texts variously exempt a worker working from home, a worker earning three times the minimum wage, one who fills a position of considerable importance or trust and his/her salary reaches seven times the mandatory minimum wage or one who has an administrative function without explicitly requiring that the worker's working time is not measured/ predetermined or can be decided by the worker himself. These provisions do not guarantee that the criteria of the Directive are fulfilled.

Derogations requiring the worker to be afforded equivalent periods of compensatory rest

- Member States have generally transposed and made use of the possibilities for derogations for certain activities provided in Article 17(3) of the Directive.

- The national laws of many Member States appear to exceed the derogations allowed under the Directive notably:
 - by not imposing any requirement for equivalent compensatory rest to be provided to the worker concerned;
 - by setting a timeframe for granting compensatory rest periods which does not ensure that the compensatory rest period follow immediately after the working time it is supposed to make up for. The equivalent compensation for missed parts of daily rest may be provided within periods ranging from 14 days to 6 months in certain activities or sectors and for weekly rest within periods ranging from 6 weeks to 6 months.

Opt out

- The Commission's analysis from 2010 showed that since the 2000 report on the Working Time Directive a large number of Member States had introduced the derogation allowing workers to 'opt-out' of the limit on maximum working time. However, the picture has been more stable in recent years. In addition to the Member States already applying the opt-out when the Commission's last analysis was carried out only Croatia (since accession) and Austria are now also users of this derogation.
- The core requirement to obtain the worker's agreement or consent is transposed in almost all cases where this derogation is used. The other protective requirements explicitly stated in the Directive are generally satisfactorily transposed. Some countries, however, seem to lack a clear transposition of the requirement to prohibit detrimental treatment of workers who refuse to consent.