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COMMUNICATION FROM THE COMMISSION

Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time

(2023/C 109/01)

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This communication updates the 2017 Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time ([1]) to reflect the more than 30 judgments and orders interpreting the Directive that the Court of Justice of the European Union ('the Court') has rendered in the meantime.

To ensure that the Interpretative Communication is up-to-date and user-friendly, it consolidates into one single document all relevant case-law issued before and after the 2017 Interpretative Communication.

This communication is intended to assist national authorities, citizens and businesses in the application of Directive 2003/88/EC. Only the Court is competent to authoritatively interpret Union law.

I. INTRODUCTION

The Working Time Directive 2003/88/EC ([2]) (the 'Directive' or the 'Working Time Directive') is a key element of the acquis of the European Union (the 'EU'). It has become one of the cornerstones of Europe's social model. The first directive of general application in the field of working time, Directive 93/104/EC ([3]) (the '1993 Directive'), was adopted almost 30 years ago.

The Directive establishes individual rights for any worker in the EU and thus gives concrete expression to Article 31 of the Charter of Fundamental Rights of the European Union (the 'Charter') which recognises as part of 'EU primary law' the right of every worker to 'working conditions which respect his or her health, safety and dignity' and to 'limitation of maximum working hours, daily and weekly rest periods, and annual paid leave'.

Indeed, the Working Time Directive lays down minimum safety and health requirements for the organisation of working time in respect of periods of daily rest, breaks, weekly rest, maximum weekly working time, annual leave and aspects of night work, shift work and patterns of work.

As rights guaranteed by the Charter, the limitation of maximum working hours, daily and weekly rest periods and paid annual leave are subject to Article 52 of the Charter which 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.'

A. *Meeting the challenges of changing work organisation*

The 1993 Directive came into force almost 30 years ago, in a society where, overall, employment relationships were more homogeneous and work organisation more standardised in the common '9 to 5' working day. However, over the past decades, working time regulation has been increasingly confronted by new forms of employment and new ways of organising work, through the rise of e.g. remote work, mobile work, on-demand work, platform work or multiple employment.

These changes have been brought about and/or accelerated by the impact of digitalisation on the economies and societies of the EU. Indeed, digital transformation has further enabled more flexible working arrangements, addressing both workers' aspirations for work-life balance and well-being at work and businesses' search for increased productivity and agility in a globalised economy.

([1]) OJ C 165, 24.5.2017, p. 1.
([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).
([3]) Council Directive 1993/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (OJ L 307, 13.12.1993, p. 18).

The Working Time Directive is therefore being implemented in a context marked by a new range of opportunities and risks. Flexible employment may lead to more use of the Directive's derogations. Digitalisation is blurring the distinction between work and rest, and enables an increased fragmentation of work, both with regard to location and to time. At the same time, technology creates new possibilities for monitoring working time.

The world of work has also been deeply impacted by the global Covid-19 pandemic. Measures taken by public authorities across the EU to limit the spread of disease led to a considerable and sudden increase in remote work. Restrictions introduced on sanitary grounds have entailed mandatory home-based telework for a sizeable proportion of workers ([4]). When the sanitary situation allowed for a progressive easing of restrictions, mandatory telework has, to a large extent, given way to more use of voluntary telework. For the growing proportion of workers whose functions can be performed remotely ([5]), the Covid-19 pandemic may mark the start of a lasting trend towards more home-based telework, combined with presence at the employer's premises during part of the working time, so that workers perform 'hybrid work'.

In this context, the present Communication updates the previous version published in 2017 with recent developments in the case-law of the Court. The most significant of these judgments are:

— The *Matzak* judgment ([6]) of 2018 and several other more recent judgments concerning the qualification of stand-by duty as either 'working time' or 'rest periods'. Those judgments deal with the issue of stand-by outside the workplace, i. e. a period during which the worker is not required to remain at the workplace, but has to remain contactable and ready to respond within a certain time limit. The Court ruled that whether standby counts as 'rest' or 'working time' depends on the intensity of the constraints applied to the worker affecting how he or she can use stand-by time. The Court also appeared to recognise that, even if a stand-by period is qualified as a 'rest period', the obligation to be contactable and to react, whose corollary is the deprivation of the right to disconnect, may in fact be harmful to workers' health and safety if it is imposed too frequently.

— The *CCOO* judgment ([7]) of 2019 on recording of working time. In this judgment, the Court ruled that Member States must require employers to set up a system enabling the duration of time worked each day by each worker to be measured. This raises complex questions notably in the case of workers performing remote work or telework who might enjoy a degree of flexibility and autonomy in organising and delivering work without physical supervision, for instance when it comes to the 11 hours of uninterrupted daily rest.

— The *Academia de Studii Economice din Bucureşti* judgment ([8]) of 2021. In that judgment the Court dealt with the issue of whether the provisions of the Directive set absolute limits in case of concurrent contracts with one or more employer(s) or if they apply to each employment relationship separately, in the specific case where an employee has concluded several contracts of employment with the same employer. The Court considered that the minimum daily rest period applies to those contracts taken as a whole and not to each of them taken separately.

— The *Ministrstvo za obrambo* judgment ([9]) of 2021, which concerns the applicability of the Working Time Directive to members of military personnel. The Court confirmed that in principle the Working Time Directive applies to such staff, however certain activities of members of the armed forces can be excluded from the scope of the Directive.

([4]) According to Eurofound (Eurofound, Telework during the pandemic: Prevalence, working conditions and regulations, November 2022), while in 2019 11 % of employees in the 27 EU Member States reported working from home 'sometimes' (i.e. less than half of the days, but at least one hour during a four-week reference period) or 'usually' (i.e. at least half of the days), the proportion increased abruptly to 19 % in 2020 and rose further to 22 % in 2021. In the Eurofound Living, Working and COVID-19 e-survey of July 2020, as many as 34 % of respondents reported working from home exclusively.

([5]) It has been estimated (Sostero et al. (2020)) that occupations accounting for 37 % of EU dependent employment could be teleworked (Eurofound, Telework during the pandemic: Prevalence, working conditions and regulations, November 2022).

([6]) Judgment of 21 February 2018, *Ville de Nivelles v Rudy Matzak*, C-518/15, ECLI:EU:C:2018:82.

([7]) Judgment of 14 May 2019, *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, C-55/18, ECLI:EU:C:2019:402.

([8]) Judgment of 17 March 2021, *Academia de Studii Economice din Bucureşti v Organismul Intermediar pentru Programul Operaţional Capital Uman – Ministerul Educaţiei Naţionale*, C-585/19, ECLI:EU:C:2021:210.

([9]) Judgment of 15 July 2021, *B. K. v Republika Slovenija (Ministrstvo za obrambo)*, C-742/19, ECLI: EU:C:2021:597.

B. ***A renewed engagement to support legal clarity and certainty***

Since 1993, more than 80 judgments and orders of the Court have dealt with the Working Time Directive and interpreted its provisions, including the scope and limitations of the flexibility it affords.

Case-law on this scale makes it difficult for Member States, employees and employers, other stakeholders such as social partners or labour inspectorates and interested citizens to understand the exact content and extent of the Directive's provisions. Yet this jurisprudence is key to ensuring correct implementation of the Directive since misunderstandings or lack of awareness of the latest developments in case-law may in turn lead to compliance issues and to avoidable complaints or litigation.

In line with the Commission's 'Better Results through Better Application' approach ([10]), this Communication aims to contribute to an effective application, implementation and enforcement of the existing EU law and to help the Member States and the public ensure that EU law is applied effectively.

Its specific objectives are:

— to offer greater legal certainty and clarity to national authorities on the obligations and flexibilities contained in the Directive to help reduce burdens and infringements;

— to help better apply the Directive's provisions in the context of new and flexible work arrangements;

— to ensure the effective enforcement of existing EU minimum standards contained in the Directive and therefore support better protection of workers' health and safety against risks associated with excessive or inappropriate working hours and inadequate rest periods, to the benefit of all parties;

— to ensure the continued relevance of the comprehensive overview of the Court's case-law on the Working Time Directive provided in the 2017 Interpretative Communication by updating it with recent case-law.

The Communication aims to bring legal clarity and certainty to the Member States and other involved stakeholders when applying the Working Time Directive and to assist national authorities, legal practitioners and social partners in its interpretation. To that end, it brings together in a single document the provisions of the Directive and the case-law of the Court that interpreted them. It mentions the relevant case-law on the main provisions of the Directive and clarifies the various possibilities for application arising from the text of the Directive itself. In terms of its format, the Communication follows as far as possible the order of the Directive's chapters and articles. However, it does not deal with Article 17(5) on doctors in training and Articles 24, 25, 26 and 27 on reports, review of the provisions with regard to workers on board seagoing fishing vessels and workers concerned with the carriage of passengers, and repeal. The first is excluded because the derogations have expired and the latter are not tackled due to their procedural nature.

In addition, the Communication presents the Commission's standpoint on several aspects. In doing so, the Commission bases itself as much as possible on existing case-law and takes into account the guiding principles for interpreting EU law: the wording ([11]), context and objectives of the Working Time Directive ([12]). In cases where these elements do not point to a specific outcome, the Commission employs the *in dubio pro libertate* principle in order to give guidance on possible gaps in the Directive and its case-law, bearing in mind the Directive's purpose to improve workers' safety and health at work.

([10]) Communication from the Commission, EU law: Better results through better application, C(2016) 8600.

([11]) With respect to the Directive's wording, it can be pointed out at the outset that, as was recognised by Advocate General Kokott in her observations on case C-484/04, '*The wording of the different provisions of the Directive is highly inconsistent depending on language version and also within individual language versions*'. This means that any analysis of the Directive's provisions must take into account not only the wording in a single language but that of several versions in order to identify the intended meaning of the provision examined. See Opinion of Advocate General Kokott of 9 March 2006, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, C-484/04, ECLI:EU:C:2006:166, paras. 62-64.

([12]) See Opinion of Advocate General Kokott of 9 March 2006, *Commission of the European Communities* v *United Kingdom of Great Britain and Northern Ireland*, C-484/04, ECLI:EU:C:2006:166, para. 22.

The Commission believes that its guidance can be of particular relevance to Member States since, in its role as guardian of the Treaties, the Commission has the power to monitor the implementation of EU law and eventually to initiate or close infringement procedures on the basis of all provisions of the Directive, including those where no ruling of the Court has yet been rendered. Informing all Member States transparently of the Commission's viewpoint on certain unclear aspects of the Directive may allow them to take them into account when devising their national legislation.

At the same time, the Commission stresses that the Communication is not binding and does not intend to create new rules. The final competence to interpret EU law lies with the Court which ensures in the interpretation and application of the Treaties that the law is observed. This is why the additional aspects for which case-law is limited or does not exist and where the Commission presents its position are clearly identified through sidelined paragraphs.

The Commission is presenting two documents: the present Interpretative Communication and the Implementation Report ([13]) provided for in Article 24 of the Directive. The latter analyses the state of play as regards the transposition of the Directive. Jointly, these documents share the goal of allowing Member States to ensure a better implementation of the Directive in order to make sure that these deliver better results for citizens, businesses and public authorities.

C. *An overview of the main provisions*

In respect of its material scope of application, the Directive is applicable to all sectors of activity, including to those which deal with events which, by definition, are unforeseeable, such as firefighting or civil protection services. Indeed, the Court has held that the exclusion from the scope of the Directive was strictly limited to exceptional events, such as 'natural or technological disasters, attacks, serious accidents or similar events' ([14]).

As concerns the definition of working time, the Court has given specific guidance in its case-law regarding qualification of periods during which workers must remain available to resume their work in case of need, such as 'on-call' and 'stand-by' ([15]). The Court held that the time spent 'on-call' is to be regarded in its entirety as 'working time' within the meaning of the Directive if the worker is required to be present at the workplace separate from his or her residence ([16]). The entire period of 'stand-by', where a worker must be reachable at all times but is not required to remain at a place determined by the employer, qualifies as 'working time', when the constraints imposed by the employer during the 'stand-by' have an objective and very significant impact on the worker's possibility to freely manage the time during which the worker's services are not required and thus on the possibility to pursue his or her personal and social interests during that time ([17]). By contrast, where these constraints do not have such an effect on a worker's ability to pursue his or her own interests, only the time linked to the actual provision of services must be regarded as 'working time' ([18]).

([13]) Report from the Commission on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time (COM(2023) 72 final), and its accompanying Staff Working Document (SWD(2023) 40 final).

([14]) Order of 14 July 2005, *Personalrat der Feuerwehr Hamburg* v *Leiter der Feuerwehr Hamburg*, C-52/04, ECLI:EU:C:2005:467, para. 54; Judgment in case C-742/19, *Ministrstvo za obrambo*, para. 59.

([15]) 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, paras. 46-52; Judgment of 9 September 2003, *Landeshauptstadt Kiel* v *Norbert Jaeger*, C-151/02, ECLI:EU:C:2003:437, paras. 44-71; Order of 4 March 2011, *Grigore*, C-258/10, ECLI:EU:C:2011:122, paras. 42-58; Judgment of 21 February 2018, *Matzak*, C-518/15, ECLI:EU:C:2018:82, paras. 53-66; Judgment of 9 March 2021, *D.J. v Radiotelevizija Slovenija*, C-344/19, ECLI:EU:C:2021:182, paras. 32-56; Judgment of 9 March 2021, *RJ v Stadt Offenbach am Main*, C-580/19, ECLI:EU:C:2021:183, paras. 33-55; Judgment of 11 November 2021, *MG v Dublin City Council*, C-214/20, ECLI:EU:C:2021:909, paras. 38-47; Judgment of 9 September 2021, *XR v Dopravní podnik hl. m. Prahy, a.s.*, C-107/19, ECLI:EU:C:2021:722, paras. 30-43, in a particular context of stand-by duty imposed on a worker during breaks.

([16]) Judgment in case C-303/98, *Simap*, para. 48; Judgment in case C-151/02, *Jaeger*, para. 63; Judgment in case C-14/04; *Dellas and Others*, para. 48; Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 33; Judgment in case C-580/19, *Stadt Offenbach am Main*, para. 34; Judgment in case C-107/19, *Dopravní podnik hl. m. Prahy*, para. 31.

([17]) Judgment in case C-518/15, *Matzak*, paras. 63-66; Judgment in case C-344/19, *Radiotelevizija Slovenija*, paras. 36-37; Judgment in case C-580/19, *Stadt Offenbach am Main*, paras. 37-38; Judgment in case C-107/19, *Dopravní podnik hl. m. Prahy*, paras. 33-34; Judgment in case C-214/20, *Dublin City Council*, para. 38.

([18]) Judgment in case C-580/19, *Stadt Offenbach am Main*, para. 39; Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 38 and the case-law cited.

Importantly, the Directive sets maximum weekly working time at 48 hours. In addition to stressing that all 'working time' must be counted towards it, the Communication recalls that this limit is an average which can be calculated over a reference period of up to 4 months even in situations where the derogations are not applicable.

On paid annual leave, the Communication outlines the extensive case-law of the Court which covers various aspects ranging from the obligation to grant workers a right to carry over untaken paid annual leave where they did not have the opportunity to exercise that right, for example due to sick leave ([19]), to the clarification that the principle of paid annual leave vested in Article 31(2) of the Charter of Fundamental Rights of the European Union has horizontal and vertical direct effect, meaning it can be invoked directly in proceedings between private individuals ([20]) and between private individuals and emanations of the state ([21]). However, additional periods of paid annual leave granted by the Member States in excess of the four weeks required by the Directive can be subject to conditions set out in national law ([22]).

A significant number of derogations are also available in the Directive and allow to accommodate the specific requirements of certain activities or sectors while protecting workers against adverse effects caused by excessively long hours and inadequate rest. Having regard to their number and to the different conditions to which they are subject, they constitute a rather complex scheme and the Communication therefore tries to clarify the conditions for use of these derogations as well as the provisions and extent to which derogations are permitted.

For example, the derogation permitted for autonomous workers is neither automatically applicable nor limited to the three categories of workers listed in the relevant article (managing executives or other persons with autonomous decision-taking powers; family workers and workers officiating at religious ceremonies in churches and religious communities) but requires that the working time of the workers concerned is not measured and/or predetermined as a whole ([23]) or that it can be determined by the workers themselves.

Also, in respect of the individual opt-out from the 48-hour weekly limitation to working time, the Communication recalls that the consent has to be individual and cannot be replaced by consent given by trade-union representatives for example in the context of a collective agreement ([24]) and that workers must be protected against any detriment, and not only against a dismissal, where they do not or no longer agree to opt-out.

II. **LEGAL BASIS AND PURPOSE OF THE DIRECTIVE**

The 1993 Directive was based on Article 118a of the Treaty establishing the European Community. This enabled minimum requirements to be adopted for gradual implementation with a view to 'encouraging improvements, especially in the working environment, as regards the health and safety of workers'.

In reply to a challenge to the use of this legal basis, the Court confirmed that it embraced all factors, physical or otherwise, capable of affecting the health and safety of workers in their working environment, including certain aspects of the organisation of working time. The Directive was therefore properly adopted on its basis ([25]).

([19]) Judgment of 10 September 2009, *Francisco Vicente Pereda v Madrid Movilidad SA*, C-277/08, ECLI:EU:C:2009:542, para. 19.

([20]) Judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v Tetsuji Shimizu*, C-684/16, ECLI:EU:C:2018:874, paras. 73-76.

([21]) Judgment of 6 November 2018, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871; paras. 80, 85 and 92.

([22]) 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,paras. 47-49; Judgment of 3 May 2012, *Georg Neidel v Stadt Frankfurt am Main*, C-337/10, ECLI:EU:C:2012:263, paras. 34-37; Judgment of 19 November 2019, *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry*, joined cases C-609/17 and C-610/17, ECLI: EU:C:2019:981, para. 54.

([23]) 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. 20; Judgment of 14 October 2010, *Union syndicale Solidaires Isère v Premier ministre and Others*, C-428/09, ECLI:EU:C:2010:612, para. 41.

([24]) Judgment in case C-303/98, *Simap*, para. 74; Judgment of 5 October 2004, *Bernhard Pfeiffer, Wilhelm Roith, Albert Süß, Michael Winter, Klaus 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. 80.

([25]) Judgment of 12 November 1996, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, C-84/94, ECLI:EU:C:1996:431, paras. 15-49; Judgment in case C-151/02, *Jaeger*, para. 93.

As a result, the current Directive, which repealed and replaced the 1993 one, was adopted by the European Parliament and the Council on the basis of the successor Article 137(2) of the Treaty establishing the European Community ([26]). This allows the adoption of directives establishing minimum requirements with a view to improving in particular the working environment to protect the health and safety of workers.

Except for the increased scope of the Directive and deletion of the earlier provision that weekly rest should 'in principle, include Sunday', the provisions of the currently applicable Working Time Directive are drafted in terms which are essentially identical to those of the previous 1993 Directive and Directive 2000/34/EC ([27]), which amended it ([28]). For this reason, the developments set out in the Communication take into account, where appropriate, the answers given by the Court to questions referred to in the previous Directives. Unless otherwise provided, the provisions presented in this Communication are therefore extracted from the currently applicable text of Directive 2003/88/EC. Reference is made to the prior texts where necessary ([29]).

In line with its legal basis, the purpose of the Directive as laid down in Article 1(1) and in several recitals ([30]) is to establish 'minimum safety and health requirements for the organisation of working time'.

The legal basis and purpose of the Directive are guiding principles in the Court's interpretation of it and must therefore be taken into account. In addition, in line with Recital 4 of the Directive, which states that '[t]he improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations', the Court has refused to take into account the economic and organisational consequences raised by Member States as to whether time spent on-call qualifies as working time ([31]).

III. SCOPE OF THE DIRECTIVE

A. *Personal scope*

1. Application of the Directive's provisions to 'workers'

While the Directive does not contain a specific article setting its personal scope, its operative provisions refer to a 'worker' (often to 'any worker' or 'every worker').

This concept of 'worker' is not defined in the Directive itself. The accompanying document to the proposal for the 1993 Directive ([32]) suggested that the definition in the 89/391/EEC Directive ([33]) would apply, i.e. 'any person employed by an employer, including trainees and apprentices but excluding domestic servants'. However, the Court has refuted this on the grounds that the Working Time Directive itself made no reference to this provision of Directive 89/391/EEC. It also excluded the application of a definition derived from national legislation and/or practices ([34]).

([26]) Now Article 153(2) of the Treaty on the Functioning of the European Union.

([27]) Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive (OJ L 195, 1.8.2000, p. 41).

([28]) Judgment of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA*, C-266/14, ECLI:EU:C:2015:578, para. 22; Judgment of 25 November 2010, *Günter Fuß v Stadt Halle*, C-429/09, ECLI:EU:C:2010:717, para. 32; Order of 4 March 2011, *Nicuşor Grigore v Regia Națională a Pădurilor Romsilva – Direcția Silvică București*, C-258/10, ECLI:EU:C:2011:122, para. 39.

([29]) The purpose of this Interpretative Communication however remains to present the state of play of the applicable text and modified provisions will therefore not be examined unless relevant for the developments. This is notably the case for the provision establishing that the weekly rest period should normally fall on Sundays and for the exclusion of transport sectors from the Directive which no longer exist as such.

([30]) See notably recitals 2 and 4.

([31]) Judgment in case C-151/02, *Jaeger*, paras. 66-67.

([32]) Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90) 317 final – SYN 295, p. 3.

([33]) Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ L 183, 29.6.1989, p. 1).

([34]) Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 27.

On the contrary, the Court held that this concept could not be interpreted differently according to the law of Member States but had an autonomous meaning specific to European Union law. It considered that the concept of worker could not be interpreted narrowly ([35]) and concluded that it 'must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration' ([36]). The Court thereby linked the interpretation of 'worker' for the purposes of the Working Time Directive to that established by case-law in the context of the free movement of workers as laid down in Article 45 of the Treaty.

The Court holds that '[i]t is for the national court to apply that concept of a "worker" in any classification, and the national court must base that classification on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved' ([37]).

However, it has issued guidance on the application of these criteria and established that the category 'worker' under EU law is independent from the national one ([38]). It has for example held that employees in a body governed by public law qualify as 'workers' irrespective of their civil servant status ([39]). It also reasoned that casual and seasonal staff employed under fixed-term contracts who are not subject to certain provisions of the national labour code fall within the scope of the concept of 'workers' ([40]). The Court has also ruled that the concept of worker could cover a person admitted to a work rehabilitation centre, regardless of the person's productivity level, the origin of the funds linked to remuneration or the limited amount of remuneration ([41]).

It is not the status of the person under national law that is decisive for the applicability of the Working Time Directive. For example, in *Matzak*, the Court qualified a volunteer firefighter under Belgian law as 'worker' in the meaning of the Directive ([42]). Instead, the applicability of the Directive will depend on whether the person concerned qualifies as a 'worker' according to the EU jurisprudential definition of worker. This is based on aspects of his or her concrete working arrangements, in particular on whether the person performs effective and genuine activities under the direction and supervision of another person and for remuneration.

This in turn means that certain persons qualified as 'self-employed' under national law could nonetheless be categorised as 'workers' by the Court for the purpose of the application of the Working Time Directive ([43]). The Court indeed held that 'the classification of a "self-employed person" under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional, thereby disguising an employment relationship' ([44]). The Court pointed to the following elements as possible indicators of the 'worker' qualification: if the person acts under the direction of an employer as regards, in particular, the freedom to choose the time, place and content of his or her work ([45]), if the person does not share the employer's commercial risks ([46]) and if he or she forms an integral part of the

([35]) Order of 7 April 2011, *Dieter May v AOK Rheinland/Hamburg – Die Gesundheitskasse*, C-519/09, ECLI:EU:C:2011:221, para. 21.

([36]) Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 28; Judgment of 20 November 2018, *Sindicatul Familia Constanța and Others v Direcția Generală de Asistență Socială și Protecția Copilului Constanța*, C-147/17, ECLI:EU:C:2018:926, para. 41; Judgment of 16 July 2020, *UX v Governo della Repubblica italiana*, C-658/18, ECLI:EU:C:2020:572, paras. 90 and 94; Judgment in case C-742/19, *Ministrstvo za obrambo*, para. 49.

([37]) Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 29; Judgment in case C-658/18, *Governo della Repubblica italiana*, para. 91.

([38]) Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 30.

([39]) Order in case C-519/09, *May*, paras. 25-26.

([40]) Judgment in case C-428/09, *Union syndicale Solidaires Isère*, paras. 30-32.

([41]) Judgment of 26 March 2015, *Gérard Fenoll v Centre d'aide par le travail 'La Jouvene' and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon*, C-316/13, ECLI:EU:C:2015:200, paras. 29-41.

([42]) Judgment in case C-518/15, *Matzak*, para. 45.

([43]) See by analogy, Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, ECLI:EU:C:2014:2411, paras. 35-37.

([44]) Judgment in case C-413/13, *FNV Kunsten Informatie en Media*, para. 35.

([45]) Judgment of 13 January 2004, *Debra Allonby* v *Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, C-256/01, ECLI:EU:C:2004:18, para. 72.

([46]) Judgment of 14 December 1989, *The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd*, C-3/87, ECLI:EU:C:1989:650, para. 36.

employer's undertaking for the duration of that relationship ([47]). On the other hand, the choice of the type of work and tasks to be executed and the manner in which they are performed, as well as of the time and place of work, and with more freedom in the recruitment of own staff, are features typically associated with the functions of an independent service provider ([48]).

The Court has held that in order to determine whether a 'self-employed' person is to be categorised as a 'worker', one should examine whether the 'independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer' ([49]).

The same assessment, on the basis of the criteria presented above, could lead to individuals under any form of contractual relationships being categorised as 'workers' and therefore being covered by the Working Time Directive.

2. **Application of the Directive in case of concurrent contracts**

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 separately.

The Court clarified that when workers have concluded several contracts of employment with the same employer, the minimum daily rest period applies to those contracts taken as a whole, and not to each of them separately ([50]).

However, the Court has not yet had to rule on the case of workers who have concluded several contracts of employment with different employers.

As indicated in previous reports ([51]), 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.

It can also be pointed out that, in line with the scope of the Directive presented above, the Directive does not apply to relationships in which the person does not qualify as a 'worker' under EU law. This for example means that the working time of 'volunteers' or 'self-employed' who do not qualify as 'workers' would not be covered by the Directive.

B. ***Material scope – sectors concerned***

1. **Principle: the Directive applies to all sectors**

Article 1 of the Working Time Directive provides that:

'[…] 3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Articles 14, 17, 18 and 19 of this Directive. […]'

Article 2 of Directive 89/391/EEC on the introduction of measures to encourage improvements in the health and safety of workers at work to which reference is made provides that:

'1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

([47]) Judgment of 16 September 1999, *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV*, C-22/98, ECLI:EU:C:1999:419, para. 26.
([48]) Order of 22 April 2020, *B v Yodel Delivery Network Ltd*, C-692/19, ECLI:EU:C:2020:288, para. 32.
([49]) Order in case C-692/19, *Yodel*, para. 45,
([50]) Judgment in case C-585/19, *Academia de Studii Economice din Bucureşti*.
([51]) 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; Report from the Commission on the implementation by Member States of Directive 2003/38/EC concerning certain aspects of the organisation of working time and accompanying document, COM(2017) 254 final and SWD(2017) 204 final.

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.'

In accordance with well-established case-law of the Court, which takes account of the objective of the Directive, namely to encourage improvement in the health and safety of workers at work, and of the wording of Article 2(1) of Directive 89/391/EEC, the scope of the Working Time Directive must be interpreted broadly ([52]).

As a consequence, exclusion from the scope set out in Article 2(2) of Directive 89/391/EEC must be interpreted restrictively ([53]) and 'in such a way that its ambit is confined to what is strictly necessary in order to safeguard the interests which it enables the Member States to protect' ([54]).

In point of fact, the Court has ruled that this exclusion does not apply to the sectors of activity considered in their entirety. Its sole aim is to ensure 'the proper operation of services essential for the protection of public health, safety and order in cases, such as a catastrophe, the gravity and scale of which are exceptional and a characteristic of which is the fact that they are liable to expose the health and safety of workers to considerable risk and that, by their nature, they do not lend themselves to planning as regards the working time of teams of emergency workers' ([55]).

The Court has established that although certain services must deal with events which, by definition, are unforeseeable, the activities which they entail in normal conditions and which also correspond to the duties specifically assigned to a service of that kind are nonetheless capable of being organised in advance, including the working hours of staff and the prevention of risks to safety and/or health ([56]).

As a result, exclusion from scope does not depend on whether workers belong to one of the sectors referred to in Directive 89/391/EEC. It depends rather on the specific nature of certain individual tasks carried out by employees in those sectors. Given the need to ensure effective protection of the community, such tasks justify an exception to the rules laid down in that Directive.

The Working Time Directive is therefore applicable to the activities of the armed forces, the police, or the civil protection services. It is also applicable to other specific public service activities as long as they are carried out under normal circumstances.

In its case-law, the Court has ruled that the Directive applies to the activities of primary care teams and medical and nursing staff providing services in primary healthcare teams ([57]). It also applies to other services which respond to emergencies such as medical and nursing staff in primary care teams and in other services which treat outside emergencies ([58]), workers in an

([52]) Judgment in case C-303/98, *Simap*, para. 34.; Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 22.

([53]) Judgment in case C-303/98, *Simap*, para. 35; Order of 3 July 2001, *Confederación Intersindical Galega (CIG) v Servicio Galego de Saude (SERGAS)*, C-241/99, ECLI:EU:C:2001:371, para. 29; Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 52; Order in case C-52/04, *Personalrat der Feuerwehr Hamburg*, para. 42; Judgment of 12 January 2006, *Commission of the European Communities v Kingdom of Spain*, C-132/04, ECLI:EU:C:2006:18, para. 22; Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 24; Judgment of 30 April 2020, *UO v Készenléti Rendőrség*, C-211/19, ECLI:EU:C:2020:344, para. 32; Judgment in case C-742/19, *Ministrstvo za obrambo*, paras. 55 and 65.

([54]) Order in case C-52/04, *Personalrat der Feuerwehr Hamburg*, para. 44; Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 54; Judgment in case C-132/04, *Commission v Spain*, para. 23, Judgment in case C-211/19, *Készenléti Rendőrség*, para. 32; Judgment in case C-742/19, *Ministrstvo za obrambo*, para. 55.

([55]) Order in case C-52/04, *Personalrat der Feuerwehr Hamburg*, para. 45; Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 55.

([56]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 57; Order in case C-52/04, *Personalrat der Feuerwehr Hamburg*, para. 46.

([57]) Judgment in case C-303/98, *Simap*, para. 41.

([58]) Judgment in case C-241/99, *CIG*, para. 30.

emergency medical service ([59]), intervention forces of public firefighters ([60]), municipal police ([61]), or non-civilian personnel of public administrations where their duties are carried out under normal circumstances ([62]). The Directive further applies to members of the armed forces ([63]).

2. **Derogation: exclusion of certain public service activities**

Exclusion from the scope of the Directive nevertheless exists, and the Court has provided some clarifications in this respect ([64]). Its interpretation arises from Article 2(2) of Directive 89/391/EEC, which states that 'This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, […] inevitably conflict with it'.

As regards the expression of 'public service', according to the case-law of the Court, it encompasses not only 'sectors in which workers are organically attached to the State or to a public authority, but also […] sectors in which workers carry out their work for a private person who performs, under the control of the public authorities, a task in the public interest which forms part of the essential functions of the State' ([65]).

However, the Court stated that Article 2(2) of Directive 89/391/EEC does not allow for the exclusion of entire sectors of activity, but only of specific tasks ([66]).

The Court specified that to be excluded from Directive 89/391/EEC, the specific public service activities must have characteristics which mean that their very nature is absolutely incompatible with the planning of working time in a way that respects the requirements imposed by the Working Time Directive ([67]). This is in particular the case where activities can be carried out only on a continuous basis and only by the same workers, without it being possible to establish a rotation system ([68]).

The Court has clarified that Article 2(2) of Directive 89/391/EEC would allow exclusions in the case of 'exceptional events in which the proper implementation of measures designed to protect the population in situations in which the community at large is at serious risk requires the personnel dealing with a situation of that kind to give absolute priority to the objective of those measures in order that it may be achieved' ([69]).

This would be the case for 'natural or technological disasters, attacks, serious accidents or similar events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large, measures the proper implementation of which would be jeopardised if all the rules laid down in Directives 89/391 and 93/104 [the Working Time Directive] were to be observed' ([70]).

However, the activities carried out under normal circumstances by safety and emergency services fall within the scope of Directive 89/391/EEC ([71]). The Court found that activities of the fire service carried out by operational forces on the ground ([72]) and activities of emergency workers tending the injured and sick ([73]) are capable of being organised in advance, including the working hours of its staff and the prevention of risks to safety and/or health. It left it to the national court to

([59]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 63.
([60]) Order in case C-52/04, *Personalrat der Feuerwehr Hamburg*, para. 52; Judgment in case C-429/09, *Fuß*, para. 57.
([61]) Judgment of 21 October 2010, *Antonino Accardo and Others v Comune di Torino*, C-227/09, ECLI:EU:C:2010:624, para. 39.
([62]) Judgment in case C-132/04, *Commission v Spain*, paras. 25-38.
([63]) Judgment in case C-742/19, *Ministrstvo za obrambo*, paras. 63-64 and 68.
([64]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others;* Order in case C-52/04, *Personalrat der Feuerwehr Hamburg;* Judgment in case C-132/04, *Commission v Spain*; Judgment in case C-147/17, *Sindicatul Familia Constanța and Others*; Judgment in case C-211/19, *Készenléti Rendőrség*.
([65]) Judgment in case C-147/17, *Sindicatul Familia Constanța and Others*, para. 56.
([66]) Judgment in case C-147/17, *Sindicatul Familia Constanța and Others*, para. 55; Judgment in case C-742/19, *Ministrstvo za obrambo*, para. 56.
([67]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 55; Judgment in case C-147/17, *Sindicatul Familia Constanța and Others*, para. 68; Judgment in case C-211/19, *Készenléti Rendőrség*, para. 43; Judgment in case C-742/19, *Ministrstvo za obrambo*, para. 60.
([68]) Judgment in case C-147/17, *Sindicatul Familia Constanța and Others*, paras. 70-74; Judgment in case C-211/19, *Készenléti Rendőrség*, para. 44; Judgment in case C-742/19, *Ministrstvo za obrambo*, para. 61.
([69]) Order in case C-52/04, *Personalrat der Feuerwehr Hamburg*, para. 53; Judgment in case C-132/04, *Commission v Spain*, para. 26.
([70]) Order in case C-52/04, *Personalrat der Feuerwehr Hamburg*, para. 54; Judgment in case C-132/04, *Commission v Spain*, para. 27.
([71]) Order in case C-52/04, *Personalrat der Feuerwehr Hamburg*, para. 51.
([72]) Order in case C-52/04, *Personalrat der Feuerwehr Hamburg*, para. 52.
([73]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others;* paras. 56 and 57.

assess whether the activities of a police force carrying out surveillance of external Schengen borders have such specific characteristics or whether the influx at the borders prevented the surveillance of those borders from being carried out under normal circumstances ([74]).

Only in the case of foster parents employed by the state who provide for the upbringing and maintenance of children withdrawn from the custody of their parents has the Court so far explicitly held that the exclusion of specific public service activities from the scope of the Directive applies. It found that the peculiar characteristics of performing their activity continuously, including during weekly rest days, public holidays, non-working days and annual leave, strictly preclude the application of the Directive to them ([75]).

In any event, the Court has stressed that, even where the Directive is not applied in exceptional situations, it requires 'the competent authorities to ensure the safety and health of workers "as far as possible"' ([76]).

3. **Derogation: the case of activities of members of the armed forces**

As regards the activities of members of the armed forces, the Court has ruled in the *Ministrstvo za obrambo* case ([77]) that a security activity performed by a member of military personnel is excluded from the scope of the Directive ([78]):

— where that activity takes place in the course of initial or operational training, including compulsory military service, or an actual military operation, whether the armed forces are deployed permanently or on a temporary basis, within or outside of the borders of a Member State;

— where the activity is so particular that it is not suitable for a staff rotation system complying with the Directive;

— where the application of the Directive, by requiring the setting up of a rotation system or a system for planning working time, would inevitably be detrimental to the proper performance of actual military operations; and

— where the activity is carried out in the context of exceptional events whose gravity and scale require the adoption of measures which are indispensable for the protection of the life, health and safety of the community at large and whose proper implementation would be jeopardised if all the rules laid down in the Directive had to be observed.

However, the Court underlined that certain activities of members of the armed forces, such as those connected, in particular, to administrative, maintenance, repair and health services, as well as services relating to public order and prosecution, cannot be excluded in their entirety from the scope of the Directive ([79]).

The Court based itself on Article 1(3) of the Directive, read in the light of Article 4(2) TEU. Under the latter provision, 'the Union is to respect […] their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security'. That provision also states that national security is to remain the sole responsibility of each Member State. The Court pointed out that the principal tasks of the armed forces of the Member States, which are the preservation of territorial integrity and safeguarding national security, are expressly included among the essential functions of the State ([80]). Although the organisation of the working time of military personnel does not entirely escape the application of EU law, Article 4(2) TEU requires that the application to such personnel of the rules of EU law relating to the organisation of working time does not hinder the proper performance of those essential functions. In addition, EU law must duly take into consideration the specific features a Member State imposes on the functioning of its armed forces, whether they result, inter alia, from the particular international responsibilities of that Member State, from the conflicts or threats with which it is confronted, or from its geopolitical context ([81]).

([74]) Judgment in case C-211/19, *Készenléti Rendőrség*, paras. 44 and 47.
([75]) Judgment in case C-147/17, *Sindicatul Familia Constanța and Others*, para. 76.
([76]) Order in case C-52/04, *Personalrat der Feuerwehr Hamburg*, para. 56; Judgment in case C-132/04, *Commission v Spain*, para. 28; Judgment in case C-147/17, *Sindicatul Familia Constanța and Others*, para. 78; Judgment in case C-211/19, *Készenléti Rendőrség*, para. 51.
([77]) Judgment in case C-742/19, *Ministrstvo za obrambo*.
([78]) Judgment in case C-742/19, *Ministrstvo za obrambo*, para. 88.
([79]) Judgment in case C-742/19, *Ministrstvo za obrambo*, para. 69.
([80]) Judgment in case C-742/19, *Ministrstvo za obrambo*, para. 37.
([81]) Judgment in case C-742/19, *Ministrstvo za obrambo*, paras. 43 and 44.

4. **Seafarers**

> Article 1(3) of the Directive provides that:
>
> '[…] This Directive shall not apply to seafarers, as defined in Directive 1999/63/EC without prejudice to Article 2(8) of this Directive. […]'

A contrario, this provision means that the general Working Time Directive applies to seafarers who are not covered by Directive 1999/63/EC ([82]) as amended by Directive 2009/13/EC ([83]).

Directive 1999/63/EC establishes minimum standards for the working time of seafarers. According to Clause 1 of the Annex to this directive, it applies to 'seafarers on board every seagoing ship, whether publicly or privately owned, which is registered in the territory of any Member State and is ordinarily engaged in commercial maritime operations' and that seafarers are defined by Clause 2 as 'any person who is employed or engaged or works in any capacity on board a ship to which this Agreement applies'.

As a result, workers on board vessels which are not ordinarily engaged in 'commercial maritime operations' would not be covered by Directive 1999/63/EC. In light of the wording of Article 1(3) as presented above, the Commission considers that such workers fall under the scope of the Working Time Directive.

5. **Other sectors and workers subject to specific legislation**

> Article 14 of the Directive also establishes that:
>
> 'This Directive shall not apply where other Community instruments contain more specific requirements relating to the organisation of working time for certain occupations or occupational activities.'

On the basis of the current Union instruments, the Working Time Directive does not apply where more specific requirements exist. This is the case for:

— *Young workers*

Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work ([84]).

— *Civil aviation*

Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) ([85]).

([82]) Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) (OJ L 167, 2.7.1999, p. 33).

([83]) Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC (OJ L 124, 20.5.2009, p. 30).

([84]) OJ L 216, 20.8.1994, p. 12.

([85]) OJ L 302, 1.12.2000, p. 57.

— *Road transport*

Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities ([86]) and Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 ([87]).

— *Cross-border railway*

Council Directive 2005/47/EC of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector ([88]).

— *Inland waterway*

Council Directive 2014/112/EU of 19 December 2014 implementing the European Agreement on certain aspects of the organisation of working time in inland waterway transport, concluded by the European Barge Union (EBU), the European Skippers Organisation (ESO) and the European Transport Workers' Federation (ETF) ([89]).

— *Work in fishing*

Council Directive (EU) 2017/159 of 19 December 2016 implementing the Agreement concerning the implementation of the Work in Fishing Convention, 2007 of the International Labour Organisation, concluded on 21 May 2012 between the General Confederation of Agricultural Cooperatives in the European Union (Cogeca), the European Transport Workers' Federation (ETF) and the Association of National Organisations of Fishing Enterprises in the European Union (Europêche) ([90]).

Akin to the situation of seafarers, it is necessary to revert to the exact scope of these Directives as, even in the sectors concerned, some workers could be excluded from it and would therefore fall under the general Working Time Directive's provisions ([91]).

C. **Scope of the provisions**

1. **What is (or not) covered?**

As indicated in Article 1(2) of the Working time Directive, it applies to:

'[…] (a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time;

(b) and certain aspects of night work, shift work and patterns of work.'

A contrario, this means that the 'statutory' working time of workers, i.e. the legal duration of the working week above which employers often have to pay overtime, is not governed by the Directive and is left to the Member States while respecting the maximum limit to the average weekly working time set out in Article 6 of the Directive (See Chapter VI).

([86]) OJ L 80, 23.3.2002, p. 35.
([87]) OJ L 102, 11.4.2006, p. 1.
([88]) OJ L 195, 27.7.2005, p. 15.
([89]) OJ L 367, 23.12.2014, p. 86.
([90]) OJ L 25, 31.1.2017, p. 12.
([91]) For example, such would be the situation of railway workers not working in interoperable cross-border services in the railway sector, who are not covered by Council Directive 2005/47/EC. This would also be the situation of road transport mobile workers operating vehicles that carry passengers on regular services not exceeding 50 kilometres, who are not covered by Directive 2002/15/EC.

The Working Time Directive also does not deal with the issue of remuneration, including the level of salaries and the methods of remuneration and various pay rates which can be established at national level ([92]). The Court has held that this was clear from both the purpose and the wording of the Directive's provisions. It is also an unambiguous consequence of Article 153(5) of the Treaty on the functioning of the European Union ([93]). The only exception to this principle recognised by the Court is that of the pay which must be ensured during the workers' annual leave (see Chapter VII).

2. **Minimum provisions**

In line with its legal basis, the Working Time Directive establishes minimum standards in the above-mentioned areas. Its minimum provisions aim to provide a 'safety net' for the health and safety of the workers concerned ([94]). These are binding for the Member States, which are under the obligation to ensure the transposition of those minimum standards in their national legal order. However, the minimal character of the Directive's provisions also means that it does not prevent Member States from applying or introducing national provisions which are more favourable to the protection of the health and safety of workers ([95]).

> Article 15 of the Directive specifically points to this aspect:
>
> 'This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

This in turn means that, where workers benefit from additional protection under national law, it is for the Member States to decide on the conditions and that the Court's interpretations in relation to the Directive's provisions are not applicable to the more protective provisions granted at national level ([96]).

Where Member States make use of this option to implement or apply more protective provisions, compliance with the rules laid down by the Directive must be ascertained by reference solely to the limits fixed by it. An obligation remains on the 'Member States to guarantee that each of the minimum requirements laid down by the Directive is observed' ([97]).

3. **Non-regression**

As indicated above, the Directive establishes minimum provisions, which the Member States have to transpose into national law.

> While the Member States enjoy a degree of freedom in the way they transpose and implement these provisions, Article 23 of the Directive provides that:
>
> 'Without prejudice to the right of Member States to develop, in the light of changing circumstances, different legislative, regulatory or contractual provisions in the field of working time, as long as the minimum requirements provided for in this Directive are complied with, implementation of this Directive shall not constitute valid grounds for reducing the general level of protection afforded to workers.'

([92]) Order of 11 January 2007, *Jan Vorel v Nemocnice Český Krumlov,* C-437/05, ECLI:EU:C:2007:23, paras. 32-35; Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, paras. 48-49; Order in case C-258/10, *Grigore*, para. 81; Judgment of 26 July 2017, *Hannele Hälvä and Others v SOS-Lapsikylä ry*, C-175/16, ECLI:EU:2017:617, para. 25; Judgment in case C-518/15 *Matzak*, para. 24; Judgment in case C-147/17, *Sindicatul Familia Constanța and Others*, para. 35; Judgment in case C-211/19, *Kdészenléti Rendőrség*, para. 23; Judgment in case C-344/19, *Radiotelevizija Slovenija*, paras. 57-58; Judgment in case C-580/19, *Stadt Offenbach am Main*, paras. 56-57.

([93]) Judgment of 1 December 2005, *Abdelkader Dellas and Others* v *Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité*, C-14/04, ECLI:EU:C:2005:728, paras. 38-39; Judgment of 7 July 2022, *Coca-Cola European Partners Deutschland GmbH v L.B. and R.G.*, joined cases C-257/21 and C-258/21, ECLI:EU:C:2022:529, para. 47.

([94]) Proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90) 317 final – SYN 295, page 3.

([95]) Judgment in joined cases C-609/17 and C-610/17, *TSN*, para. 48.

([96]) Judgment in joined cases C-609/17 and C-610/17, *TSN*, para. 36.

([97]) Judgment in case C-14/04, *Dellas and Others*, para. 53.

While the Court has not had the occasion to rule on this provision in terms of the Working Time Directive, it has ruled on a similar provision contained in the Fixed-Term Work Directive ([98]), i.e. Clause 8(3), which states that 'Implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement'.

In this context, the Court has ruled that this clause could not be interpreted restrictively due to the Agreement's aim of improving the living and working conditions of the workers concerned ([99]).

The Court also identified two criteria to be examined in respect of that clause ([100]):

— the existence of a reduction in 'the general level of protection' and

— the fact that this reduction must be connected to the 'implementation' of the Agreement.

While the Court held that it is for the national courts to rule on the existence of a reduction in the protection of workers ([101]), it nevertheless considered that, in terms of the first criterion, the fact that the reduction relates to the 'general level of protection' meant that only a 'reduction on a scale likely to have an effect overall on national legislation […] is liable to be covered' by this provision ([102]).

As to the second criterion, the Court considered that the connection with the 'implementation of the Agreement' did not limit itself to the original transposition of the Directive; but also covered 'all domestic measures intended to ensure that the objective pursued by the Directive may be attained, including those which, after transposition in the strict sense, add to or amend domestic rules previously adopted' ([103]). However, it did exclude reductions covered by texts justified by the need to encourage 'another objective, one that is distinct from [the implementation of the Agreement]' ([104]).

The Commission considers that the same stance applies to the Working Time Directive, given its aim to protect the health and safety of workers and the similar wording of its Article 23 and Clause 8(3) of the Fixed-Term Work Directive. This means that Article 23 cannot be interpreted restrictively and that the two criteria above apply to the characterisation of a reduction of the general level of protection linked to the implementation of the Directive, which is prohibited.

IV. **DEFINITIONS**

A. ***'Working time' and 'rest periods'***

Article 2 defines 'working time' and 'rest time' for the purposes of the Directive:

'For the purposes of this Directive, the following definitions shall apply:

1. "working time" means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

2. "rest period" means any period which is not working time;'.

As per Recital 5 of the Directive, the concept of 'rest' must be expressed in units of time, i.e. in days, hours and/or fractions thereof.

([98]) Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ L 175, 10.7.1999, p. 43).

([99]) Judgment of 23 April 2009, *Kiriaki Angelidaki and Others v Organismos Nomarchiakis Autodioikisis Rethymnis, Charikleia Giannoudi v Dimos Geropotamou* and *Georgios Karabousanos and Sofoklis Michopoulos v Dimos Geropotamou*, joined cases C-378/07 to C-380/07, ECLI:EU:C:2009:250, paras. 112-113.

([100]) Judgment in joined cases C-378/07 to C-380/07, *Angelidaki and Others*, para. 126.

([101]) Judgment in joined cases C-378/07 to C-380/07, *Angelidaki and Others*, para. 129.

([102]) Judgment in joined cases C-378/07 to C-380/07, *Angelidaki and Others*, para. 140.

([103]) Judgment in joined cases C-378/07 to C-380/07, *Angelidaki and Others*, para. 131.

([104]) Judgment in joined cases C-378/07 to C-380/07, *Angelidaki and Others*, para. 133.

1. **Definition of 'working time' and 'rest periods'**

In terms of the wording of the Directive, the Court has ruled that in the logic of the Directive, working time is 'placed in opposition to rest periods, the two being mutually exclusive' ([105]) and that the Directive 'does not provide for any intermediate category between working time and rest periods' ([106]).

The Court has held that the concepts of 'working time' and 'rest period' 'may not be interpreted in accordance with the requirements of the various legislations of the Member States but constitute concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of that directive, intended to improve workers' living and working conditions. Only such an autonomous interpretation is capable of securing full effectiveness for that directive and uniform application of those concepts in all the Member States' ([107]).

This also means that Member States cannot unilaterally determine the scope of these concepts ([108]). This is further corroborated by the fact that the Directive does not permit any derogation from Article 2 of the Directive ([109]), which establishes, amongst others, the definitions of 'working time' and 'rest period'.

With reference to the text of Article 2(1) itself, the Court's case-law ([110]) and historical documents ([111]), three cumulative criteria determine whether certain periods are deemed to be 'working time':

— *The worker is working*

This first criterion is a spatial one that corresponds to a condition that 'the worker is at work' or is 'present at the workplace'. This criterion is expressed with small differences between the various linguistic versions of the Directive: for example, in English, it states 'the worker is working' and in German 'ein Arbeitnehmer … arbeitet' while in French it states 'le travailleur est au travail' and in Spanish 'el trabajador permanezca en el trabajo', not 'le travailleur travaille' or 'el trabajador trabaja'.

As a uniform interpretation of the provisions of European law is necessary, the text of the Directive has to be interpreted and applied in the light of the versions that exist in the other official languages. If there is divergence, the provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms part ([112]).

([105]) Judgment in case C-303/98, *Simap*, para. 47; Judgment in case C-151/02, *Jaeger*, para. 48, Order in case C-437/05, *Vorel*, para. 24; Judgment in case C-14/04, *Dellas and Others*, para. 42; Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, para. 25; Judgment in case C-518/15, *Matzak*, para. 55; Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 29; Judgment in case C-580/19, *Offenbach am Main*, para. 30; Judgment in case C-107/19, *Dopravní podnik hl. m. Prahy*, para. 28.

([106]) Order in case C-437/05, *Vorel*, para. 25; Judgment in case C-14/04, *Dellas and Others*, para. 43; Order in case C-258/10, *Grigore*, para. 43; Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, para. 26; Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 29; Judgment in case C-580/19, *Offenbach am Main*, para. 30; Judgment in case C-107/19, *Dopravní podnik hl. m. Prahy*, para. 28; Judgment of 8 October 2021, *BX v Unitatea Administrativ Teritorială D.*, C-909/19, ECLI:EU:C:2021:893, para. 38.

([107]) Judgment in case C-14/04, *Dellas and Others*, para. 44; Judgment in case C-151/02, *Jaeger*, para.58; Order in case C-437/05, *Vorel*, para. 26; Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, para. 27; Order in case C-258/10, *Grigore*, para. 44. Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 30; Judgment in case C-580/19, *Offenbach am Main*, para. 31; Judgment in case C-107/19, *Dopravní podnik hl. m. Prahy*, para. 29.

([108]) Judgment in case C-14/04, *Dellas and Others*, para. 45.

([109]) Order in case C-258/10, *Grigore*, para. 45; Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, para. 28; Judgment in case C-518/15, *Matzak*, paras. 34-38.

([110]) Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, paras. 30, 35 and 43.

([111]) Explanatory Memorandum of the Communication from the Commission on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC of 23 November 1993, 18 November 1998, COM(1998) 662 final, para. 6.

([112]) See by analogy: Judgment of 19 April 2007, *UAB Profisa* v *Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos*, C-63/06, ECLI:EU:C:2007:233, paras. 13-15.

In the case of the Working Time Directive, such interpretation has led the Court to consider the criteria of the 'the worker is working' as a spatial one relating to the need for the worker to be 'at the workplace' or 'at a place determined by his employer'. This has been interpreted clearly by Advocate General Bot ([113]) and implicitly by the Court ([114]) which repeatedly pointed out that a decisive factor in determining 'working time' is whether the worker is required to be physically present at the place determined by the employer ([115]).

It should be noted that the place determined by the employer does not need to be the workplace. As presented below, the Court has also held that travel time could, in certain cases, also count as 'working time' since the working time of such workers could not be restricted to the time spent on the premises of their employer or the customers such as in that of workers without fixed places of work in the *Tyco* case ([116]).

The Court has clarified in the context of qualifying 'on-call' or 'stand-by' as either 'working time' or 'rest period' that when 'on-call' or 'stand-by' duty takes place in a place determined by the employer, which is different from the worker's home, the entire period of such duty qualifies systematically as 'working time' under the Directive, without any further assessment being necessary ([117]). However, when the workplace is also the worker's home, the qualification as 'working time' or 'rest period' will depend on the intensity of constraints imposed on the worker by the employer ([118]).

— *The worker is at the employer's disposal*

On this issue, the decisive factor is that the worker is available to provide the appropriate services immediately in case of need ([119]).

This is the case where workers are legally obliged to obey the instructions of their employer and carry out their activity for that employer. On the contrary, where workers can manage their time without major constraints and pursue their own interests, this could prove that the period of time in question does not constitute 'working time' ([120]).

In the context of 'stand-by', where workers are free to choose their whereabouts, this implies the necessity for national courts to establish in each case whether constraints the employer imposes on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests ([121]). Only if this is the case will the entire period of 'stand-by'

([113]) Opinion of Advocate General Bot of 11 June 2015, *Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Dalail Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA.*, C-266/14, ECLI:EU:C:2015:391, paras. 31 and 48.

([114]) See notably the judgment in case C-303/98, *Simap*, para. 48, in which the Court considers that the two first conditions of working time ('is working' and 'at the employer's disposal') are fulfilled in the case of time spent on call at the health centre; see also judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, para. 43, in which the Court states in respect of the application of the criteria 'is working' to workers travelling to/from a customer that '*the place of work of such workers cannot be reduced to the physical areas of their work on the premises of their employer's customers*'.

([115]) Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras.*, para. 35; Judgment in case C-14/04, *Dellas and Others*, para. 48; Order in case C-437/05, *Vorel*, para. 28; Order in case C-258/10, *Grigore*, para. 63; Judgment in case C-909/19, *Unitatea Administrativ Teritorială D.*, para. 40.

([116]) Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, paras. 43-46.

([117]) Judgment in case C-303/98, *Simap*, para. 48; Judgment in case C-151/02, *Jaeger*, para. 63; Judgment in case C-14/04, *Dellas and Others*, para. 48; Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 33; Judgment in case C-580/19, *Stadt Offenbach am Main*, para. 34; Judgment in case C-107/19, *Dopravní podnik hl. m. Prahy*, para. 31.

([118]) Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 43 and the case-law cited; Judgment in case C-580/19, *Stadt Offenbach am Main*, para. 43.

([119]) Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, para. 35; Judgment in case C-14/04, *Dellas and Others*, para. 48; Order in case C-437/05, *Vorel*, para. 28; Order in case C-258/10, *Grigore*, para. 63.

([120]) Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, paras. 36-37; Judgment in case C-303/98, *Simap*, para. 50.

([121]) Judgment in case C-518/15, *Matzak*, paras. 63-66; Judgment in case C-344/19, *Radiotelevizija Slovenija*, paras. 36-37; Judgment in case C-580/19, *Stadt Offenbach am Main*, paras. 37-38; Judgment in case C-107/19, *Dopravní podnik hl. m. Prahy*, paras. 33-34; Judgment in case C-214/20, *Dublin City Council*, para. 38.

qualify as 'working time'. On the contrary, where the constraints imposed on the worker by the employer during the 'stand-by' do not prevent the worker from pursuing his or her own interest, only the time linked to the actual provision of services must be regarded as 'working time' ([122]).

— *The worker must be carrying out his activity or duties*

In terms of this third criterion, it is important to point out that both the intensity of and any discontinuity in the activities carried out are irrelevant.

In line with the objective of the Working Time Directive to ensure the safety and health of workers, the Court has ruled that, 'even if the activity actually performed varies according to the circumstances, the fact that [the workers] are obliged to be present and available at the workplace with a view to providing their professional services means that they are carrying out their duties in that instance' ([123]). The Court has indeed stressed that the intensity of the work done by the employee and his or her output are not amongst the defining characteristics of 'working time' within the meaning of the Directive ([124]) and that the time concerned may qualify as working time 'irrespective of the fact that […] the person concerned is not continuously carrying on any professional activity' ([125]).

Where national courts are asked to rule on whether time qualifies as 'working time' or a 'rest period', they must not limit their analysis to the provisions of national law. They should examine the conditions which apply in practice to the working time of the worker concerned ([126]).

Finally, in line with the wording of the Directive and the Court's case-law, if a period of time does not fulfil these criteria, it must be regarded as a 'rest period'.

2. **Recording of working time**

In order to ensure effectiveness of the rights enshrined in Articles 3, 5 and 6(b) of the Working Time Directive, the Member States must require employers to set up 'an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured' ([127]) ([128]).

Nonetheless, Member States have discretion to determine the specific arrangements for implementing such a system. In particular they have the right to decide the form that it must take, having regard, as necessary, to the particular characteristics of each sector of activity concerned, or the specific characteristics of certain undertakings concerning, *inter alia*, their size ([129]).

There is one exception to this rule. If on account of the specific characteristics of the activity concerned where the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves a Member State may derogate from Articles 3 to 6 of the Working Time Directive and does not have to set up a system of recording of working time for that activity ([130]).

3. **Application of the Directive's definition to specific periods of time**

a) *'On-call' and 'standby time'*

The situation as regards 'on-call' and 'standby' time has received specific guidance from the Court, in particular in its *Simap*, *Jaeger* and *Dellas* cases, which concerned doctors in primary care teams and at the hospital as well as a special needs teacher in residential establishments for handicapped young people and adults ([131]).

([122]) Judgment in case C-580/19, *Stadt Offenbach am Main*, para. 39; Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 38 and the case-law cited.
([123]) Judgment in case C-303/98, *Simap*, para. 48.
([124]) Order in case C-437/05, *Vorel*, para. 25; Judgment in case C-14/04, *Dellas and Others*, para. 43
([125]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 93.
([126]) Order in case C-258/10, *Grigore*, para. 50.
([127]) Judgment in case C-55/18, *CCOO*, para. 60.
([128]) The Court has held that under EU personal data protection rules, records of working time are personal data; Judgment of 30 May 2013, *Worten – Equipamentos para o Lar SA v Autoridade para as Condições de Trabalho (ACT)*, C-342/12, ECLI:EU:C:2013:355.
([129]) Judgment in case C-55/18, *CCOO*, para. 63.
([130]) Judgment in case C-55/18, *CCOO*, para. 63.
([131]) Judgment in case C-303/98, *Simap*; Judgment in case C-151/02, *Jaeger*; Judgment in case C-14/04, *Dellas and Others*.

In those cases, the Court held that the time spent 'on-call' by workers is to be regarded in its entirety as working time within the meaning of the Directive if they are required to be present at the workplace. In such a situation, the workers concerned are required to be available to provide their services at a place determined by the employer for the whole duration of the period. The workers are also subject to much greater constraints as they have to remain away from their family and social environment and have less freedom to manage the time during which their professional services are not required ([132]).

In support of its stance, the Court pointed to the fact that excluding 'on-call' time from working time if physical presence is required would seriously undermine the objective of ensuring the health and safety of workers by granting them minimum periods of rest and adequate breaks ([133]).

However, when the worker is obliged to remain at the workplace which includes or is indistinguishable from the worker's residence, that mere fact does not suffice for that period to be classified as 'working time' within the meaning of the Directive; rather, the qualification of such 'on-call' time as 'working time' or 'rest period' will depend on the intensity of constraints imposed on the worker by the employer. Indeed, in that case, the requirement that the worker does not leave the workplace does not necessarily mean that the worker must remain apart from his or her family and social environment and thus the obligation to respond to the employer's calls is less likely to interfere with the possibility to freely manage the time during which professional services are not required ([134]).

It should be noted that 'on-call' time has the status of 'working time' regardless of whether the person actually works during the period of 'on-call' duty ([135]). This means that if 'on-call' time includes inactivity, this is irrelevant for its status as 'working time' ([136]). Similarly, if a rest room is available to workers and they can rest or sleep during the periods when their services are not required, this does not affect the status of 'on-call' time as working time ([137]).

In respect of the use of systems of equivalence whereby a ratio is established for the accounting of 'on-call' time, the Court has ruled that if such systems do not ensure compliance with all the minimum safety and health requirements, they are incompatible with the Directive ([138]).

In contrast, during 'stand-by', where workers must be reachable at all times but are free to choose their whereabouts, or where they must remain at a workplace which is also their home, national courts will need to assess on a case-by case basis whether the constraints imposed by the employers on the workers are such as to preclude the workers from the possibility to pursue their own interests. If this is the case, 'working time' covers the entire periods of 'stand-by time' ([139]).

Conversely, where the constraints imposed on workers allow them to manage their time and to pursue their own interests without major constraints, only the time linked to the provision of work actually carried out during that period constitutes 'working time' ([140]).

In its recent case-law the Court specified the elements to be taken into account to determine the intensity of constraints imposed on workers during 'stand-by'.

The presence of at least one of the two following elements triggers, in principle, the qualification of the entire 'stand-by' period as 'working time':

— a very short time ('a few minutes') required to resume the work in case of need ([141]), and

([132]) Judgment in case C-151/02, *Jaeger*, para. 65.
([133]) Judgment in case C-303/98, *Simap*, para. 49.
([134]) Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 43; Judgment in case C-580/19, *Stadt Offenbach am Main*, para. 44.
([135]) Order in case C-437/05, *Vorel*, para. 27; Judgment in case C-14/04, *Dellas and Others*, para. 46.
([136]) Order in case C-437/05, *Vorel*, para. 28.
([137]) Judgment in case C-151/02, *Jaeger*, paras. 60 and 64.
([138]) Judgment in case C-14/04, *Dellas and Others*, para. 63.
([139]) Judgment in case C-518/15, *Matzak*, paras. 63-66; Judgment in case C-344/19, *Radiotelevizija Slovenija*, paras. 36-37; Judgment in case C-580/19, *Stadt Offenbach am Main*, paras. 37-38; Judgment in case C-107/19, *Dopravní podnik hl. m. Prahy*, paras. 33-34; Judgment in case C-214/20, *Dublin City Council*, para. 38.
([140]) Judgment in case C-580/19, *Stadt Offenbach am Main*, para. 39; Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 38 and the case-law cited.
([141]) Judgment in case C-580/19, *Stadt Offenbach am Main*, para. 47; Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 48.

— a high frequency of calls in conjunction with a 'non-negligible' duration of the actual activity performed by the worker, if it is possible to objectively estimate this frequency ([142]).

If the worker is only rarely called upon to act during the periods of stand-by time, these periods are nonetheless not 'rest periods' when the time limit within which the worker must return to the activity constrains, objectively and very significantly, the ability freely to manage the time when the worker is not required to work ([143]).

However, even if one of the two elements is present, it may still be that the non-active part of 'stand-by' would qualify as 'rest period', where facilities and/or leeway granted to the worker enable that worker to use the time for his or her own interests ([144]).

To assess the intensity of constraints imposed on the worker, only the constraints imposed and facilities granted by the employers themselves, by legislation or by collective agreements can be taken into account ([145]). Such constraints can, for example, include the obligation to have specific equipment ([146]) or penalties if the reaction time is exceeded ([147]). Facilities can cover the use of a professional vehicle with special traffic rights ([148]), absence of obligation to respond to all calls ([149]) or the possibility to carry out another professional activity during 'stand-by' ([150]).

On the other hand, constraints that may affect the quality of workers' rest during 'stand-by' but that are not imposed by the employer, by legislation or by collective agreements are not relevant for the qualification as 'working time'. These may be natural factors ([151]) or the workers' own choice ([152]).

Where 'stand-by' takes place during a worker's break, only the constraints that result from the obligation to remain ready for a call-out within a very short time-limit are relevant for the assessment of whether 'stand-by' qualifies as 'working time' or 'rest period'. The fact that the limited duration of a break inevitably also results in constraints is not relevant for this assessment ([153]).

Also irrelevant is the provision of service accommodation located at the workplace or next to the workplace ([154]).

Even in cases where the non-active part of 'stand-by' qualifies as 'rest period', this does not mean that employers have a free hand concerning the duration and timing of 'stand-by'. Employers must always comply with their obligations under Directive 89/391/EEC to protect the safety of the workers ([155]). The Court clarified that it follows from Article 5(1) of that directive that employers are obliged to evaluate and prevent all risks to the safety and health of workers. This includes certain psychosocial risks, such as stress or burnout ([156]). Thus, workers need to be able to withdraw from the working environment for a sufficient number of consecutive hours, so as to permit them to neutralise the effects of work on their safety or health ([157]). Consequently, employers cannot establish periods of stand-by so long or frequent that they could put at risk workers' health ([158]). The Court indicated that Member States are to define detailed arrangements for the application of that obligation ([159]).

([142]) Judgment in case C-580/19, *Stadt Offenbach am Main*, paras. 50-53; Judgment in case C-344/19, *Radiotelevizija Slovenija*, paras. 51-53.
([143]) Judgment in case C-344/19 *Radiotelevizija Slovenija*, para. 54.
([144]) Judgment in case C-214/20, *Dublin City Council*, paras. 41-42.
([145]) Judgment in case C-580/19, *Offenbach am Main*, para. 40; Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 39.
([146]) Judgment in case C-580/19, *Offenbach am Main*, para. 49.
([147]) Opinion of Advocat General Pitruzzella of 6 October 2020 in case C-344/19, *Radiotelevizija Slovenija*, para. 120 and opinion of Advocat General Pitruzzella of 6 October 2020 in case C-580/19, *Offenbach am Main*, para. 111.
([148]) Judgment in case C-580/19, *Offenbach am Main*, para. 49.
([149]) Judgment in case C-214/20, *Dublin City Council*, para. 44.
([150]) Judgment in case C-214/20, *Dublin City Council*, paras. 43-44.
([151]) Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 50 (place of work located in a remote location with limited leisure possibilities).
([152]) Judgment in case C-214/20, *Dublin City Council*, para. 45 (worker's choice where to pursue another professional activity during his stand-by).
([153]) Judgment in case C-107/19, *Dopravní podnik hl. m. Prahy*, para. 39.
([154]) Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 50.
([155]) Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 61; Judgment in case C-580/19, *Offenbach am Main*, para. 60.
([156]) Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 62.
([157]) Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 64.
([158]) Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 65.
([159]) Judgment in case C-344/19, *Radiotelevizija Slovenija*, para. 65.

b) *Breaks*

The Court has ruled in the *Dopravní podnik hl. m. Prahy* case that a break granted to a worker during the daily working time, in which a worker must be ready to respond within a time limit of two minutes constitutes 'working time' within the meaning of Article 2, as 'the limitations imposed on that worker during that break are such as to affect objectively and very significantly that worker's ability to manage freely the time during which his or her professional services are not required and to devote that time to his or her own interests' ([160]).

c) *Time spent by workers without a fixed place of work travelling between their first and last customers and their homes*

The Court has ruled in the *Tyco* case on whether the time spent travelling to the first and from the last customer by workers without a fixed place of work qualifies as 'working time' ([161]).

This case concerned technicians employed to install and maintain security equipment in various locations within a geographical area assigned to them. They were travelling at least once per week to the offices of a transport logistics company to pick up the equipment needed for their work. On other days they were driving directly from their homes to the places where they were to carry out their activities.

The Court considered that the three criteria of 'working time' were fulfilled. Firstly, it held that the journeys of workers travelling to customers designated by their employer were a necessary means of their providing technical services to customers. As a result, it concluded that these periods must be regarded as periods during which the workers carry out their activity or duties ([162]). Secondly, in terms of the fact that the workers concerned received an itinerary for their journeys and they were not able to use their time freely and pursue their own interests during that period, the Court held that the workers were, also during that time, at the employer's disposal ([163]). Thirdly, the Court confirmed that workers travelling to or from a customer and therefore carrying out their duties must also be regarded as working during those journeys. Given that travelling is an integral part of being a worker without a fixed or habitual place of work, the place of work of such workers cannot be reduced to the premises of their employer's customers ([164]).

d) *Vocational training required by the employer*

The Court has underlined that the workplace means any place where the worker is required to exercise an activity on the employer's instruction, including where it is not the place where professional duties are usually carried out. Consequently, the Court has held that the period during which a worker attends vocational training required by the employer, which takes place away from the usual place of work and, in whole or in part, outside normal working hours, constitutes 'working time' ([165]).

e) *Other periods of time*

As the Court has ruled only on a limited range of periods qualifying as 'working time', the Commission considers it necessary to provide guidance in respect of other types of periods. The following outlines the Commission's views of the notion of 'working time' in terms of other periods of time.

— Journeys in between appointments during the working day

The issue of journeys between jobs during the working day is not dealt with in the *Tyco* ruling. This is because, in the case at hand, these periods were already counted as part of the daily working hours calculated by the employer ([166]).

([160]) Judgment in case C-107/19, *Dopravní podnik hl. m. Prahy*, para. 43.
([161]) Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*.
([162]) Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, paras. 30-34.
([163]) Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, paras. 35-39.
([164]) Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, paras. 43-46.
([165]) Judgment in case C-909/19, *Unitatea Administrativ Teritorială D*.
([166]) Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, para. 16.

However, given this ruling and depending on the exact facts of the case on which a ruling would be requested, the Commission considers that journeys in between jobs during the working day would also qualify as working time. This would be the case if the following conditions were met:

— if the journeys concerned constitute a necessary means of providing the services to customers and they must therefore be regarded as periods during which the workers carry out their activity or duties;

— if the workers concerned are at the employer's disposal during that time, meaning that they act on instructions of the employer and they cannot use their time freely to pursue their own interests;

— if the time spent travelling forms an integral part of the workers' work and the place of work of such workers cannot therefore be reduced to the premises of their employer's customers.

— Irregular journeys of workers to a different workplace

Following the same line of reasoning as for journeys in between appointments during the working day, it is possible to consider that, in the light of the above-mentioned criteria and the Directive's objective to protect the health and safety of workers, journeys of workers who, instead of going to their main workplace, go directly to appointments or to a different workplace upon request of their employer should be considered as working time. Indeed, during these periods, the workers' situation can be assimilated to that of workers in the *Tyco* case since they are sent by their employers to a different place than that of the usual performance of their work ([167]).

— Journeys to and from the workplace

As regards daily travel time to a fixed place of work, there is no indication that such periods should be considered as 'working time' for the purposes of the Directive.

Workers with a fixed place of work are able to determine the distance between their home and workplace and can use and organise their time freely on the way to and from that workplace to pursue their own interests. The situation is therefore different from that of the *Tyco* case, in which the Court considered that workers, who did not have a fixed place of work, had lost this ability to freely determine the distance between their homes and the usual place of the start and finish of their working day ([168]).

B. ***Night time and night worker***

Article 2(3) and (4) provide that:

'3. "night time" means 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 5.00;

4. "night worker" means:

(a) 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

(b) on the other hand, any worker who is likely during night time to work a certain proportion of his annual working time, as defined at the choice of the Member State concerned:

(i) by national legislation, following consultation with the two sides of industry; or

(ii) by collective agreements or agreements concluded between the two sides of industry at national or regional level;'

([167]) Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*.

([168]) Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, para. 44.

As regards the definition of 'night time', its content is similar to that used for 'night work' in the International Labour Organization's (the 'ILO') Convention on night work ([169]). The definition finally agreed for the Working Time Directive imposes on each Member State the obligation to define a period of 7 hours in its national law which constitutes 'night time'. This means that any work carried out during this period, regardless of its duration, qualifies as night work.

This definition is complemented by a definition of 'night worker' which sets out the following criteria: (a) where workers work at least 3 hours of their daily working time during night time or (b) where they are likely to work a certain proportion of their annual working time during night time.

The English wording of the Directive seems to be flawed in that it links criteria (a) and (b) with an 'and', implying that they could be cumulative. At the same time, both paragraphs are introduced separately by 'on the one hand' and 'on the other hand'. Some other language versions do not include this 'and' ([170]), which suggests that the conditions are alternative. This second understanding appears supported by the Court, which stated in its *Simap* ruling that 'Article 2(4)(a) of Directive 93/104 defines a night worker as any worker who, during night time, works at least three hours of his daily working time as a normal course' and that 'Article 2(4)(b) also permits the national legislature or, at the option of the Member State concerned, the two sides of industry at national or regional level to treat as night workers other workers who work during night time a certain proportion of their annual working time.' ([171]).

Therefore, the Commission considers the criteria to be alternative and that workers fulfilling one of the two criteria would qualify as 'night workers'.

The original proposal ([172]) explicitly stated that night workers can be performing shifts. This confirms that the different categories were not intended to be mutually exclusive and that a worker can be a 'shift worker' at the same time as being a 'night worker'. This view has been upheld by the Court in the *González Castro* ruling, where the Court found that a worker who 'does shift work in the context of which only part of her duties are performed at night must be regarded as performing work during "night time" and must therefore be classified as a "night worker" within the meaning of Directive 2003/88' ([173]).

C. ***Shift work and shift worker***

Article 2(5) and (6) provide that:

'5. "shift work" means any method of organising work in shifts whereby workers succeed each other at the same work stations 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;

6. "shift worker" means any worker whose work schedule is part of shift work;'.

The definitions of 'shift work' and 'shift worker' have been subject to only very limited interpretation by the Court. In its *Simap* ruling, the Court held that the working time of doctors, organised so that workers are assigned successively to the same work posts on a rotational basis, fulfils the requirements of the definition of shift work ([174]). In this case, the workers, doctors in public health services, normally worked from 8 a.m. to 3 p.m. However, they also carried out on-call periods from 3 p.m. to 8 a.m. every 11 days. The Court held that this 'on-call time' at the health centre or 'standby' time where the workers had to be reachable at all times fulfilled the definition of shift work on the grounds that:

— workers were assigned *successively to the same work posts* on a rotational basis;

([169]) International Labour Organization, Convention concerning Night Work, C171, 26 June 1990.
([170]) See notably the French and German texts of the Working Time Directive.
([171]) Judgment in case C-303/98, *Simap*, para. 55.
([172]) Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90) 317 final – SYN 295.
([173]) Judgment of 19 September 2018, *Isabel González Castro v Mutua Umivale and Others*, C-41/17, ECLI:EU:C:2018:736, para. 46.
([174]) Judgment in case C-303/98, *Simap*, paras. 59-64.

— and that, even if the duty is performed at regular intervals, the *doctors concerned are called upon to perform their work at different times over a given period of days or weeks.*

In this case, the Court did not hold that the 'normal' work schedule of doctors amounted to shift work, possibly due to the fact that the workers then worked at the same time and in different posts ([175]).

As pointed out in the definitions, 'shift work' is not limited to the well-known 'rotating pattern' under which employees work one set of hours for a period and then rotate to a different set of hours usually organised as three periods of 8 hours in a day.

Finally, as indicated above, 'shift workers' may also be 'night workers' ([176]). A worker who is covered by more than one definition must benefit from the protective measures attached to each.

D. ***Mobile worker***

Article 2(7) establishes that:

'7. "mobile worker" means any worker employed as a member of travelling or flying personnel by an undertaking which operates transport services for passengers or goods by road, air or inland waterway;'.

The distinction between mobile and non-mobile staff for the purpose of the application of the Working Time Directive was one of the aspects discussed in the preparation of Directive 2000/34/EC, which amended the 1993 Directive, and introduced therein ([177]).

Under the 1993 Directive, doubts existed as to whether or not the exclusion of certain sectors had to be applied to *all* workers in these sectors or solely to those subject to specific mobility obligations ([178]). The amending Directive 2000/34/EC therefore aimed to establish certain specific provisions for mobile staff while guaranteeing that non-mobile staff in sectors with mobile workers would benefit from a working time organisation which complied with the general provisions.

Therefore, the qualification as 'mobile workers' in the Working Time Directive is limited to workers who concurrently:

— are part of travelling or flying personnel;

— work for an undertaking operating transport services for passengers or goods;

— work in the road, air or inland waterway.

The meaning of the term 'mobile workers' is specific to the Working Time Directive and is intrinsically linked to the 'travelling or flying' criterion. It aims to take into account the distinctive working conditions and particular features of the activities of the workers concerned (e.g. working and living at the workplace for certain periods, mainly as part of cross-border activities). This differs from mobile workers in the sense of posted, migrant or cross-border workers. It also means that not all workers 'travelling' or 'flying' would qualify as 'mobile workers'.

This definition in the Working Time Directive is linked to the derogation introduced by its Article 20 for mobile workers (see below under point IX.D.1).

However, as indicated under point III.B.5 above, only mobile workers not covered by a specific transport legislation fall under the Directive and its derogations.

([175]) Judgment in case C-303/98, *Simap*., para. 61.
([176]) Judgment in case C-41/17, *González Castro*. paras. 44-46.
([177]) Explanatory Memorandum of the Communication from the Commission on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC of 23 November 1993, 18 November 1998, COM(1998) 662 final, point 27.
([178]) It can however be noted that the Court eventually clarified this aspect in its judgment of 4 October 2001, *J.R. Bowden, J.L. Chapman and J.J. Doyle v Tuffnells Parcels Express Ltd*, C-133/00, ECLI:EU:C:2001:514, where it ruled that the exclusion of certain transport sectors which was entailed in Article 1(3) of Directive 93/104/EC excluded not only mobile workers but all workers in these sectors from the scope of the Directive and the application of its provisions.

E. ***Offshore work***

Article 2(8) states that:

'8. "offshore work" means work performed mainly on or from offshore installations (including drilling rigs), directly or indirectly in connection with the exploration, extraction or exploitation of mineral resources, including hydrocarbons, and diving in connection with such activities, whether performed from an offshore installation or a vessel;'.

To date, no specific issues appear to have arisen for this definition and there is no case-law of the Court.

F. ***Adequate rest***

Article 2(9) provides that

'9. "adequate rest" means that workers have regular rest periods, the duration of which is expressed in units of time and which are sufficiently long and continuous to ensure that, as a result of fatigue or other irregular working patterns, they do not cause injury to themselves, to fellow workers or to others and that they do not damage their health, either in the short term or in the longer term.'

The concept of adequate rest is referred to both in Recital 5 of the Directive stating that 'All workers should have adequate rest periods' and in Articles 20 and 21 establishing derogations for mobile and offshore workers as well as workers on board seagoing fishing vessels. It is therefore used in relation to workers who are not covered by the provisions on rest periods set out in Articles 3-5. These specific derogatory provisions state that such workers are entitled to 'adequate rest' as a minimum level of protection ([179]).

In the absence of numerical limits and the lack of case-law on this notion, the Commission considers that the notion of 'adequate rest' must be examined in the light of the specific circumstances in which it is applied. In particular the specificities linked to the organisation of working time, the working conditions of the three types of workers concerned: mobile, offshore and workers on board seagoing fishing vessels must be taken into account.

V. **MINIMUM REST PERIODS**

The right of workers to minimum periods of daily and weekly rest periods is enshrined in Article 31(2) of the Charter of Fundamental Rights of the European Union.

Recital 5 of the Working Time Directive confirms the importance of these periods of rest and states that 'All workers should have adequate rest periods. The concept of "rest" must be expressed in units of time, i.e. in days, hours and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. […]'

In the Directive, three types of rest periods are defined: daily rest (Article 3), breaks (Article 4) and weekly rest (Article 5). Article 7 also provides for a period of paid annual leave, which was originally called 'yearly rest' ([180]) and is further discussed in Chapter VII.

It must be pointed out that derogations to these provisions exist and that the conditions for their use and protective measures attached to them are detailed in Chapter IX.

([179]) Articles 20 and 21 provide respectively that mobile workers, and workers on seagoing fishing vessels, are not covered by Articles 3, 4, or 5, but that Member States shall take the necessary measures to ensure that these workers are still entitled to '*adequate rest*'.

([180]) Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90) 317 final – SYN 295.

A. ***Daily rest***

> Article 3 provides that:
>
> '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.'

The requirement to grant every worker 11 consecutive hours of rest is a minimum standard and more protective provisions are often provided by national law transposing the Directive, for example granting workers a longer period of daily rest or establishing a maximum daily working time. The Commission considered it as a 'safety net' for the health and safety of the workers concerned, which also took into account economic requirements and shift work cycles ([181]).

The 11 hours of daily rest must be consecutive. This means that workers should not be interrupted in their rest period unless the Member State has provided otherwise under the permitted derogations (see Chapter IX).

Workers must receive one period of daily rest for each 24-hour period. However, the Directive does not define this period as being a calendar day. Such an approach would *de facto* amount to imposing a work schedule which would not fit with the usual periods of work ([182]).

However, by establishing a framework of 24-hour periods, the Directive imposes a certain regularity in daily rest periods. In this respect, the Court has ruled that 'in order to ensure the effective protection of the safety and health of the worker provision must as a general rule be made for a period of work regularly to alternate with a rest period' ([183]). The purpose of daily rest is to allow workers to remove themselves from their working environment for a number of hours. These must be consecutive and 'directly follow a period of work in order to enable him to relax and dispel the fatigue caused by the performance of his duties' ([184]).

This means that where there is no derogation, the consecutive working time is limited to 13 hours (from which the break presented below must be deducted) and must be followed by at least 11 consecutive hours of rest. Under the 'normal' provisions of the Directive, workers cannot carry out work for more than 13 consecutive hours as this would be contrary to the purpose of this provision. Such regimes are therefore only permitted under the conditions detailed in Chapter IX.

B. ***Breaks***

> Article 4 provides that:
>
> '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.'

Article 4 entitles workers to a rest break if their working day is longer than 6 hours. However, it leaves the definition of its duration and terms to collective agreements or national legislation.

([181]) Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90) 317 final – SYN 295.

([182]) This would impose for workers to work between 00.00 and 13.00 and to benefit from their rest period between 13.00 and 24.00 or on the contrary resting from 00.00 until 11.00 and working from 11.00 until 24.00.

([183]) Judgment in case C-151/02, *Jaeger*, para. 95.

([184]) Judgment in case C-151/02, *Jaeger*, para. 95.

1. **Duration of the break**

Recital 5 of the Directive states that rest periods, to which breaks pertain, must be expressed in units of time, i.e. in days, hours and/or fractions thereof, and that workers must be granted 'adequate breaks' ([185]).

The Commission therefore considers that the rest breaks to which workers must be entitled must be clearly defined in units of time and that, although the duration of the break must be defined by collective agreement or national legislation, excessively short breaks would be contrary to the Directive's provisions.

2. **Timing of the break**

Similarly, although the Directive leaves it to collective agreements or legislation to define the terms under which the break is granted, the break should effectively allow workers to rest during their working day where the latter is longer than 6 hours. Its timing should therefore be adapted to the workers' schedule and it should take place at the latest after 6 hours.

3. **Conditions of the break**

The 'break' to which workers are entitled under Article 4 of the Directive should constitute a 'rest period' as is clear from both its inclusion in Recital 5 and the title of the chapter 'Minimum rest periods' in which it is inserted.

In light of the definitions of 'working time' and 'rest period', this means that workers should not be obliged to remain at their workstations, at the employer's disposal or carrying out their activity or duties. Such breaks where workers are allowed to manage their time without major constraints and to pursue their own interests do not constitute working time ([186]). The breaks therefore do not need to be counted as 'working time' as they constitute 'rest periods'. National law can nevertheless differ as, as stressed above, Member States are allowed to apply provisions which are more favourable to the protection of the health and safety of workers, for example by counting breaks during a working day as 'working time'.

On the contrary, a period during which workers are requested by their employer to remain at their post and be available to provide services if necessary, even if their activity is zero, would qualify as 'working time' and would therefore not fulfil the right of workers to receive a break during their working day.

The Court has ruled that a period during which workers must be ready to respond to a call-out within a time limit of two minutes constitutes 'working time' if it is apparent that the limitations imposed on the workers very significantly affect their ability to manage freely their time ([187]).

4. **Transposition obligations on Member States**

The Directive allows collective agreements to establish the duration and terms of the break. Nevertheless, the duty to transpose the Directive resides with the Member States ([188]). It is therefore their responsibility to ensure that all workers, including those who may not be covered by collective agreements, are entitled to a break.

The Directive's wording establishes that the duration and terms of the rest break are defined by collective agreements or national legislation. This in turn means that national transposition texts may not leave the duration and terms of the rest break to be defined by individual agreements between the worker and the employer concerned.

([185]) This latter notion of '*adequate breaks*' has also been referred to by the Court for example in judgment of 14 October 2010, *Günter Fuß v Stadt Halle*, C-243/09, ECLI:EU:C:2010:609, para. 32.

([186]) Judgment in case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras*, paras. 36-37; Judgment in case C-303/98, *Simap*, para. 50.

([187]) Judgment in case 107/19, *Dopravní podnik hl. m. Prahy*, para. 43.

([188]) Article 288 of the Treaty on the Functioning of the European Union provides that: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

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 addition, Article 16 establishes that:

'Member States may lay down:

(a) for the application of Article 5 (weekly rest period), a reference period not exceeding 14 days; […]'

The 1993 Directive had a somewhat different wording in Article 5 as it included the following sentence: 'The minimum rest period referred to in the first subparagraph shall in principle include Sunday'. However, this provision was annulled by the Court, which considered that the obligation to fix Sunday rather than any other day of the week as a rest day was not justified in the light of the legal basis used for this Directive, which relates to the protection of the health and safety of workers ([189]). The sentence was then deleted during the Directive's amendment by way of Directive 2000/34/EC.

Although case-law to date is limited on the subject of weekly rest, the Commission nevertheless outlines the following considerations in light of the wording and objective of the Directive.

1. **A minimum period of 35 uninterrupted hours of weekly rest**

As noted above, Article 5 of the Working Time Directive provides that workers enjoy 'per each seven-day period' a rest period of 24 hours plus the 11 hours of daily rest, meaning that this period of 11 hours of daily rest cannot be subtracted from the weekly rest period.

This amounts to a continuous rest period of 35 hours.

As indicated above, this requirement is a minimum provision. Member States are free to establish additional or longer periods of rest insofar as this minimum is complied with.

2. **A period of rest for each 7-day period ('weekly rest')**

Article 5 establishes that workers must be entitled to a weekly rest period 'per each seven-day period'. In light of the objective to protect the health and safety of workers, the Directive requires certain regularity of the weekly rest to which the worker is entitled.

The Court has held that Article 5 does not specify when the minimum weekly rest period must take place and that it gives Member States a degree of flexibility with regard to the choice on timing. The rest period may be provided at any time within each seven-day period ([190]). The Directive does not require the weekly rest to be granted on the same day of the week in each period of seven days.

3. **Weekly rest over a reference period of 14 days**

Beyond the flexibility described above on the fixing of weekly rest periods during each period of 7 days, Article 16 of the Working Time Directive allows a reference period of 14 days to be set for weekly rest. In this respect, the Commission's proposal ([191]) indicated that the rest periods proposed constituted 'reasonable minima which take account of economic

([189]) Judgment in case C-84/94, *United Kingdom v Council*.

([190]) Judgment of 9 November 2017, *António Fernando Maio da Rosa v Varzim Sol – Turismo, Jogo e Animação SA*, C-306/16, ECLI:EU:C:2017:844, paras. 39 and 44.

([191]) Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90) 317 final – SYN 295.

requirements and shift work cycles, since the weekly rest period may be averaged over a period of two weeks. This takes account of the necessary flexibility, as exemplified by the multiplication of "productivity deals" agreed upon by both sides of industry.'[129]

This means that national law could allow averaging of the weekly rest periods of 2 weeks. This would therefore allow workers to be granted either two periods of 35 hours or one double period of weekly rest.

Articles 5 and 16 again impose a certain regularity by guaranteeing that workers are entitled to a set amount of rest per period of 14 days. However, they do not impose any obligation that this rest falls on the same days during each period of 14 days.

This means that national transposing acts should ensure that two weekly rest periods of 35 hours or one double period of weekly rest is granted in each 14-day period.

4. **A shortened period of weekly rest in certain cases**

Article 5, last sentence provides for a possibility to reduce the weekly rest to 24 hours on the grounds of objective, technical or work organisation conditions.

This provision has, to date, not been interpreted by the Court's case-law. It is therefore difficult to define its precise scope. Two aspects can nonetheless give guidance for the clarification of this provision.

Firstly, this provision was introduced in the common position with the aim to cover the possible problem of shift workers working the late shift on Saturday and the early shift on Monday, i.e. receiving only 24 hours of rest consecutively ([192]). Secondly, the Court has repeatedly held that, in light of objective of the Directive, the exclusions to its scope and derogations to its provisions have to be interpreted restrictively ([193]).

Although these considerations are not decisive and this derogation may also apply to different cases than that of shift workers, its use would have to be carefully considered on a case-by-case basis.

VI. **MAXIMUM WEEKLY WORKING TIME**

The right of workers to a limitation of maximum working hours is enshrined in the Charter of Fundamental Rights of the European Union.

The Working Time Directive can be seen as giving concrete expression to this right in that it sets out a maximum average weekly working time in Article 6:

'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.'

This right is framed by a reference period established in Article 16:

'Member States may lay down:

[…] (b) for the application of Article 6 (maximum weekly working time), a reference period not exceeding four months.

([192]) As reported in the Explanatory Memorandum concerning the re-examined proposal for a Council Directive concerning certain aspects of the organisation of working time, 16 November 1993, COM(93) 578 final – SYN 295, page 3, amendment No 5.

([193]) On the exclusions to the scope, see: Judgment in case C-303/98, *Simap*, para. 35; Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 24; Judgment in case C-211/19, *Készenléti Rendőrség*, para. 32; Judgment in case C-742/19, *Ministrstvo za obrambo*, paras. 55 and 65. On the derogations, see: Judgment in case C-151/02, *Jaeger*, para. 89; Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 40; Judgment in case C-518/15, *Matzak*, para. 38; Judgment in case C-585/19, *Academia de Studii Economice din Bucureşti*, para. 61.

The periods of paid annual leave, granted in accordance with Article 7, and the periods of sick leave shall not be included or shall be neutral in the calculation of the average; […]'.

Finally, while the limitation of weekly working time itself is only subject to derogations in the case of 'autonomous workers' and for workers having agreed to the 'opt-out', derogations to the reference period permitted in Article 16 are possible in other cases described below but circumscribed by Article 19 as presented in Chapter IX below.

The special status of the limitation of weekly working time has been further emphasised by the Court, which has repeatedly held that 'in view of both the wording of [the Directive] and its purpose and scheme, the various requirements it lays down concerning maximum working time and minimum rest periods 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' ([194]).

A. *Maximum weekly working time*

1. What time must be counted towards the maximum weekly working time

The maximum weekly limit applies to the notion of working time presented above and used by the Court ([195]).

In addition, the Directive explicitly provides that overtime should be included in the calculation of the average maximum weekly working time. This is in line with the definition of working time presented above, which does not distinguish between 'statutory' working time and periods of time which can, for example, be qualified as 'overtime' or 'on-call time' under national legislation and be treated differently in particular for remuneration purposes.

2. A maximum established at 48 hours

The maximum weekly working time is set at 48 hours for each seven-day period. This provision establishes a minimum standard and Member States may provide more protection as presented above.

3. An unconditional maximum

Throughout its case-law, the Court has stressed that Member States cannot unilaterally determine the scope of the provisions of the Working Time Directive so that Member States cannot attach conditions or restrictions to the implementation of the worker's right under Article 6(2) of the Directive not to work more than 48 hours per week ([196]).

The Court has held that the effectiveness of that provision should be ensured by Member States. It concluded for example that applying a measure under which a worker is subject to a compulsory transfer to a different service for having requested compliance with the maximum weekly working time negates the effectiveness of the provision since 'fear of such a reprisal measure, where no legal remedy is available against it, might deter workers who considered themselves the victims of the measure taken by their employer from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the Directive' ([197]).

In addition, the Court has also held that exceeding that maximum constituted is, in itself, an infringement of that provision, without it being necessary to show that a specific detriment had been suffered ([198]).

([194]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 100; Judgment in case C-14/04, *Dellas and Others*, para. 49; Order in case C-437/05, *Vorel*, para. 23; Judgment of 11 April 2019, *Syndicat des cadres de la sécurité intérieure v Premier ministre and Others*, C-254/18, ECLI:EU:C:2019:318, para. 32; Judgment in case C-909/19, *Unitatea Administrativ Teritorială D.*, para. 36; Judgment in case C-214/20, *Dublin City Council*, para. 37.

([195]) See notably: Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, paras. 93-95; Judgment in case C-14/04, *Dellas and Others*, para. 50.

([196]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 99; Judgment in case C-243/09, *Fuß*, para. 52; Judgment in case C-429/09, *Fuß*, para. 34.

([197]) Judgment in case C-243/09, *Fuß*, paras. 65-66.

([198]) Judgment in case C-243/09, *Fuß*, para. 53.

B. ***A maximum which can be averaged***

1. **How long is the reference period?**

As indicated by the text of Article 6, the weekly working time used for checking compliance with the maximum limit can be averaged. A reference period for calculating average weekly working time can be established by Member States, in all sectors and all activities, at a period of up to 4 months.

By way of derogation, the reference periods can be extended in certain cases subject to Article 19. Further details on the conditions and extent of the derogations are presented in Chapter IX. In any event, in light of the limitations to derogations from the reference period, the Court has acknowledged that 'the reference period may in no circumstances exceed 12 months' and that it was 'therefore possible to determine the minimum protection which must be provided in any event' to workers ([199]).

2. **What is not included in the reference period**

As regards the reference period used for the calculation of average weekly working time, Article 16 of the Directive provides that '[…] The periods of paid annual leave, granted in accordance with Article 7, and the periods of sick leave shall not be included or shall be neutral in the calculation of the average […]'.

This means that the absence of work during these periods cannot be used to compensate other periods during which the weekly working time exceeded the maximum.

As for paid annual leave, this relates to the 4 weeks granted by the Directive. However, in terms of the right to sick leave, its 'conditions for exercise […] are not, as Community law now stands, governed by that law' ([200]). It is therefore necessary to refer to the national definition(s) of sick leave to know which periods should be excluded or be neutral in the calculation of the average weekly working time.

3. **What can be included in the reference period**

In light of the wording of Article 16(b) and despite the absence of case-law of the Court on this issue, the Commission considers that, where national law entitles workers to additional periods of paid annual leave beyond the minimum of 4 weeks, the Member State concerned remains free to decide on the inclusion or exclusion of these additional periods of paid annual leave when calculating the average weekly working time.

C. ***A provision with direct effect***

The Court has considered Article 6(2), in conjunction with the provisions on the reference period, as fulfilling all the conditions necessary to produce direct effect ([201]).

Despite the possible adjustments of the reference period applicable to the maximum weekly working time, the Court stated that '[t]he latitude allowed does not make it impossible to determine minimum rights' and that the provisions were precise and unconditional ([202]). As a consequence, the Court held that Article 6(2) of the Directive confers a 'right on individuals whereby the reference period for the implementation of the maximum duration of their weekly working time must not exceed 12 months' ([203]).

Nevertheless, the Directive cannot in itself impose obligations on an individual and therefore cannot be applied in proceedings exclusively between private parties ('horizontal direct effect') ([204]).

However, it is in any event the responsibility of the national courts to provide the legal protection which an individual derives from that rule and therefore to interpret national law, as far as possible, in the light of the wording and the purpose of the Directive, in order to achieve the desired result ([205]).

([199]) Judgment in case C-303/98, *Simap*, para. 69.
([200]) 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. 27.
([201]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, paras.104-106; Judgment in case C-243/09, *Fuß*, para. 59; Judgment in case C-429/09, *Fuß*, para. 35.
([202]) Judgment in case C-303/98, *Simap*, para. 68.
([203]) Judgment in case C-303/98, *Simap*, para. 70.
([204]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, paras.108-109.
([205]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, paras. 110-113.

In addition, the direct effect of a provision also enables citizens to rely directly on it in actions against the state or public bodies which are 'emanations of the state' such as regional authorities, cities and towns or communes ([206]), including in their capacity as employers, where they have failed to transpose a provision into national law or transposed it incorrectly ([207]) ('vertical direct effect'). This may in turn lead to the application of the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law. The State can then be held responsible and have to grant individuals a right to reparation under certain conditions, which have to be examined by the national courts ([208]).

It should be pointed out that an exception would remain where the Member State concerned has used a relevant derogation such as that for autonomous workers or the individual opt-out. However, this is subject to compliance with all the conditions set out for the concerned derogations under the Directive ([209]).

VII. **PAID ANNUAL LEAVE**

The Court has considered the right to paid annual leave very closely and notably held that it was a particularly important principle of Community and European Union social law ([210]).

This right is also expressly laid down in the Charter of Fundamental Rights of the European Union, which has the same legal value as the Treaties. Article 31(2) of the Charter provides that 'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'.

A. ***The right to paid annual leave of every worker***

Article 7(1) provides that

'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.'

([206]) Judgment in case C-243/09, *Fuß*, para. 61; Judgment in case C-429/09, *Fuß*, para. 38.
([207]) Judgment in case C-243/09, *Fuß*, para. 56; Judgment in case C-429/09, *Fuß*, paras. 38-39.
([208]) Judgment in case C-429/09, *Fuß*, paras. 45-48.
([209]) See notably judgment in case C-243/09, *Fuß*, paras. 58-59 on the opt-out.
([210]) 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. 43; Judgment in case C-342/01, *Merino Gómez*, para. 29; 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. 48; Judgment of 6 April 2006, *Federatie Nederlandse Vakbeweging v Staat der Nederlanden*, C-124/05, ECLI:EU:C:2006:244, para. 28; Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 22; Judgment in case C-277/08, *Vicente Pereda*, para. 18; Judgment of 22 April 2010, *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol*, C-486/08, ECLI:EU:C:2010:215, para. 28; Judgment of 15 September 2011, *Williams and Others v British Airways plc*, C-155/10, ECLI:EU:C:2011:588, para. 17; Judgment of 22 November 2011, *KHS AG v Winfried Schulte*, C-214/10, ECLI:EU:C:2011:761, para. 23; Judgment in case C-282/10, *Dominguez*, para. 16; Judgment in case C-337/10, *Neidel*, para. 28; 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. 16; 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, para. 22; Order of 21 February 2013, *Concepción Maestre García v Centros Comerciales Carrefour SA*, C-194/12, ECLI:EU:C:2013:102, para. 16; Order of 13 June 2013, *Bianca Brandes v Land Niedersachsen*, C-415/12, ECLI:EU:C:2013:398, para. 27; Judgment of 22 May 2014, *Z.J.R. Lock v British Gas Trading Limited*, C-539/12, ECLI:EU:C:2014:351, para. 14; Judgment of 12 June 2014, *Gülay Bollacke v K + K Klaas & Kock BV & Co. KG*, C-118/13, ECLI:EU:C:2014:1755, para. 15; Judgment of 11 November 2015, *Kathleen Greenfield v The Care Bureau Ltd*, C-219/14, ECLI:EU:C:2015:745, para. 26; Judgment of 30 June 2016, *Alicja Sobczyszyn* v *Szkoła Podstawowa w Rzeplinie*, C-178/15, ECLI:EU:C:2016:502, para. 19; Judgment of 20 July 2016, *Hans Maschek* v *Magistratsdirektion der Stadt Wien – Personalstelle Wiener Stadtwerke*, C-341/15, ECLI:EU:C:2016:576, para. 25; Judgment of 29 November 2017, *Conley King v The Sash Window Workshop Ltd and Richard Dollar*, C-214/16, ECLI:EU:C:2017:914, para. 32; Judgment of 4 October 2018, *Ministerul Justiției and Tribunalul Botoşani v Maria Dicu*, C-12/17, ECLI:EU:C:2018:799, para. 24; Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, para. 38; Judgment of 6 November 2018, *Sebastian W. Kreuziger v Land Berlin*, C-619/16, ECLI:EU:C:2018:872, para. 28; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, para. 19; Judgment of 13 December 2018, *Torsten Hein v Albert Holzkamm GmbH & Co.*, C-385/17, ECLI:EU:C:2018:1018, para. 22; Judgment of 25 June 2020, *QH v Varhoven kasatsionen sad na Republika Bulgaria and CV v Iccrea Banca SpA*, joined cases C-762/18 and C-37/19, ECLI: EU:C:2020:504, pas. 53-54; Judgment of 25 November 2021, *WD v job-medium GmbH*, C-233/20, ECLI:EU:C:2021:960, para. 24; Judgment of 9 December 2021, *XXXX v Staatssecretaris van Financiën*, C-217/20, ECLI:EU:C:2021:987, para. 19; Judgment of 13 January 2022, *DS v Koch Personaldienstleistungen GmbH*, C-514/20, ECLI:EU:C:2022:19, paras. 23-24.

The Directive does not permit any derogation from Article 7(1) ([211]). The Court has determined that this leave has a dual purpose: to enable the worker both to rest and to enjoy a period of relaxation and leisure ([212]).

The Court has ruled that the entitlement to annual leave cannot be interpreted restrictively ([213]) and that its implementation by the competent national authorities must be confined within the limits expressly laid down by the Directive ([214]).

1. **Minimum paid annual leave of 4 weeks**

Four weeks of paid annual leave per year is a minimum provision. During that period, 'a worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety' ([215]).

The annual leave entitlement is four weeks, meaning that workers must be freed from their work obligations for four calendar weeks, irrespective whether they work full-time or part-time.

When converting the four weeks of paid annual leave into a number of working days during which the worker is freed from his work obligations, 'the entitlement to minimum paid annual leave, within the meaning of Directive 2003//88, must be calculated by reference to the days, hours and/or fractions of days or hours worked and specified in the contract of employment' ([216]).

The Court has ruled that 'as regards the accrual of entitlement to paid annual leave, it is necessary to distinguish periods during which the worker worked according to different work patterns, the number of units of annual leave accumulated in relation to the number of units worked to be calculated for each period separately' ([217]).

In cases such as short-time working where the employment relationship continues but the worker does not perform actual work for the employer, the Court has ruled that a worker may acquire entitlement to paid annual leave only during the periods during which he or she performed actual work (*pro rata temporis*). No entitlement to leave is acquired during the periods when no work was performed ([218]). Similarly, workers do not acquire entitlements to paid annual leave during periods of parental leave ([219]).

([211]) Judgment in case C-173/99, *BECTU*, paras. 41-43; Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 24; Judgment in case C-78/11, *ANGED*, para. 16. See also: Judgment in case C-124/05, *Federatie Nederlandse Vakbeweging*, para. 34; Judgment in case C-233/20, *job-medium*, para. 24. The Court added in its judgment in joined cases C-131/04 and C-257/04, *Robinson-Steele and Others*, para. 52, that derogations from this right may not be made by contractual arrangement.

([212]) Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para 25; Judgment in case C-277/08, *Vicente Pereda*, para. 21; Judgment in case C-486/08, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, para. 30; Judgment in case C-214/10, *KHS*, para. 31; Judgment in case C-78/11, *ANGED*, para. 19; Judgment in case C-194/12, *Maestre García*, para. 18; Judgment in case C-178/15, *Sobczyszyn*, para 23; Judgment in case C-341/15, *Maschek*, para 34; Judgment in case C-12/17, *Dicu*, para. 27; Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, para. 41; Judgment in case C-214/16, *King*, para. 37; Judgment in case C-514/20, *Koch Personaldienstleistungen*, para. 30.

([213]) Judgment in case C-486/08, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, para. 29; Judgment in case C-78/11, *ANGED*, para. 18; Judgment in joined cases C-229/11 and C-230/11, *Heimann and Toltschin*, paras. 22-23; Judgment in case C-194/12, *Maestre García*, para. 16; Judgment in case C-415/12, *Brandes*, para. 29; Judgment in case C-219/14, *Greenfield*, para. 28; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, para 31; Judgment in case C-233/20, *job-medium*, para. 26.

([214]) Judgment in case C-173/99, *BECTU*, para. 43; Judgment in case C-342/01, *Merino Gómez*, para. 29; Judgment in joined cases C-131/04 and C-257/04, *Robinson-Steele and Others*, para. 48; Judgment in case C-277/08, *Vicente Pereda*, para. 18; Judgment in case C-155/10, *Williams and Others*, para. 17; Judgment in case C-341/15, *Maschek*, para 19.

([215]) Judgment in case C-173/99, *BECTU*, para. 44; Judgment in case C-342/01, *Merino Gómez*, para. 30; Judgment in case C-124/05, *Federatie Nederlandse Vakbeweging*, para. 29; Judgment in case C-514/20, *Koch Personaldienstleistungen*, para 31; Judgment in case C-233/20, *job-medium*, para. 24.

([216]) Judgment in case C-219/14, *Greenfield*, para. 32.

([217]) Also referred to in judgment in case C-219/14, *Greenfield*, para. 35.

([218]) Judgment in case C-385/17, *Hein*, paras. 28 and 29.

([219]) Judgment in case C-12/17, *Dicu*, paras. 36-38.

Where workers change from full to part-time employment, the Court has ruled that it would be incompatible with the Directive to apply the *pro rata temporis* principle retrospectively to the right to annual leave accumulated during a period of full-time work as this would entail a loss of some accumulated rights ([220]). So a reduction in working hours cannot reduce the right to annual leave that the worker has already accumulated ([221]). In the contrary situation where a worker moves from part to full-time, a new entitlement must in any case be calculated for the period after the increase in working hours, following the *pro rata temporis* principle ([222]).

The Directive does not affect the Member States' right to apply provisions that would be more favourable to the protection of the safety and health of workers ([223]), including granting workers more than four weeks of paid leave per year. In such cases, the Member State may establish different conditions for entitlement to and granting of the additional leave ([224]) without being required, in that regard, to comply with the protective rules which the Court has laid down in respect of that minimum period ([225]). For example, the Court has held that, when deciding to grant workers' rights to paid annual leave beyond that minimum period of four weeks, Member States are not obliged to grant an allowance in lieu (see below under point VII.B) for untaken leave entitlements at the end of the employment relationship which exceed four weeks ([226]). Similarly, the Court has held that Member States are free to grant days of paid annual leave which exceed the minimum period of four weeks, and yet exclude the carry-over of those days of leave on the grounds of illness ([227]). In cases of short-time working arrangement where the *pro rata temporis* principle applies to the accrual of right, the Court has also held that Member States can give workers the right to more paid annual leave than that guaranteed by the Directive, irrespective of their working time having been reduced on account of short-time working ([228]).

Although such situations fall outside the scope of Article 7 of the Directive and Article 31(2) of the Charter of Fundamental Rights ([229]), the provisions of national law which are more favourable to workers cannot be used to compensate for a possible infringement of the minimum protection guaranteed by the provision of EU law ([230]).

2. **Minimum leave for all workers, subject to no conditions**

Article 7(1) states that the right to paid annual leave is granted to every worker. The Court has stated that 'every worker' includes workers who are absent from work on sick leave, whether short or long term, regardless of whether they have in fact worked in the course of the leave year ([231]).

The Court has ruled on the particular case of workers who were unlawfully dismissed and then reinstated in their employment, in accordance with national law, following the annulment of the dismissal by a decision of a court. It held that those workers are entitled to paid annual leave for the period between the date of the dismissal and that of the reinstatement in their employment, despite the fact that, during that period, they did not actually carry out work for the employer ([232]). The Court stated that the fact that a worker is deprived of the opportunity to work owing to dismissal that

([220]) Judgment in case C-486/08, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, paras. 32-34; Judgment in joined cases C-229/11 and C-230/11, *Heimann and Toltschin*, para. 35; Judgment in case C-219/14, *Greenfield*, para. 37.

([221]) Judgment in case C-486/08, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, para. 32; Judgment in joined cases C-229/11 and C-230/11, *Heimann and Toltschin*, para. 35; Judgment in case C-415/12, *Brandes*, para 30; Judgment in case C-219/14, *Greenfield*, para. 34.

([222]) Judgment in case C-219/14, *Greenfield*, paras. 38 and 44.

([223]) Judgment in case C-342/01, *Merino Gómez*, para. 43; Judgment in joined cases C-609/17 and C-610/17, *TSN*, para. 33.

([224]) Judgment in case C-282/10, *Dominguez*, paras. 47-48; Judgment in case C-337/10, *Neidel*, paras. 34-37.

([225]) Judgment in joined cases C-609/17 and C-610/17, *TSN*, para. 36.

([226]) Judgment in case C-337/10, *Neidel*, para. 36; Judgment in case C-341/15, *Maschek*, para. 39.

([227]) Judgment in joined cases C-609/17 and C-610/17, *TSN*, para. 40.

([228]) Judgment in case C-385/17, *Hein*, para. 31.

([229]) According to the definition of the scope of the Charter in Article 51(1), the provisions of the Charter are addressed to Member States only when they are implementing EU law. When Member States legislate on provisions of national law that are more favourable to workers than the Working Time Directive they are not in the scope of EU law. Therefore, Article 31(2) of the Charter does not apply to paid annual leave which exceeds the minimum period of four weeks. Judgment in joined cases C-609/17 and C-610/17, *TSN*, paras. 42 and 55.

([230]) Judgment in case C-385/17, *Hein*, para. 43; Judgment in joined cases C-609/17 and C-610/17, *TSN*, para. 35.

([231]) Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 40.

([232]) Judgment in joined cases C-762/18 and C-37/19, *Varhoven kasatsionen sad na Republika Bulgaria*. Another ruling of the Court on this issue can be expected in case C-57/22.

was subsequently held to be unlawful is, as a rule, not foreseeable and beyond the worker's control. That situation is the consequence of the employer's actions, and an employer that does not allow a worker to exercise his or her right to paid annual leave must bear the consequences. Thus, the period between the date of the unlawful dismissal and the date of the worker's reinstatement must be treated as a period of actual work for the purpose of determining the rights to paid annual leave. However, where, during that period, the worker obtained other employment, he or she can claim the entitlement to paid annual leave corresponding to the period of work with the new employer only from that employer.

The Directive provides that paid annual leave is granted 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice'. Thus, it is for the Member States to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise the right ([233]). Nevertheless, the Court has held that the Directive precludes Member States from unilaterally limiting the entitlement to paid annual leave conferred on all workers by applying preconditions which would in practice prevent certain workers from benefiting from it ([234]). For example, the Court has held that Member States may not impose on workers the condition of a period of 13 weeks of uninterrupted employment with the same employer before accruing leave ([235]). Similarly, Member States cannot impose conditions that make it impossible for certain workers to exercise the right to paid annual leave ([236]).

Having in mind that the right to paid annual leave enshrined in Article 7 of the Directive is also a fundamental right affirmed in Article 31(2) of the Charter of Fundamental Rights, the Court has expressly stated that limitations to that right have to comply with the strict conditions laid down in Article 52(1) of the Charter and, in particular, the essential content of that right ([237]).

Member States nevertheless have some scope to regulate the way in which the right to paid annual leave may be exercised. This could include, for example, 'the planning of holiday periods, the obligation, if any, for the worker to give his employer advance notice of when he intends to take leave, the requirement that a minimum period of employment must be completed before leave can be taken, the criteria governing the pro-rata calculation of annual leave entitlement where the employment relationship is of less than one year, and so forth' ([238]).

— *Entitlement to and granting of leave in the early period of employment*

While Member States may, for example, organise 'the manner in which workers may take the annual leave to which they are entitled during the early weeks of their employment' ([239]), they may not impose a minimum period of uninterrupted work for the same employer before workers are entitled to paid annual leave ([240]).

— *Scheduling of leave*

The Directive does not regulate the scheduling of paid annual leave. This is left to national law, collective agreements or practices. However, as explained below, it provides that a worker who is unable to take planned leave due to another conflicting period of leave (sick leave, maternity leave or another period of leave whose purpose is different from that of

([233]) Judgment in case C-619/16, *Kreuziger*, para. 41; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, para. 34.

([234]) Judgment in case C-173/99, *BECTU*, paras. 48-53; Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 28; Judgment in case C-214/16, *King*, para. 34; Judgment in case C-12/17, *Dicu*, para. 26; Judgment in joined cases C-762/18 and C-37/19, *Varhoven kasatsionen sad na Republika Bulgaria*, para. 56; Judgment in case C-514/20, *Koch Personaldienstleistungen*, para. 22.

([235]) Judgment in case C-173/99, *BECTU*, para. 64; Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 28.

([236]) Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 48; Judgment in case C-155/10, *Williams and Others*, para. 26; Judgment in case C-539/12, *Lock*, para. 17; Judgment in case C-118/13, *Bollacke*, para. 16; Judgment in case C-214/16, *King*, para. 34

([237]) Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, para. 54.

([238]) Commission's submission in case C-173/99 to which reference is made in Opinion of Advocate General Tizzano of 8 February 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:2001:81, para. 34 and in Opinion of Advocate General Trstenjak of 16 June 2011, *Williams and Others* v *British Airways plc*, C-155/10, ECLI:EU:C:2011:403, para. 37.

([239]) Judgment in case C-173/99, *BECTU*, para. 61.

([240]) Judgment in case C-173/99, *BECTU*, para. 64.

the right to annual leave) is entitled to take that annual leave at another time, if necessary outside the corresponding reference period ([241]), with certain limits to the carry-over period in the event of long-term sick leave ([242]).

— *Obligations of the employer concerning the taking of leave*

The Court has held that employers may not impose on workers a restriction of their right to paid annual leave. Any practice or omission of an employer that may deter a worker from taking annual leave, as well as incentives or encouragements not to take leave are incompatible with the right to paid annual leave ([243]). A worker's failure to request paid annual leave during the reference period cannot lead to the loss of paid annual leave at the end of the reference period automatically and without prior verification that the employer had in fact enabled him/her to exercise that right ([244]).

The Court held that the employer should inform the worker accurately and in good time of his or her leave rights ([245]). The employer should also inform the worker that if he or she does not take the leave, it will be lost at the end of the reference period or authorised carry-over period, or upon termination of the employment relationship ([246]). According to the Court, although employers should create opportunities and encourage the worker, formally if need be, to take the leave, they are not required to force their workers to exercise their right to paid annual leave ([247]).

The burden of proof in that respect is on the employer. If the employer is not able to show that it has exercised all due diligence in order to enable the worker to take the paid annual leave to which he or she is entitled, the entitlement to paid annual leave, and, in the event of the termination of the employment relationship, a payment of an allowance in lieu of untaken annual leave, is not lost ([248]). The fact that the employer wrongly considered that the worker is not entitled to paid annual leave is irrelevant as it is for the employer to seek all information regarding its obligations in that regard ([249]).

However, the Working Time Directive does not preclude the loss of the right to paid annual leave, if the employer is able to discharge the burden of proof, as a result of which it appears that the worker refrained deliberately and in full knowledge of the ensuing consequences from taking the paid annual leave to which he or she was entitled after having been given the opportunity to exercise this right ([250]).

According to the Court, unlike in a situation of accumulation of entitlement to paid annual leave by a worker who was unfit for work due to sickness, an employer who does not allow a worker to exercise his or her right to paid annual leave must bear the consequences ([251]). In the absence of any national statutory or collective provision establishing a limit to the carry-over of leave in accordance with the requirements of EU law, paid annual leave cannot lapse at the end of the reference period ([252]). Indeed, the Court has held that if it were to be accepted, in that context, that the worker's acquired entitlement to paid annual leave could be extinguished, that would amount to 'validating conduct by which an employer was unjustly enriched to the detriment [of] workers' health' ([253]).

([241]) Judgment in case C-194/12, *Maestre García*.
([242]) Judgment in case C-214/10, *KHS*.
([243]) Judgment in case C-619/16, *Kreuziger*, para. 49; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, para. 42; Judgment in case C-214/16, *King*, para. 39; Judgment in case C-514/20, *Koch Personaldienstleistungen*, paras. 32 and 41.
([244]) Judgment in case C-619/16, *Kreuziger*, para. 56; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, paras. 40 and 61.
([245]) Judgment in case C-619/16, *Kreuziger*, para. 52; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, para. 45.
([246]) Judgment in case C-619/16, *Kreuziger*, para. 52; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, para. 45.
([247]) Judgment in case C-619/16, *Kreuziger*, paras. 51 and 52; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, para. 44.
([248]) Judgment in case C-619/16, *Kreuziger*, para. 53, Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, para. 46.
([249]) Judgment in case C-214/16, *King*, para. 61.
([250]) Judgment in case C-619/16, *Kreuziger*, para. 54; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, paras. 47 and 56.
([251]) Judgment in case C-214/16, *King*, para. 63.
([252]) Judgment in case C-214/16, *King*, para. 64.
([253]) Judgment in case C-214/16, *King*, para. 64.

Where the employer has not put the worker in a position to exercise the right to paid annual leave, the right may not lapse at the end of an authorized carry-over period or even at a later stage if the worker becomes incapacitated for work due to illness in the course of the leave year ([254]). Similarly, the right may not be time-barred at the end of a three-year period which begins to run at the end of the year in which that right arose ([255]).

— *Carry-over and possible loss of leave*

Similarly, national law can lay down conditions for exercising the right to paid annual leave, including the conditions for carry-over at the end of a leave year.

As concerns carry-over, the Court has held that 'while the positive effect of paid annual leave for the safety and health of the worker is deployed fully if it is taken in the year prescribed for that purpose, namely the current year, the significance of that rest period in that regard remains if it is taken during a later period' ([256]).

The Court has elaborated on the need to provide for carry-over if the worker whose right to annual leave is lost has not had the opportunity to exercise that right ([257]). The Court took the view that carry-over is inevitable where periods of leave guaranteed by EU law ([258]) overlap, and in the case of sick leave ([259]). The Court has also held that where an employer refuses to remunerate the annual leave to which the worker was entitled, the worker's right to carry-over remains until the termination of the employment relationship ([260]).

Loss of leave entitlement is consequently limited to cases in which the worker has actually had the opportunity to exercise that right ([261]). For instance, it cannot lapse at the end of the reference period laid down by national law if the worker was on sick leave for the whole or part of the leave year and has not had the opportunity to take annual leave ([262]), save for the exception admitted by the Court that allows the carry-over period to be limited in the case of long-term sick leave (see Part C). Furthermore, it cannot lapse automatically and without prior verification whether the employer had in fact enabled the worker, in particular through the provision of sufficient information, to exercise his or her right to leave ([263]).

3. ***Payment during annual leave***

The Court has underlined that 'the Directive treats entitlement to annual leave and to a payment on that account as being two aspects of a single right', as the aim of the payment during annual leave is 'to enable the worker actually to take the leave to which he is entitled' ([264]). As a consequence it considered that 'the purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work' ([265]).

([254]) Judgment of 22 September 2022, *XP v Fraport AG Frankfurt Airport Services Worldwide and AR v St. Vincenz-Krankenhaus GmbH*, joined cases C-518/20 and C-727/20, ECLI:EU:C:2022:707.

([255]) Judgment of 22 September 2022, *LB vs TO*, C-120/21, ECLI:EU:C:2022:718.

([256]) Judgment in case C-178/15, *Sobczyszyn*, para. 33; see also: Judgment in case C-124/05, *Federatie Nederlandse Vakbeweging*, para. 30; Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 30; Judgment in case C-277/08, *Vicente Pereda*, para. 24.

([257]) Judgment in case C-277/08, *Vicente Pereda*, para. 19; Judgment in case C-178/15, *Sobczyszyn*, para 22. Judgment in case C-619/16, *Kreuziger*, paras. 42 and 45.

([258]) Judgment in case C-124/05, *Federatie Nederlandse Vakbeweging*, para. 24.

([259]) Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*.

([260]) Judgment in case C-214/16, *King*, para. 65

([261]) Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, para. 35.

([262]) Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, paras. 43 and 55; Judgment in case C-277/08, *Vicente Pereda*, para. 19.

([263]) Judgment in case C-619/16, *Kreuziger*, para. 56; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, paras. 40 and 61.

([264]) Judgment in joined cases C-131/04 and C-257/04, *Robinson-Steele and Others*, para. 58; Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 60; Judgment in case C-539/12, *Lock*, para. 17; Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, para. 40.

([265]) Judgment in joined cases C-131/04 and C-257/04, *Robinson-Steele and Others*, paras. 58-59; Judgment in case C-385/17, *Hein*, para. 33.

Workers 'must receive their normal remuneration for that period of rest' ([266]) and 'a reduction in a worker's remuneration in respect of his paid annual leave, liable to deter him from actually exercising his right to take that leave, is contrary to the objective pursued by Article 7' ([267]), the timing of the reduction is irrelevant ([268]).

The Court has held that payments for annual leave in the form of part payments staggered over the annual period of work are incompatible with the Directive. It has stressed that the payments should be made for a specific period in which the worker actually takes rest ([269]): the point at which the payment for annual leave is made must put the worker during that leave in a position that is comparable to periods of work as regards remuneration ([270]).

Where pay is made up of various components, the Court has considered that a specific analysis is needed to determine 'the normal remuneration to which the worker in question is entitled during his annual leave' ([271]). According to the Court, normal remuneration should not be lower than the average normal remuneration received by the workers during periods actually worked ([272]). In the specific case of short-time working arrangements, periods during which workers are freed from any obligation to work should not be taken into consideration for determining the average normal remuneration ([273]).

As to what constitutes 'the normal remuneration', the Court has held that the components of total remuneration relating to the professional and personal status of the worker have to be paid during the paid annual leave. It gave the example of allowances relating to seniority, length of service and to professional qualification ([274]).

If allowances are linked intrinsically to performing tasks required by the worker's contract of employment and are calculated as part of the worker's total remuneration, they must be taken into account in the remuneration to which the worker is entitled during annual leave ([275]). Similarly, commission received for performing tasks required by the contract of employment, such as a commission on sales, must be taken into account in calculating remuneration ([276]). It is for national courts to assess the reference period considered representative for the calculation of the average component payable for annual leave ([277]).

It is not, however, necessary to take into account components of remuneration intended to cover exclusively 'occasional or ancillary costs arising at the time of performance of the tasks which the worker is required to carry out under the contract of employment' ([278]) or 'collectively agreed additional payment on top of […] average normal remuneration' ([279]).

Given its exceptional and unforeseeable nature, remuneration received for overtime does not, in principle, form part of the normal remuneration ([280]). However, when the obligations arising from the employment contract require the worker to work overtime on a broadly regular and predictable basis, and the corresponding pay constitutes a significant element of the total remuneration that the worker receives for the professional activity, the pay received for that overtime work should be included in the normal remuneration ([281]).

In order to determine whether a threshold of hours worked granting entitlement to overtime pay is reached, the hours corresponding to a worker's period of paid annual leave must be taken into account as hours worked ([282]).

([266]) Judgment in joined cases C-131/04 and C-257/04, *Robinson-Steele and Others*, para. 50; Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 58; Judgment in case C-539/12, *Lock*, para. 16.
([267]) Judgment in case C-155/10, *Williams and Others*, para. 21; Judgment in case C-539/12, *Lock*, para. 23; Judgment in case C-385/17, *Hein*, para. 44; Judgment in case C-514/20, *Koch Personaldienstleistungen*, para. 33.
([268]) Judgment in case C-539/12, *Lock*, para. 23.
([269]) Judgment in joined cases C-131/04 and C-257/04, *Robinson-Steele and Others*, para. 63.
([270]) Judgment in joined cases C-131/04 and C-257/04, *Robinson-Steele and Others*, paras. 59-63.
([271]) Judgment in case C-155/10, *Williams and Others*, para .22; Judgment in case C-539/12, *Lock*, para. 27.
([272]) Judgment in case C-385/17, *Hein*, para. 52.
([273]) Judgment in case C-385/17, *Hein*, para. 44.
([274]) Judgment in case C-155/10, *Williams and Others*, para. 27; Judgment in case C-539/12, *Lock*, para. 30.
([275]) Judgment in case C-155/10, *Williams and Others*, para. 24; Judgment in case C-539/12, *Lock*, para. 29; Judgment in case C-233/20, *job-medium*, para. 31.
([276]) Judgment in case C-539/12, *Lock*, paras. 32-33.
([277]) Judgment in case C-155/10, *Williams and Others*, para. 26; Judgment in case C-539/12, *Lock*, para. 34.
([278]) Judgment in case C-155/10, *Williams and Others*, para. 25; Judgment in case C-539/12, *Lock*, para. 31.
([279]) Judgment in case C-385/17, *Hein*, para. 52.
([280]) Judgment in case C-385/17, *Hein*, para. 46.
([281]) Judgment in case C-385/17, *Hein*, para. 47.
([282]) Judgment in case C-514/20, *Koch Personaldienstleistungen*, paras. 43-46.

In addition, the Court has consistently held that, as regards the entitlement to paid annual leave, workers who are on sick leave during the reference period must be treated in the same way as those who have actually worked during that period. Consequently, in the case of a worker who was partially incapacitated for work due to illness and wished to take paid annual leave, the Court has ruled that the level of pay during annual leave must be based on the normal rate, not a rate that has been temporarily reduced due to partial incapacity to work ([283]).

4. ***Direct effect of the right to paid annual leave***

In case a national provision conflicts with Article 7 of the Directive, the Court has held that national courts must 'interpret [domestic law], so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive' ([284]). According to the Court, this requires national courts to do 'whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the directive in question is fully effective and to achieving an outcome consistent with the objective pursued by it' ([285]). It also entails 'the obligation for national courts to change established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive' ([286]).

Furthermore, the Court has held that both paragraphs 1 and 2 of Article 7 satisfy the criteria for direct effect, being unconditional, unequivocal and precise ([287]). This means that, if a Member State has failed to transpose this provision into national law or has transposed it incorrectly, an individual can go to the national courts to enforce the entitlement to at least four weeks paid annual leave against the State or public bodies, in their capacity either as employers or as public authorities ([288]). The national courts are, in that regard, required to disapply the conflicting national legislation ([289]).

While it is normally not possible to invoke the 'direct effect' of a directive in proceedings between private parties ([290]), the Court upheld 'horizontal' direct effect of Article 31(2) of the Charter of Fundamental Rights based on the qualification of the right to paid annual leave as an essential principle of European Union social law ([291]). In proceedings between private parties, this would impose on national courts the obligation to ensure the full effectiveness of the right to paid annual leave, including by disapplying if need be any provision of national legislation contrary to that principle ([292]). The horizontal direct effect of Article 31(2) applies only to the minimum of four weeks of paid annual leave and not to any rights that exceed this minimum nor to the conditions for any carrying over of such additional rights ([293]).

B. ***Entitlement to an allowance in lieu of paid annual leave***

Article 7(2) provides that:

'2. the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

([283]) Judgment in case C-217/20, *Staatssecretaris van Financiën*, para. 41.
([284]) Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, paras. 66 and 69.
([285]) Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, para. 67.
([286]) Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, para. 68. The obligation on the national courts to refer to EU law when they interpret and apply the relevant rules of national law is limited by general principles of law, and it cannot serve as the basis for an interpretation of national law *contra legem*. Judgment in case C-385/17, *Hein*, para. 51.
([287]) Judgment in case C-282/10, *Dominguez*, paras 33-35; Judgment in case C-619/16, *Kreuziger*, para. 22; Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, paras. 72 and 73.
([288]) Judgment in case C-282/10, *Dominguez*, paras. 34-39.
([289]) Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, para. 75.
([290]) Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, para. 77; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, paras. 66 and 67.
([291]) Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, paras. 80 and 85; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, paras. 72 and 74.
([292]) Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, paras. 86 and 91; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, paras. 75 and 80.
([293]) The rights that exceed the minimum of four weeks of paid annual leave do not fall under the scope of Article 31(2) of the Charter, Judgment in joined cases C-609/17 and C-610/17, *TSN*, para. 54.

1. **The entitlement to an allowance in lieu**

The Directive allows an allowance in lieu of paid annual leave to which a worker was entitled on the date employment ended and which has not been taken ([294]).

The purpose of the allowance in lieu of outstanding entitlements to annual leave is to avoid that the termination of the employment relationship, by making it no longer possible to take paid annual leave, would lead to 'a situation in which the worker loses all enjoyment of that right, even in pecuniary form' ([295]).

Two conditions are laid down for entitlement to an allowance in lieu: 'first, that the employment relationship has ended and, second, that the worker has not taken all annual leave to which he was entitled on the date that that relationship ended' ([296]). The Directive does not impose any additional condition. In particular, the Court has ruled that no prior application should be required ([297]).

As the Court emphasised, it is only where employment has ended that Article 7(2) allows an allowance in lieu of paid annual leave: a worker must normally be entitled to actual rest, with a view to ensuring effective protection of health and safety ([298]). By contrast, 'the possibility of financial compensation in respect of the minimum period of annual leave carried over would create an incentive, incompatible with the objectives of the Directive, not to take leave or to encourage employees not to do so' ([299]).

If the worker did not ask to exercise the right to paid annual leave prior to the termination of the employment relationship, the worker cannot lose the right to payment in lieu automatically and without prior verification of whether the employer had in fact enabled the worker, in particular by providing sufficient information, to exercise the right to leave prior to the termination of that relationship ([300]). The burden of proof is on the employer ([301]).

If the contract has not ended, an allowance in lieu cannot be paid. It is irrelevant whether the worker was prevented from taking annual leave for reasons to do with production or the organisation of the undertaking ([302]).

If the contract has ended, the reason why it ended is irrelevant ([303]). To ensure the effectiveness of this provision of the Directive, an allowance in lieu of paid annual leave is due also if the worker has asked to end the employment relationship ([304]), retires ([305]) or even dies ([306]). The right to an allowance in lieu is not extinguished upon the worker's death but forms part of the assets to be inherited by the heirs ([307]).

In the event of termination of the employment relationship after the worker has been unlawfully dismissed then reinstated in his or her employment, in accordance with national law, following the annulment of the dismissal by a decision of a court, that worker is entitled to financial compensation in lieu of paid annual leave not taken during the period between

([294]) Judgment in case C-118/13, *Bollacke*, para. 23; Judgment in case C-341/15, *Maschek*, para. 27.
([295]) Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 56; Judgment in case C-337/10, *Neidel*, para. 29; Judgment in case C-118/13, *Bollacke*, para. 17; Judgment in case C-341/15, *Maschek*, para. 26; Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, para. 43.
([296]) Judgment in case C-118/13, *Bollacke*, para. 23; Judgment in case C-341/15, *Maschek*, para. 27. Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, para. 44; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, para. 23.
([297]) Judgment in case C-118/13, *Bollacke*, paras. 27-28.
([298]) Judgment in case C-173/99, *BECTU*, para. 44; Judgment in case C-342/01, *Merino Gómez*, paras. 29-30; Judgment in case C-124/05, *Federatie Nederlandse Vakbeweging*, para. 29; Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 23; Judgment in case C-277/08, *Vicente Pereda*, para. 20; Judgment in case C-486/08, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, para. 31.
([299]) Judgment in case C-124/05, *Federatie Nederlandse Vakbeweging*, para. 32.
([300]) Judgment in case C-619/16, *Kreuziger*, para. 56; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, para. 61.
([301]) Judgment in case C-619/16, *Kreuziger*, para. 53; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, para. 46.
([302]) Judgment in case C-194/12, *Maestre García*, paras. 28-29.
([303]) Judgment in case C-341/15, *Maschek*, para. 28; Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, para. 45; Judgment in case C-233/20, *job-medium*, para. 32.
([304]) Judgment in case C-341/15, *Maschek*, para. 29.
([305]) Judgment in case C-337/10, *Neidel*, para. 31.
([306]) Judgment in case C-118/13, *Bollacke*, para. 24; Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, para. 50.
([307]) Judgment in joined cases C-569/16 and C-570/16, *Bauer and Willmeroth*, para. 48.

the date of the unlawful dismissal and that of the reinstatement in employment ([308]). However, if the worker obtained other employment during that period, this worker cannot claim from the first employer compensation corresponding to the period of work with the new employer.

2. **The amount of the allowance**

The Directive does not determine how the allowance in lieu of the minimum period of paid annual leave should be calculated.

The Court has nevertheless ruled that Member States must ensure that the conditions laid down by national law take account of the limits derived from the Directive itself. They must require that the allowance in lieu 'be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship' ([309]). This means that the worker's normal remuneration, which must normally continue during annual leave, is decisive ([310]) in calculating the allowance in lieu of annual leave not taken by the end of the employment relationship ([311]).

3. **Additional leave entitlement**

If Member States provide for an additional period of annual leave exceeding the 4 weeks required by the Directive, they can decide whether or not to provide workers who have been prevented from taking that leave during their employment relationship with an allowance in lieu and they may lay down the conditions of that additional entitlement ([312]).

C. ***Interaction between paid annual leave and other types of leave***

The Court has held that 'a period of leave guaranteed by Community law cannot affect the right to take another period of leave guaranteed by that law' ([313]), including eventually, in the event of the aggregation of several periods of leave, the inevitable carrying forward of annual leave or part thereof to the following year ([314]).

In the case of rights to leave governed by national law, the Court held that the purpose of the leave is to be assessed to derive conclusions on any overlap with paid annual leave.

1. **Maternity leave**

The Court has held that the purposes of maternity leave and paid annual leave are different: the first aims to protect a woman's biological condition during and after pregnancy and to protect the special relationship between a woman and her child in the period which follows childbirth ([315]). This interpretation was deemed necessary 'in order to guarantee observance of the rights connected with the employment contract of a worker in the event of maternity leave' ([316]).

Workers on maternity leave, who are, as a result, unable to work, must be guaranteed a right to paid annual leave and cannot be made subject to a condition to have actually worked. When absent on maternity leave during the reference period for paid annual leave they are to be treated in the same way as workers who have actually worked ([317]).

([308]) Judgment in joined cases C-762/18 and C-37/19, *Varhoven kasatsionen sad na Republika Bulgaria*.
([309]) Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, paras. 57-60.
([310]) Judgment in joined cases C-229/11 and C-230/11, *Heimann and Toltschin*, para. 25.
([311]) Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 61.
([312]) Judgment in case C-337/10, *Neidel*, paras. 36-37; Judgment in case C-341/15, *Maschek*, para. 39.
([313]) Judgment of 14 April 2005, *Commission of the European Communities* v *Grand Duchy of Luxemburg*, C-519/03, ECLI:EU:C:2005:234, para. 33; Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 26.
([314]) Judgment in case C-519/03, *Commission v Luxembourg*, para. 33; Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 26.
([315]) Judgment in case C-342/01, *Merino Gómez*, para. 32; Judgment in case C-12/17, *Dicu*, para. 34.
([316]) Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 27.
([317]) Judgment in case C-12/17, *Dicu*, para. 30.

Further, 'a worker must be able to take her annual leave during a period other than the period of her maternity leave, including in a case in which the period of maternity leave coincides with the general period of annual leave fixed, by a collective agreement, for the entire workforce' ([318]). This wording suggests that it is an absolute principle, and that, unlike the situation of sick leave (see below), the carry-over of paid annual leave cannot be limited. Indeed, the Court has insisted that 'a period of leave guaranteed by Community law cannot affect the right to take another period of leave guaranteed by that law' ([319]).

In the light of the directive protecting pregnant workers and workers who have recently given birth or are breastfeeding ([320]), the Court added that this applies not only to the minimum paid annual leave of four weeks, but also to any additional leave provided for by national law ([321]).

2. **Parental leave and other types of leave protected by EU law**

The Court has ruled on parental leave in the context of the Framework Agreement on parental leave ([322]), which has since been repealed by Directive (EU) 2019/1158 ([323]).

Article 10(1) of Directive (EU) 2019/1158 on work-life balance for parents and carers provides that rights acquired or in the process of being acquired by the worker on the date on which, *inter alia* ([324]), parental leave starts are to be maintained as they stand until the end of parental leave and apply after that leave.

That provision is intended to avoid the loss of or reduction in rights derived from an employment relationship, to which workers are entitled when they start parental leave, and to ensure that, at the end of that leave, they will find themselves in the same situation as when it started. The Court has ruled that the right to paid annual leave is one of the rights derived directly from the employment relationship of every worker. Thus, the entitlement to annual leave accumulated during the period preceding the start of parental leave cannot lapse while being on parental leave ([325]).

Even though a worker on parental leave remains, during that period, a worker for the purposes of EU law, the employment relationship can be suspended pursuant to national law, thus suspending the reciprocal obligations of the parties ([326]). In such a case 'the period of parental leave taken by the worker concerned during the reference period cannot be treated as a period of actual work for the purpose of determining that worker's entitlement to paid annual leave under Article 7 of Directive 2003/88' ([327]).

Should other forms of leave be introduced in EU law, the Commission considers that the principle established by the Court that 'a period of leave guaranteed by EU law cannot affect the right to take another period of leave guaranteed by that law' ([328]) would apply. If periods of different types of leave protected by EU law coincide, this could entail carrying forward annual leave, or part of it, to the following year.

([318]) Judgment in case C-342/01, *Merino Gómez*, para. 41.

([319]) Judgment in case C-342/01, *Merino Gómez*, paras. 32-33; Judgment in case C-519/03, *Commission v Luxembourg*, para. 33; Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 26; Judgment in case C-124/05, *Federatie Nederlandse Vakbeweging*, para. 24; Judgment in case C-12/17, *Dicu*, para. 37.

([320]) Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ L 348, 28.11.1992, p. 1).

([321]) Judgment in case C-342/01, *Merino Gómez*, para. 45.

([322]) Framework agreement on parental leave, concluded on 14 December 1995, annexed to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ L 145, 19.6.1996, p. 4), as amended by Council Directive 97/75/EC of 15 December 1997 (OJ L 10, 16.1.1998, p. 24); Revised Framework Agreement on parental leave concluded on 18 June 2009, annexed to Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (OJ L 68, 18.3.2010, p. 13).

([323]) Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (OJ L 188, 12.7.2019, p. 79).

([324]) Article 10(1) of Directive (EU) 2019/1158 regulates paternity leave, parental leave, carers' leave and time off from work on grounds of force majeure.

([325]) Judgment in case C-486/08, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, paras. 48-56.

([326]) Judgment in case C-12/17, *Dicu*, para. 35.

([327]) Judgment in case C-12/17, *Dicu*, para. 36.

([328]) Judgment in case C-519/03, *Commission v Luxembourg*, para. 33; Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 26, Judgment in case C-12/17, *Dicu*, para. 37.

3. **Sick leave**

In contrast to the right to maternity leave and parental leave, the right to sick leave and the conditions for exercise of that right are not governed by EU law. Nonetheless the Court establishes limits to national law, where paid annual leave and sick leave overlap.

This builds on the different purposes of the two. The purpose of the right to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. The purpose of the right to sick leave is to enable the worker to recover from an illness that has caused him or her to be unfit for work ([329]).

a) *Entitlement in case of sick leave*

As stated above, workers on sick leave remain entitled to accrue paid annual leave, since it is not a condition of paid annual leave that the worker must have worked during the reference period ([330]).

b) *Exercise of the right in the event of sick leave*

The Court has clearly held that it is open to the Member State to authorise or prohibit the taking of annual leave during a period of sick leave ([331]).

Nonetheless, if the worker does not wish to take annual leave during that period, annual leave must be granted for a different period ([332]). This means, in particular, that a worker who is on sick leave during a period of planned annual leave has the right to take that annual leave at a different time, at his or her request ([333]), whether sick leave begins before or during the planned paid annual leave ([334]).

While the employer's interests can be taken into account when scheduling the worker's leave, the entitlement to annual leave at a later date cannot be called into question ([335]). So the employer must grant the worker a different period of annual leave compatible with those interests, without excluding in advance a period outside the reference period for the annual leave in question ([336]).

c) *Carry-over in case of sick leave*

Where the worker has been sick during part or all of the leave year, he or she may not have been able to take paid annual leave, although still entitled.

As stated above, while the Court has held that 'the positive effect of paid annual leave for the safety and health of the worker is deployed fully if it is taken in the year prescribed for that purpose, namely the current year', it has nevertheless taken the view that 'that period did not lose his interest in this respect if it is taken during a later period' ([337]). Therefore, where a worker who has been on sick leave for all or part of the leave year has not had the opportunity to take the paid annual leave, the Court has held that the right to paid annual leave cannot lapse at the end of the reference period ([338]) but that the worker should be allowed to carry it over, by scheduling it if necessary outside the reference period for annual leave ([339]).

([329]) Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 25; Judgment in case C-277/08, *Vicente Pereda*, para. 21; Judgment in case C-78/11, *ANGED*, para. 19; Order in case C-194/12, *Maestre García*, para. 19; Judgment in case C-178/15, *Sobczyszyn*, para. 25; Judgment of 4 June 2020, *Federación de Trabajadores Independientes de Comercio (Fetico) and Others v Grupo de Empresas DIA S.A. and Twins Alimentación S.A.*, C-588/18, ECLI:EU:C:2020:420, para. 33; Judgment in case C-217/20, *Staatssecretaris van Financiën*, para. 25.

([330]) Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 41; Judgment in case C-282/10, *Dominguez*, para. 20; Judgment in joined cases C-229/11 and C-230/11, *Heimann and Toltschin*, para. 24; Judgment in case C-12/17, *Dicu*, para. 29; Judgment in joined cases C-762/18 and C-37/19, *Varhoven kasatsionen sad na Republika Bulgaria*, para. 59; Judgment in case C-217/20, *Staatssecretaris van Financiën*, para. 29.

([331]) Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, paras. 28-31; Order in case C-277/08, *Vicente Pereda*, para. 25.

([332]) Judgment in case C-277/08, *Vicente Pereda*, para. 25.

([333]) Judgment in case C-277/08, *Vicente Pereda*, para. 22; Judgment in case C-78/11, *ANGED*, para. 20; Order in case C-194/12, *Maestre García*, para. 19; Judgment in case C-178/15, *Sobczyszyn*, para. 26.

([334]) Judgment in case C-78/11, *ANGED*, para. 21.

([335]) Order in case C-194/12, *Maestre García*, para. 24.

([336]) Judgment in case C-78/11, *ANGED*, para. 23; Judgment in case C-277/08, *Vicente Pereda*, para. 23; Order in case C-194/12, *Maestre García*, para. 23.

([337]) Judgment in Case C-124/05, *Federatie Nederlandse Vakbeweging*, para. 30.

([338]) Judgment in joined Cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, paras. 38-49; Judgment in case C-277/08, *Vicente Pereda*, para. 19.

([339]) Judgment in case C-78/11, *ANGED*, para. 23; Judgment in case C-277/08, *Vicente Pereda*, para. 23.

Member States may limit the period in which paid annual leave can be carried over ([340]). The Court has acknowledged that the right to the accumulation of entitlements to paid annual leave acquired during incapacity for work is not unlimited ([341]).

However, the Court has also held that 'any carry-over period must be substantially longer than the reference period in respect of which it is granted' ([342]). It has therefore held that a carry-over period of 9 months, i.e. shorter than the reference period to which it relates, did not ensure the positive effect of paid annual leave as a rest period and therefore could not be used to determine the expiry of the entitlement to paid annual leave ([343]). By contrast, it accepted a carry-over period of 15 months ([344]).

Finally, the Court has clarified that when Member States decide to grant paid annual leave in addition to the four weeks provided for by the Directive, they are not obliged to provide for a carry-over of any such additional leave, since that additional leave (beyond four weeks) is not covered by the Directive ([345]).

d) *Allowance in lieu in the event of sick leave until the employment relationship ends*

In the case of a worker being on sick leave for all or part of the leave year and/or of a carry-over period until employment ends, the Court has held that it is incompatible with Article 7(2) to preclude the payment of allowance in lieu of paid annual leave not taken ([346]).

4. **Other types of leave at national level**

Where workers are entitled to other forms of leave under national legislation, the purpose of the leave is the critical factor in judging how to handle any overlap with paid annual leave ([347]).

In the case of 'convalescence leave', the Court held that the considerations held for sick leave were applicable, and established the principle that where the purposes of the leave granted at national level and that of paid annual leave differ, there is an obligation to grant the worker concerned a different period of annual leave ([348]).

Nevertheless the Court considered that in the case of a specific type of leave granted by national law, it was for the national courts to determine whether the purpose of that right was different from the purpose of the right to paid annual leave, as interpreted by the Court and in light of its guidance and the factors at national level governing the granting of the leave ([349]).

Member States may grant to workers paid special leave which enables them to meet specific needs or obligations that require their personal presence such as, for instance, marriage, the birth of a child, hospitalization, the death of a close relative, or the performance of representative trade-union functions. The Court ruled that such special leave does not fall within the scope of the Working Time Directive, but rather of the exercise, by a Member State, of its own competences ([350]).

([340]) Judgment in case C-214/10, *KHS*, paras. 28-35.
([341]) Judgment in case C-214/10, *KHS*, paras. 28-35.
([342]) Judgment in case C-214/10, *KHS*, paras. 38-40.
([343]) Judgment in case C-337/10, *Neidel*, paras. 41-43; Judgment in case C-214/10, *KHS*, para. 38.
([344]) Judgment in case C-214/10, *KHS*, para. 44; Judgment in case C-214/16, *King*, para. 55; Judgment in joined cases C-762/18 and C-37/19, *Varhoven kasatsionen sad na Republika Bulgaria*, para. 71.
([345]) Judgment in joined cases C-609/17 and C-610/17, *TSN*.
([346]) Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para. 62; Judgment in case C-337/10, *Neidel*, para. 30; Judgment in case C-341/15, *Maschek*, para. 31.
([347]) National measures against the spread of Covid-19 have recently given rise to a preliminary reference by a national court before the Court (case C-206/22), the question being whether the obligation to grant paid annual leave is fulfilled if, during an authorised period of leave, the worker concerned is affected by an unforeseeable event such as government-ordered quarantine. The Court has not yet ruled on that case.
([348]) Judgment in case C-178/15, *Sobczyszyn*, para. 32.
([349]) Judgment in case C-178/15, *Sobczyszyn*, paras. 24-31.
([350]) Judgment in case C-588/18, *FETICO and Others*.

VIII. NIGHT WORK, SHIFT WORK AND PATTERNS OF WORK

The Working Time Directive acknowledges the particular nature of night work and of certain burdensome forms of work organisation ([351]). In addition to general provisions on rest periods and maximum weekly working time, the Directive therefore contains specific provisions on night work, shift work and other work patterns which are detailed below.

A. *The length of night work*

> Article 8 of the Directive lays down that:
>
> 'Member States shall take the measures necessary to ensure that:
>
> (a) normal hours of work for night workers do not exceed an average of eight hours in any 24-hour period;
>
> (b) night workers whose work involves special hazards or heavy physical or mental strain do not work more than eight hours in any period of 24 hours during which they perform night work.
>
> For the purposes of point (b), work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the specific effects and hazards of night work.'

This Article establishes two different limits for night workers: one applicable to all night workers and another applicable to night workers whose work involves special hazards or heavy physical or mental strain. For the notion of 'night work', reference is made to the definition presented in Chapter IV.B.

1. The average limit on night work

The Directive limits the average working time of all night workers to 8 hours per 24-hour period.

a) *The limit on 'working time'*

This limit applies to the hours of work of 'night workers'. It therefore refers to *all working time*, not only 'night time' (see Chapter IV).

In addition, although Article 8 refers to 'normal hours of work', the definitions of 'working time' and 'rest periods' in Chapter IV, and Recital 8 of the Directive, imply that all 'working time', including overtime, should be counted towards this limit on night work.

Since this limit is an average, Member States can decide on the reference period. Under Article 16(c), the reference period must be defined after consulting the two sides of industry or directly by collective agreements or agreements at national or regional level.

b) *The average over a 'reference period'*

The original proposal to establish a reference period of maximum 14 days ([352]) does not appear in the Directive as adopted. The reference period is determined by Member States and/or social partners without any express limit.

However, in light of the Directive's objective of laying down minimum safety and health requirements, and of the need to maintain the effectiveness of the provision concerning night work, the reference period for night work should be substantially shorter than that used for the maximum working week. Indeed, setting the same reference periods for both would *de facto* render the night work provision pointless, since compliance with the average 48-hour working week and the weekly rest period would automatically ensure daily working time of 8 hours on average.

([351]) Directive 2003/88/EC, Recital 7: 'Research has shown that the human body is more sensitive at night to environmental disturbances and also to certain burdensome forms of work organisation and that long periods of night work can be detrimental to the health of workers and can endanger safety at the workplace'.

([352]) Proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90) 317 final – SYN 295.

Under Article 16(c), if the minimum weekly rest period falls within the reference period for calculating night work, it is not included when calculating the average. Recitals 5 and 7 of the Directive state that 'all workers should have adequate rest periods' and 'long periods of night work can be detrimental to the health of workers'. By contrast, the daily rest period, which naturally limits the working time of the workers concerned and ensures that they benefit from regular periods of rest, is included in calculating the average.

2. **Maximum limit on night work involving special hazards or heavy physical or mental strain**

a) *Absolute limit*

This absolute limit of 8 hours applies to the hours of work of 'night workers'. It therefore includes *all working time* (e.g. overtime), not only 'night time'.

Unlike the average limit, the maximum limit on this specific kind of night work under Article 8(b) applies to 'any period of 24 hours'. It cannot be calculated as an average. This means that while the workers concerned may do less work in certain 24-hour periods, they can never exceed the maximum of 8 hours at other times where they perform night work.

However, unlike the average limit which applies to all hours of work of night workers, this absolute limit applies only to the time during which the workers concerned actually perform night work. This means that if a 'night worker whose work involves special hazards or heavy strain' does not carry out night work in a specific 24-hour period, it is not the absolute 8-hour limit for that period that applies but the average limit. So the worker could work for longer than 8 hours if he or she does not perform night work during that period.

b) *Work involving special hazards*

The Directive does not define the concepts of 'special hazards or heavy physical or mental strain'. It provides for them to be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry.

The Directive provides that, in whatever way work involving special hazards or heavy physical or mental strain is defined, it should take account of the specific effects and hazards of night work. As a guide, reference may be made to Recital 7, which points to 'environmental disturbances' and 'certain burdensome forms of work organisation' as liable to have a detrimental effect on the health of the workers concerned. The Commission's original proposal referred to 'piece work, assembly-line work or work at a pre-established pace' as examples in this respect ([353]).

B. **Health assessments and transfer of night workers to day work**

Article 9 imposes on Member States the following obligations:

'1. Member States shall take the measures necessary to ensure that:

(a) night workers are entitled to a free health assessment before their assignment and thereafter at regular intervals;

(b) night workers suffering from health problems recognised as being connected with the fact that they perform night work are transferred whenever possible to day work to which they are suited.

2. The free health assessment referred to in paragraph 1(a) must comply with medical confidentiality.

3. The free health assessment referred to in paragraph 1(a) may be conducted within the national health system.'

([353]) Proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90) 317 final – SYN 295.

1. **The right of night workers to health assessments**

a) *Health assessment before assignment*

Article 9 of the Directive entitles all 'night workers' under Article 2(4) (see Chapter IV above) to a health assessment before assignment.

This provision is comparable to that in Article 4 of ILO Convention 171 which provides that 'At their request, workers shall have the right to undergo a health assessment without charge and to receive advice on how to reduce or avoid health problems associated with their work: (a) before taking up an assignment as a night worker; […]'.

The health assessment must take place *before* the worker's assignment to night work, i.e. before the worker concerned starts performing night work.

Unlike the ILO Convention, the Directive does not refer to a worker's request but entitles all night workers to health assessments before taking up an assignment.

b) *Health assessment at regular intervals*

'Night workers' are also entitled to health assessments 'at regular intervals'. The intervals are left undefined and are therefore for the Member States to determine.

In the adoption process for the 1993 Directive, the European Parliament ([354]) proposed one check-up per year until the age of 40 and two per year after that age. This was taken up by the Commission ([355]) but was not adopted in the final text ([356]).

c) *The health assessments must be free*

While the Directive provides that the health assessment must be free for the worker, it does not establish whether the costs should be borne by the employer or a third party, such as occupational health services, and it is therefore left for the Member States to decide.

d) *Medical confidentiality*

The Working Time Directive requires that the free health assessments to which workers are entitled before assignment and then at regular intervals comply with medical confidentiality.

Unlike the ILO Convention, the Directive makes no explicit exception for a 'finding of unfitness for night work' ([357]).

e) *The possibility to carry out the assessments as part of the national health system*

The Directive states that these health assessments may take place within the national health system, but does not require this.

2. **The transfer of night workers to daytime work for health reasons**

This provision is comparable with Article 6 of ILO Convention 171 ([358]) and requires that, where workers suffer from health problems connected with their night work, they are transferred whenever possible to day work to which they are suited.

The Directive does not enter into details of the procedure or how the health problems and the connection with night work are to be proven. These can therefore be decided on at national level.

As to the positions to which workers should be transferred, the Directive only requires that it is work to which they are suited and that it is 'day work'. The transfer should take place 'whenever possible'.

([354]) European Parliament, Decision on the common position established by the Council with a view to the adoption of a directive concerning certain aspects of the organization of working time (C3-0241/93 – SYN 295) (OJ C 315, 22.11.1993, p. 125).
([355]) Commission amendment to the Proposal for a Council Directive concerning certain aspects of the organisation of working time, 23 April 1991, COM(91) 130 final – SYN 295.
([356]) Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time.
([357]) International Labour Organization, Convention concerning Night Work, C171, 26 June 1990, Article 4(2).
([358]) International Labour Organization, Convention concerning Night Work, C171, 26 June 1990, Article 6.

Unlike the ILO Convention[242], the Directive does not detail situations where transfer would not be possible, nor does it specify benefits or protection against dismissal for workers for whom no transfer proves possible despite health problems linked to night work.

C. **Guarantees for night time working**

> Article 10 provides that:
>
> 'Member States may make the work of certain categories of night workers subject to certain guarantees, under conditions laid down by national legislation and/or practice, in the case of workers who incur risks to their safety or health linked to night-time working.'

This provision allows Member States to increase the protective measures applicable to certain 'categories of night workers'. It does not permit derogations but rather explicitly provides that additional protective measures can be set up.

Information from the adoption file for the Directive suggests that the European Parliament's intention for this provision was to allow protection of pregnant women or mothers in the first 6 months after giving birth or adopting a child ([359]). The wording of Article 10, however, is open and Member States may freely decide on the categories subject to such guarantees and the nature of the guarantees.

D. **Notification of regular use of night workers**

> Article 11 sets out that:
>
> 'Member States shall take the measures necessary to ensure that an employer who regularly uses night workers brings this information to the attention of the competent authorities if they so request.'

The original proposal ([360]) required employers to systematically inform the health and safety authorities of the regular use of night workers, in the light of the adverse effects of night work on health ([361]).

The final text limits the requirement to inform the competent authorities to cases where the authorities request this. This means that while Member States may still require employers to inform the authorities of the regular use of night workers as part of systematic declarations, the Directive does not impose this obligation. It requires only that the competent authorities decide on the situations in which the authorities must be informed.

This duty to inform the authorities applies to employers who 'regularly' use night workers. The exact scope of the term 'regularly' is not defined by the Directive, nor has it been the subject of Court proceedings.

It is the Commission's views that provisions of national law imposing a general obligation on employers to communicate information on their workers, working time and work organisation could correspond to this requirement.

([359]) European Parliament, Decision on the common position established by the Council with a view to the adoption of a directive concerning certain aspects of the organization of working time (C3-0241/93 – SYN 295) (OJ C 315, 22.11.1993, p. 125).

([360]) Proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90) 317 final – SYN 295.

([361]) Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90) 317 final – SYN 295, para. 28.

E. **Safety and health protection**

Article 12 of the Directive establishes that:

'Member States shall 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;

(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.'

This provision concerns both night workers and shift workers and requires Member States to ensure appropriate protection of their health and safety and the availability at all times of protection and prevention services or facilities equivalent to those applicable to other workers.

The first indent requires that workers who carry out night and shift work benefit from appropriate measures tailored to the nature of their work. Recital 7 points to the fact that 'the human body is more sensitive at night to environmental disturbances and also to certain burdensome forms of work organisation'. The Commission's proposal also stated that the aim was to take into account 'the more demanding nature of these forms of work and the problems which usually occur when shift work cycles change' ([362]). In this light, Article 12 means that the protection granted to the workers should take account both of the fact that the workers carry out night or shift work, and of the conditions in which they carry out their work. As to what protective measures could be taken, the Commission's Explanatory Memorandum gave the example of scheduling rest periods and breaks[246], but the Directive does not specify.

The Court has interpreted Article 12 first indent by referring to Recital 6 ([363]). With regard to the organisation of working time, in particular of night work, account should be taken of the principles of the International Labour Organisation, according to which compensation for night workers in the form of working time, pay or similar benefits must recognise the nature of night work ([364]). The Court has held that pursuant to Article 12 first indent night workers must benefit from protective measures regulating working hours, remuneration, allowances or similar benefits, to compensate for the particular hardship involved in the work they carry out ([365]). However, a provision of a collective agreement which provides for a higher supplementary allowance for irregular night work than that established for regular night work is not within scope of the Directive ([366]).

The second indent can be linked to Recital 10, which states that 'the organisation and functioning of protection and prevention services and resources should be efficient'. The methods that Member States adopt to fulfil their obligations may be linked to those set out in Article 5 of ILO Convention 171, which states: 'Suitable first-aid facilities shall be made available for workers performing night work, including arrangements whereby such workers, where necessary, can be taken quickly to a place where appropriate treatment can be provided.' However, the Directive is broader, since it not only covers protection but also refers to prevention services and facilities. The exact extent of the requirements will depend on the protection and prevention facilities established for day-work in the Member States and other EU directives on the safety and health of workers ([367]).

([362]) Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90) 317 final – SYN 295, para. 29.

([363]) Judgment of 24 February 2022, *VB v Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto'*, C-262/20, ECLI:EU:C:2022:117, para. 54.

([364]) Article 8 of ILO Convention 171.

([365]) Judgment in case C-262/20, *Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto'*, para. 55.

([366]) Judgment in joined cases C-257/21 and C-258/21, *Coca-Cola European Partners Deutschland*, para. 53.

([367]) Notably Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ L 183, 29.6.1989, p. 1) and Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace, (OJ L 393, 30.12.1989, p. 1).

F. **Pattern of work**

> Article 13 establishes that:
>
> 'Member States shall 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 of safety and health requirements, especially as regards breaks during working time.'

This provision is particularly relevant for shift work but is not expressly limited to it. It requires Member States to ensure that employers take into account the 'general principle of adapting work to the worker' when they set up a new work pattern or change an existing one. The Directive stresses the importance of breaks here, but does not limit the scope of the protective measures to be taken.

IX. **DEROGATIONS**

The Working Time Directive is a complex text, because it seeks to provide a degree of flexibility appropriate to different activities, while ensuring a solid level of minimum protection. This flexibility is enshrined in the Directive's derogations, which are numerous and varied both as regards the workers and sectors concerned and the provisions from which derogations are allowed.

As most of the rights developed in the Directive are also protected under Article 31 of the Charter of Fundamental Rights of the European Union, it is important to stress that in this context, Article 52 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.'

The derogations to the Working Time Directive also have the following common features:

First, they must be validly transposed in order to be used. The Court has held that: 'Since the derogations available under the derogating provisions in question are optional, European Union law does not require Member States to implement them in domestic law.' ([368]) It has ruled that in order to make use of an option to derogate from certain provisions, 'the Member States are required to make a choice to rely on it'[248].

The Court has nevertheless taken the view that 'provided that, even in the absence of express measures transposing [the Working Time Directive], the national law applicable to a given activity observes the conditions laid down in Article 17 thereof, that law conforms to the directive and there is nothing to prevent national courts from applying it.' ([369]) This means that where national law meets the conditions of the derogation, it may be applied even if it does not expressly present itself as transposing the derogations provided for in the Directive. Member States should, however, ensure that the general principles of EU law are obeyed, including the principle of legal certainty and, as a consequence, that the provisions permitting optional derogations display the 'precision and clarity necessary to satisfy the requirements flowing from that principle' ([370]).

Second, 'as exceptions to the European Union system for the organisation of working time put in place by Directive 2003/88, those 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' ([371]). This means not only that derogations are limited to the cases in which they are expressly granted by the Directive but also that the scope of each derogation is limited to the provisions exhaustively listed in it ([372]).

([368]) Judgment in case C-227/09, *Accardo and Others*, para. 51.
([369]) Judgment in case C-303/98, *Simap*, para. 44.
([370]) Judgment in case C-227/09, *Accardo and Others*, para. 55.
([371]) Judgment in case C-227/09, *Accardo and Others*, para. 58; Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 40.
([372]) Judgment in case C-151/02, *Jaeger*, para. 89; Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 77.

Third, the derogations are to be implemented 'subject to strict conditions intended to secure effective protection for the safety and health of workers' ([373]).

While a number of conditions are already set out in the Directive for each of the derogating provisions, the Commission considers that where several aspects of the protection provided for by the Directive are amended through the cumulative use of derogations, further protective measures may be necessary to respect the Directive's objective to protect the safety and health of workers.

A. *The derogation for 'autonomous workers'*

Article 17(1) sets out the following derogation:

'1. With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Articles 3 to 6, 8 and 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of:

(a) managing executives or other persons with autonomous decision-taking powers;

(b) family workers; or

(c) workers officiating at religious ceremonies in churches and religious communities.'

1. **The scope of the 'autonomous workers' derogation**

Article 17(1) of the Directive allows derogations 'when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves'.

As pointed out above, Article 17(1) must be interpreted in such a way that its scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected ([374]).

This derogation covers two main types of situations and both have to be assessed 'on account of the specific characteristics of the activity concerned'. Therefore, in the view of the Commission, such derogation cannot be applied broadly to a whole category of workers.

The first criterion for this derogation states that the 'duration of the working time is not measured and/or predetermined'. The second one requires that the workers can determine the duration of their working time themselves.

In respect of both qualification criteria, the Court has held that it was apparent from its wording that it 'applies only to workers whose working time *as a whole* is not measured or predetermined or can be determined by the workers themselves on account of the kind of activity concerned' ([375]) (Commission's emphasis). This means that the derogation is not applicable to workers whose working time is only partially not measured or predetermined or can only partially be determined by the workers themselves.

In its *Isère* case, the Court considered whether this derogation applied to 'workers employed in holiday and leisure centres under an educational commitment contract'. It based its assessment on the fact that the description of the activities of the workers concerned and the operation of such centres suggests that those workers were not 'able to decide the number of hours which they are to work'. The Court also noted that there were no elements indicating that the workers were 'not

([373]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 77; Judgment in case C-243/09, *Fuß*, para. 34.

([374]) Judgment in case C-428/09, *Union syndicale Solidaires Isère*, paras. 39-40.

([375]) Judgment in case C-484/04, *Commission v United Kingdom*, para. 20; Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 41. While the Court remained silent on the precise elements leading to this interpretation, the Opinion of Advocate-General Kokott in the same case analysed the wording, context as well as objectives of the Directive in order to reach the conclusion that the derogation cannot apply to cases in which only part of the working time is not measured, predetermined or can be determined by the workers themselves. See case C-484/04, Opinion of Advocate General Kokott, 9 March 2006, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2006:166, paras. 22-32.

obliged to be present at their place of work at fixed times', and concluded that they did not fall within the scope of the derogation ([376]). In its *Hälvä* case, the Court confirmed that 'relief parents' who temporarily replace foster parents do not fall under the 'autonomous workers derogation' of Article 17(1) ([377]). This is despite the fact that the 'relief parents' have a certain degree of autonomy in the organisation of their time and, more specifically, their daily duties, their movements and their periods of inactivity ([378]). The ability of the workers to decide on both the quantity and the scheduling of their working hours is therefore essential for the autonomous workers derogation of Article 17(1) to apply.

In light of these elements, the Commission considers that the derogation could encompass certain high-level managers whose working time, as a whole, is not measured or predetermined since they are not obliged to be present at the workplace at fixed hours but can decide on their schedule autonomously. Similarly, it could for example apply to certain experts, senior lawyers in an employment relationship or academics who have substantial autonomy to determine their working time.

Article 17(1) goes on to list three specific categories of workers the duration of whose working time may not be measured and/or predetermined or who can determine it themselves: these are 'managing executives or other persons with autonomous decision-taking powers', 'family workers' or 'workers officiating at religious ceremonies in churches and religious communities'.

In view of the Directive's wording: the three categories are introduced with the phrase 'particularly in the case of', the Commission takes the view that this list is not exhaustive.

The Directive presents such workers as examples since they generally have a high degree of autonomous power to organise their working time and could qualify as autonomous workers. However, not all workers who fall into the categories listed, for example not all managing executives, would qualify for the so-called 'autonomous workers' derogation under Article 17(1).

Workers who are not in these categories may also qualify if, on account of the specific characteristics of the activity concerned, their working time is not measured and/or predetermined or can be determined by them.

2. **The consequences of the 'autonomous workers' derogation**

So-called 'autonomous workers' remain within the scope of the Directive (only in very exceptional cases is exclusion permitted, see Chapter III. B. 2). As indicated above, the scope of this derogation is subject to the general principles of the protection of the safety and health of workers and limited to the provisions listed in Article 17(1):

— daily rest (Article 3);

— breaks (Article 4);

— weekly rest period (Article 5);

— maximum weekly working time (Article 6);

— the length of night work (Article 8);

— reference periods for the application, of the weekly rest period, the maximum weekly working time and the length of night work (Article 16).

Article 17(1) does not specify any conditions for the derogations to these provisions. So it appears that autonomous workers are entirely excluded from them and are not entitled to compensatory rest, unlike workers falling under the derogations below.

The workers concerned remain subject to all other Directive's provisions.

B. **Derogations requiring equivalent compensatory rest or appropriate protection**

Article 17(3) provides for exceptions to Articles 3 (daily rest), 4 (breaks), 5 (weekly rest period), 8 (length of night work) and 16 (reference periods) in the case of certain activities. Similarly, Article 17(4) provides for derogations to Articles 3 and 5. Article 18 provides for derogations from Articles 3, 4, 5, 8 and 16 by collective agreement. All other provisions of the Directive continue to apply.

([376]) Judgment in case C-428/09, *Union syndicale Solidaires Isère*, paras. 41-43.
([377]) Judgment in case C-175/16, *Hälvä and Others*.
([378]) Judgment in case C-175/16, *Hälvä and Others*, para. 35.

All of these derogations are, however, subject to the condition set out in Article 17(2) (and in Article 18), i.e. 'that the workers concerned are afforded equivalent 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' ([379]).

1. **The derogation for 'certain activities' under Article 17(3)**

Article 17(3) provides that:

'3. In accordance with paragraph 2 of this Article derogations may be made from Articles 3, 4, 5, 8 and 16:

(a) in the case of activities where the worker's place of work and his place of residence are distant from one another, including offshore work, or where the worker's different places of work are distant from one another;

(b) in the case of security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms;

(c) in the case of activities involving the need for continuity of service or production, particularly:

(i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, including the activities of doctors in training, residential institutions and prisons;

(ii) dock or airport workers;

(iii) press, radio, television, cinematographic production, postal and telecommunications services, ambulance, fire and civil protection services;

(iv) gas, water and electricity production, transmission and distribution, household refuse collection and incineration plants;

(v) industries in which work cannot be interrupted on technical grounds;

(vi) research and development activities;

(vii) agriculture;

(viii) workers concerned with the carriage of passengers on regular urban transport services;

(d) where there is a foreseeable surge of activity, particularly in:

(i) agriculture;

(ii) tourism;

(iii) postal services;

(e) in the case of persons working in railway transport:

(i) whose activities are intermittent;

(ii) who spend their working time on board trains; or

(iii) whose activities are linked to transport timetables and to ensuring the continuity and regularity of traffic;

(f) in the circumstances described in Article 5(4) of Directive 89/391/EEC;

(g) in cases of accident or imminent risk of accident.'

([379]) The wording in the English version of Article 18 differs slightly and states that the condition is that 'equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods the workers concerned are afforded appropriate protection'. This slight difference in the wording does not appear to the same extent in the French, German or Italian versions of the Directive.

a) *The sectors and activities concerned*

Most elements contained in Article 17(3) relate to specific sectors and activities. However, it can be noted that this derogation may also be used in cases of accident or imminent risk of accident (point g) or in the circumstances 'where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care' ([380]) (point f).

The Court considered that the list of sectors and activities in Article 17(3) was not exhaustive ([381]).

In particular, it held that the following activities may be covered by the derogations provided for in Article 17(3): activities of medical and nursing staff in primary care teams ([382]), ambulance services ([383]), activities at holiday and leisure centres which require continuity of service ([384]), firefighting ([385]), and activities of military personnel which fall within the scope of the Directive ([386]).

This means that the derogations can apply to activities which are not expressly referred to in Article 17(3), as long as they are linked to one of the items listed there.

b) *Provisions from which derogations are permitted*

The derogations relate to the following provisions:

— daily rest (Article 3);

— breaks (Article 4);

— weekly rest period (Article 5);

— the length of night work (Article 8);

— the reference periods for application of the weekly rest period, the maximum weekly working time and the length of night work (Article 16).

The other provisions of the Directive continue to apply and the Court has stressed that this derogation 'does not allow derogations from the definitions of the concepts of working time and rest period in Article 2 of the Directive' ([387]).

2. **The derogation for shift and split work**

Article 17(4) sets out that:

'4. In accordance with paragraph 2 of this Article derogations may be made from Articles 3 and 5:

(a) in the case of shift work activities, each time the worker changes shift and cannot take daily and/or weekly rest periods between the end of one shift and the start of the next one;

(b) in the case of activities involving periods of work split up over the day, particularly those of cleaning staff.'

([380]) Article 5(4) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.
([381]) Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 48.
([382]) Judgment in case C-303/98, *Simap*, paras. 42-45; Order in case C-241/99, *CIG*, paras. 29-32.
([383]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 97.
([384]) Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 49.
([385]) Judgment in case C-243/09, *Fuß*, para. 49.
([386]) Judgment in case C-742/19, *Ministrstvo za obrambo*, paras. 86 and 87.
([387]) Judgment in case C-151/02, *Jaeger*, para. 91.

This derogation has not been the subject of case-law in the Court.

It is limited to derogations from the provisions on daily and weekly rest. All other provisions of the Directive therefore remain applicable and as for all derogations in this part, their use is subject to the workers being granted equivalent compensatory rest or, in exceptional cases in which this is not possible for objective reasons, appropriate protection.

3. **The derogation for all sectors by collective agreement**

> Article 18 establishes that:
>
> 'Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level.
>
> Member States in which there is no statutory system ensuring the conclusion of collective agreements or agreements concluded between the two sides of industry at national or regional level, on the matters covered by this Directive, or those Member States in which there is a specific legislative framework for this purpose and within the limits thereof, may, in accordance with national legislation and/or practice, allow derogations from Articles 3, 4, 5, 8 and 16 by way of collective agreements or agreements concluded between the two sides of industry at the appropriate collective level.
>
> The derogations provided for in the first and second subparagraphs shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.
>
> Member States may lay down rules:
>
> (a) for the application of this Article by the two sides of industry; and
>
> (b) for the extension of the provisions of collective agreements or agreements concluded in conformity with this Article to other workers in accordance with national legislation and/or practice.'

In its proposal for the 1993 Directive ([388]), the Commission emphasised that, given the differences arising from national practices, the subject of working conditions in general fell under the autonomy of the two sides of industry, who act in the public authorities' stead and/or complement their action. It was however stressed that, although collective agreements can make a contribution to the application of directives, these do not release the Member States concerned from the responsibility for attaining the objectives sought via the directives.

a) *When the derogation can be used*

The Court has ruled that Article 18 is independent in scope from Article 17(3), which limits derogations to a number of sectors or activities (see section 1 ([389])).

This means that Article 18 allows derogations in all sectors if they are established 'by collective agreement or agreements concluded between the two sides of the industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of the industry at a lower level'.

The concept of 'collective agreement' is not defined in the Directive nor does it appear to have been defined in other pieces of European law, or by the Court.

Similarly, the notion of 'agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level' also remains unspecified in the Directive.

([388]) Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90) 317 final – SYN 295, p. 4.

([389]) Judgment in case C-227/09, *Accardo and Others*, paras. 32-36.

The Commission therefore considers that these concepts must be defined by national law and practice. In doing so, Member States shall nevertheless take into account existing international standards on collective bargaining and collective agreements ([390]) as, similarly to the stance taken by the Court for other notions used by EU law and the Working Time Directive, the sole title of 'collective agreement' given to a document would not suffice ([391]).

b) *What the derogation permits*

The provisions from which derogations are allowed by collective agreement are listed in Article 18 and concern:

— daily rest (Article 3);

— breaks (Article 4);

— weekly rest period (Article 5);

— the length of night work (Article 8);

— the reference periods for the application, of the weekly rest period, the maximum weekly working time and the length of night work (Article 16).

The other provisions of the Directive continue to apply.

4. **The requirement of equivalent compensatory rest or, exceptionally, appropriate protection**

Article 17(2) establishes that:

'2. Derogations provided for in paragraphs 3, 4 and 5 may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided 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.'

Article 18 also stipulates that:

'[…] The derogations provided for in the first and second subparagraphs shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection. […]'

Despite slight differences in the wording in certain language versions, the two provisions require the same conditions to be applied to derogations implemented under Article 17(3) and (4) and Article 18 ([392]).

There are two 'levels' of conditions: in most cases the workers concerned must be afforded 'equivalent periods of compensatory rest'; however, in 'exceptional cases' where these cannot be afforded for objective reasons, the workers concerned should benefit from 'appropriate protection'.

([390]) See notably: International Labour Organization, Recommendation concerning Collective Agreements, R091, 29 June 1951; Recommendation concerning the Promotion of Collective Bargaining, R163, 19 June 1981; Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, C098, 1 July, 1949; Convention concerning the Promotion of Collective Bargaining, C154, 3 June 1981. See also International Labour Organization, Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, C151, 27 June 1978, Article 7, in which the International Labour Organization recognised not only 'negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations' but also 'such other methods as will allow representatives of public employees to participate in the determination of these matters'.

([391]) In particular, the Court has constantly held that the '*sui generis* legal nature of an employment relationship in national law can in no way whatsoever affect whether or not the person is a worker for the purposes of European Union law', see in particular the judgment in case C-316/13, *Fenoll*, para. 31.

([392]) Judgment in case C-151/02, *Jaeger,* para. 90.

a) *Requirement to provide equivalent compensatory rest*

Any derogation must be compensated for with an equivalent period of rest. For any derogation from the provisions on daily and weekly rest or breaks, a worker who has not received part or all of a rest period must receive the missing units of time as compensation.

It is the Commission's opinion that, for derogations from the average length of night work and from the reference periods, the compensatory rest is automatically granted. Indeed, the average would remain applicable but would be calculated over a different period of time, thus ensuring compensation over that period. Any other approach would deny the possibility to derogate from these provisions.

In light of the Court's case-law, the equivalent compensatory rest is 'characterised by the fact that during such periods the worker is *not subject to any obligation vis-à-vis his employer* which may prevent him from *pursuing freely and without interruption his own interests* in order to neutralise the effects of work on his safety or health' (Commission's emphasis) ([393]). Indeed, the Court has stressed that 'the worker must be able to remove himself from his working environment' and that this should 'enable him to relax and dispel the fatigue caused by the performance of his duties' ([394]).

The Commission understands that the absence of obligation vis-à-vis the employer also means that the worker cannot be on 'stand-by' during that period, irrespective of whether that stand-by time would be considered as working time or as a rest period (see Chapter IV). Indeed, during compensatory rest, the worker shall be able to pursue without interruption his own interests.

As regards the time when the equivalent compensatory rest has to be granted, the Court has clarified this obligation as regards daily rest, stating that it must follow on immediately from the working time which it is supposed to counteract ([395]) since the periods of rest 'must not only be consecutive but must also directly follow a period of work' ([396]). Indeed, 'in order to ensure the worker's safety and to protect his health effectively, provision must as a general rule be made for a period of work regularly to alternate with a rest period' ([397]). On the contrary, 'a series of periods of work completed without the interpolation of the necessary rest time may, in a given case, cause damage to the worker or at the very least threaten to overtax his physical capacities, thus endangering his health and safety with the result that a rest period granted subsequent to those periods is not such as correctly to ensure the protection of the interests at issue' ([398]).

It follows that a Member State could, in certain circumstances, provide for the option to postpone, albeit strictly temporarily, all or part of the minimum daily rest period, but only on condition that the worker receives all the rest hours to which he or she is entitled in the period that follows.

The Court has not specifically ruled on the timing of equivalent compensatory rest as regards derogations from the weekly rest periods, breaks, average and absolute limit to night work or the reference periods.

As concerns breaks, the Commission considers that, as in the case of daily rest, compensation should be granted as soon as possible and at the very latest before the next period of work.

As regards weekly rest, the Commission considers that the situation is somewhat different from that of daily rest, both considering the physiological needs of the workers concerned and the existing reference period of 2 weeks for granting weekly rest. It therefore considers 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 safety and health, also since the regular alternation of work and rest periods is already ensured through daily or compensatory rest periods.

b) *The 'appropriate protection' exception*

The 'second level of derogation' permitted is the guarantee of appropriate protection if equivalent periods of compensatory rest cannot be granted.

([393]) Judgment in case C-151/02, *Jaeger*, para. 94; Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 50.
([394]) Judgment in case C-151/02, *Jaeger*, para. 95.
([395]) Judgment in case C-151/02, *Jaeger*, para. 94.
([396]) Judgment in case C-151/02, *Jaeger*, para. 95.
([397]) Judgment in case C-151/02, *Jaeger*, para. 95; Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 51.
([398]) Judgment in case C-151/02, *Jaeger*, para. 96.

As noted by the Court, 'it is only in entirely exceptional circumstances that Article 17 enables appropriate protection to be accorded to the worker where the grant of equivalent periods of compensatory rest is not possible on objective grounds' ([399]).

However, in its subsequent *Isère* judgment, the Court referred to Recital 15, which states: 'In view of the question likely to be raised by the organisation of working time within an undertaking, it appears desirable to provide for flexibility in the application of certain provisions of this Directive, whilst ensuring compliance with the principles of protecting the safety and health of workers'.

In that judgment, the Court ruled that the workers concerned in the case, i.e. members of staff carrying out casual and seasonal activities designed to educate and occupy children at holiday and leisure centres and ensuring continual supervision of those children may be covered by the second level of derogation established by Article 17(2) ([400]).

The Court therefore appears to consider that the 'particular nature of the work' or the 'particular circumstances in which that work is carried out' could, exceptionally, justify derogations from both the daily rest periods and the obligation to ensure regular alternation between a period of work and a period of rest ([401]).

However, even in such situations, the Court considered that, while Article 17(2) allows 'Member States and, where appropriate, the two sides of industry, some latitude when establishing, in exceptional cases, an appropriate protection for the workers concerned, the position remains that the objective of that protection, which concerns the health and safety of those workers, is exactly the same as that of the minimum daily rest period provided for in Article 3 of that directive or the equivalent period of compensatory rest provided for in Article 17(2), namely to enable those workers to relax and dispel the fatigue caused by the performance of their duties' ([402]).

The Court consequently held that solely imposing an annual ceiling on the number of days worked cannot in any circumstances be regarded as 'appropriate protection' within the meaning of Article 17(2) ([403]).

The Commission is of the opinion that, in line with the Directive's objective to protect workers' health and safety, even in such specific cases, the 'appropriate protection' which the worker must receive must be sufficient to ensure rest throughout the period concerned, in addition to complementary compensation after the period concerned.

5. **Derogations from the reference periods**

> Article 19 limits the option to derogate from the reference period for maximum weekly working time in the following way:
>
> 'The option to derogate from Article 16(b), provided for in Article 17(3) and in Article 18, may not result in the establishment of a reference period exceeding six months.
>
> However, Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months.
>
> Before 23 November 2003, the Council shall, on the basis of a Commission proposal accompanied by an appraisal report, re-examine the provisions of this Article and decide what action to take.'

As outlined in Chapter VI, weekly working time can be averaged and Article 16(b) allows the reference period for calculating this average to be up to 4 months in all sectors and all activities.

([399]) Judgment in case C-151/02, *Jaeger*, para. 98; Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 55.
([400]) Judgment in case C-428/09, *Union syndicale Solidaires Isère*, paras. 45 and 57.
([401]) Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 60.
([402]) Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 59.
([403]) Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 58.

However, Article 17(3) and Article 18 permit derogations from the provision on reference periods in certain cases. The derogations permitted therefore concern the reference periods for granting weekly rest periods and for calculating the length of night work and the average maximum weekly working time. Article 19 regulates the latter option to derogate from the reference periods for calculating the weekly working time and limits the reference period to:

— 6 months by means of laws, regulations or administrative provisions in certain sectors or specific activities as per Article 17(3) of the Directive;

— 12 months by collective agreements or agreements concluded between the two sides of industry for objective or technical reasons or reasons concerning the organisation of work and subject to compliance with general principles relating to the protection of the safety and health of workers. This can be done either in certain sectors or specific activities as per Article 17(3) of the Directive, in any sector under Article 18 of the Directive or for mobile and offshore workers under Article 20 of the Directive.

The Court has had the occasion to rule on the issue of fixed and rolling reference periods; fixed reference periods start and end on fixed calendar dates, whereas rolling reference periods are periods the start and end of which move on a permanent basis with the passage of time. In a case where a Member State had set the maximum average weekly working time at 48 hours and extended to six months the reference period used for calculating that maximum, the Court ruled that national legislation may lay down reference periods which start and end on fixed calendar dates, provided that that legislation contains mechanisms which make it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods ([404]).

C. **The 'opt-out' from maximum weekly working time**

Article 22(1) of the Directive contains the so-called 'opt-out', which is worded as follows:

'1. A Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, 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), unless he has first obtained the worker's agreement to perform such work;

(b) no worker is subjected to any detriment by his employer because he is not willing to give his 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 referred to in Article 16(b).

Before 23 November 2003, the Council shall, on the basis of a Commission proposal accompanied by an appraisal report, re-examine the provisions of this paragraph and decide on what action to take.'

1. **Requirement to transpose this provision**

Similarly to other derogations presented above, in order to be applicable this provision must be transposed into national law. The Court held that without national law giving effect to it, the derogation did not apply and was therefore irrelevant to the resolution of a particular case ([405]). So the 48-hour maximum average working time for each seven-day period, including overtime, remained applicable to the workers concerned.

([404]) Judgment in case C-254/18, *Syndicat des cadres de la sécurité intérieure*.
([405]) Judgment in case C-243/09, *Fuß*, paras. 36-38.

2. **The conditions attached**

The Article imposes a number of specific conditions which must be applied cumulatively ([406]).

a) *The agreement of the worker*

The Court has ruled in several instances that this provision requires the consent of the *individual* worker ([407]).

In particular, the Court has held that 'the consent given by trade-union representatives in the context of a collective or other agreement is not equivalent to that given by the worker himself' ([408]). This is supported by the absence of Article 6 from the list of Articles from which derogations are allowed by collective agreements under Article 18 ([409]).

The Court has also stated that 'if the worker concerned is encouraged to relinquish a social right which has been directly conferred on him by the directive, he must do so freely and with full knowledge of all the facts' ([410]) and that his consent should also be given expressly ([411]).

The Court has held that 'those conditions are not met where the worker's employment contract merely refers to a collective agreement authorising an extension of maximum weekly working time. It is by no means certain that, when he entered into such a contract, the worker concerned knew of the restriction of the rights conferred on him by Directive 93/104.' ([412])

Although the Directive does not expressly require the worker's consent to be in writing, in light of this case-law, the use of a written form setting out the exact extent of the agreement could help prove the worker's express and individual consent.

The Court insisted that 'Those requirements are all the more important given that the worker must be regarded as the weaker party to the employment contract and it is therefore necessary to prevent the employer being in a position to disregard the intentions of the other party to the contract or to impose on that party a restriction of his rights without him having expressly given his consent in that regard.' ([413]).

In light of this, the Commission further considers that, to preserve the free character of the worker's consent, the latter must be revocable. Although the right of cancellation may be qualified, for example by requiring a period of advance notice proportionate to the need for the employer to find alternative solutions, it would seem contrary to the objectives of the Directive and to this particular provision to make workers' opt-outs unlimited and irrevocable.

b) *No detriment*

The second condition is that the no worker must be subjected to any detriment by his employer because he is not willing to give his agreement to work more than the average weekly maximum.

The Commission considers that the notion of detriment protects the concerned worker not only against dismissal but includes other forms of harm or disadvantages, for example, compulsory transfer to another department or position ([414]). The Commission also considers this obligation to protect the worker from any detriment to apply to the worker's withdrawal of agreement.

To comply with this condition effectively, Member States are obliged to ensure that means of redress are available.

([406]) Judgment in case C-243/09, *Fuß*, para. 50.
([407]) Judgment in case C-303/98, *Simap*, para. 74; Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 80.
([408]) Judgment in case C-303/98, *Simap*, para. 74; Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 80.
([409]) Judgment in case C-303/98, *Simap*, para. 73.
([410]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 82.
([411]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 82.
([412]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 85.
([413]) Judgment in joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 82.
([414]) Judgment in case C-243/09, *Fuß*, paras. 41-55. It must nevertheless be pointed out that this case concerned a worker who was not subject to an opt-out provision since it was not transposed into national law. Still, the Court hinted that the compulsory transfer of that worker to another service after his request to comply with the maximum limit of 48 hours on average meant that the worker had suffered a detriment.

c) *Record keeping*

Where the 'opt-out' is used, national law must require employers to keep up-to-date records of all workers carrying out such work.

d) *Availability of such records to the authorities*

The records of all workers subject to an 'opt-out' must be placed at the disposal of the competent authorities, which must have the power to prohibit or restrict use of the opt-out for health and safety reasons.

e) *Availability of information on opted-out workers*

The employer must provide the competent authorities with information on the cases in which workers have agreed to opt-out.

3. **Consequences of the 'opt-out'**

If transposed into national law, the opt-out allows individual workers to work more than 48 hours over a seven-day period, calculated as an average over a reference period of up to 4 months.

In light of this wording and of Member States' option to apply provisions that are more favourable to the health and safety of workers, this means that, in the view of the Commission, the opt-out can be used in different ways:

— full derogation from Article 6 and Article 16(b): a worker may work over 48 hours on average over a reference period to be defined, which can also exceed 12 months;

— limited derogations alternatively or concurrently from Article 6 or from Article 16(b). Possible examples are:

— allowing workers to work over 48 hours per week on average over the same reference period as applicable for other workers, by setting a higher maximum limit to the worker's weekly working time, taking into account the provisions on rest periods;

— allowing workers to exceed the maximum of 48 hours on average over 4 months while imposing that this limit is respected over a longer reference period – this amounts to a derogation from the reference period for calculating the maximum weekly working time.

In any event, it must be stressed that the 'opt-out' does not allow derogations from provisions other than Article 6, including the articles concerning minimum rest periods. It does not permit derogations from the minimum rest periods or the limits to night work, for example, and there is therefore a natural limit to its use.

As stated above, Article 22 specifies that use of the opt-out is subject to 'respecting the general principles of the protection of the safety and health of workers' and expressly envisages that even workers who have agreed to opt out may be prevented or restricted from exceeding an average 48-hour week by intervention of the competent authorities 'for reasons concerned with the safety and/or health of workers'. The precise limits required by health and safety reasons may depend on the exact facts and the nature of the activities involved but may well be below the theoretical 78 hours maximum ([415]).

D. **Specific derogation for mobile workers and offshore work**

Article 20 sets out the following:

'1. Articles 3, 4, 5 and 8 shall not apply to mobile workers.

Member States shall, however, take the necessary measures to ensure that such mobile workers are entitled to adequate rest, except in the circumstances laid down in Article 17(3)(f) and (g).

([415]) Looking only at the daily and weekly rest periods, out of the total 168 hours (24 hours × 7 days) contained in each week, the minimum daily and weekly rests required by the Directive already add up to 90 rest hours on average (6 days × 11 hours of daily rest + 24 hours of weekly rest). Accordingly, working hours could not exceed an average of 78 hours per week, without taking into account breaks and the possible tighter limits applicable in case of night work.

2. Subject to compliance with the general principles relating to the protection of the safety and health of workers, and provided that there is consultation of representatives of the employer and employees concerned and efforts to encourage all relevant forms of social dialogue, including negotiation if the parties so wish, Member States may, for objective or technical reasons or reasons concerning the organisation of work, extend the reference period referred to in Article 16(b) to 12 months in respect of workers who mainly perform offshore work.

3. Not later than 1 August 2005 the Commission shall, after consulting the Member States and management and labour at European level, review the operation of the provisions with regard to offshore workers from a health and safety perspective with a view to presenting, if need be, the appropriate modifications.'

This provision – and the next, concerning workers on board seagoing fishing vessels – was inserted when the 1993 Directive was amended by Directive 2000/34/EC. The aim of the amending Directive was 'to apply all the provisions of the Directive to as many workers as possible, including non-mobile workers, all mobile and non-mobile railway workers and offshore workers; to extend to certain mobile workers the Directive's provisions on 4 weeks' paid annual leave and certain provisions in relation to night work and shift work (including health assessments); and to provide for these workers a guarantee of adequate rest and a limit on the number of hours to be worked annually. This last provision will also apply to offshore workers' ([416]). The resulting text therefore includes mobile and offshore workers in the scope of the Working Time Directive but provides for specific derogations.

1. **Mobile workers**

If mobile workers do not come within the scope of one of the sector-specific Directives, as an alternative to the derogations provided under Article 17(3) and Article 18 (see Part B), the Directive permits their exclusion from the rules on daily rest, breaks, weekly rest and length of night work without requiring equivalent compensatory rest or appropriate protection.

The Directive nevertheless requires not only compliance with the general principles relating to the protection of the safety and health of workers but also that workers are entitled to 'adequate rest' (See Chapter IV above) except in circumstances of accident or imminent risk of accident. Despite the original Commission proposal ([417]), the adopted text does not permit additional derogations from the reference period for calculating mobile workers' maximum weekly working time.

2. **Offshore workers**

For offshore workers, Member States may use the derogations provided in Article 17(3), since they are available for 'activities where the worker's place of work and his place of residence are distant from one another, including offshore work'. In such cases, the workers remain entitled to equivalent compensatory rest periods or appropriate protection, as outlined in part B.

However, in addition to these derogations and as an exception to Article 19 on the derogations from the reference period for calculating the maximum weekly working time, Article 20 also allows for a reference period of 12 months for workers who mainly perform offshore work. Member States may set this extended reference period for objective or technical reasons or reasons concerning the organisation of work, on condition that employers' and employees' representatives are consulted and that the general principles relating to the protection of the safety and health of workers are complied with.

([416]) Explanatory Memorandum of the Communication from the Commission on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC of 23 November 1993, 18 November 1998, COM(1998) 662 final, para. 13.

([417]) Explanatory Memorandum of the Communication from the Commission on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC of 23 November 1993, 18 November 1998, COM(1998) 662 final, para. 13.

This flexible approach to rest periods for offshore workers aimed in particular to allow 'shift systems based on 2 shifts × 12 hours × 14 days to continue and to give adequate recognition to the international and seasonal nature of the industry's working patterns by allowing an annualised calculation of working hours' ([418]). An assessment of these specific provisions was carried out in 2006 and concluded that they were adequate for this sector ([419]).

E. **Specific derogation for workers on board seagoing fishing vessels**

Article 21 provides that:

'1. Articles 3 to 6 and 8 shall not apply to any worker on board a seagoing fishing vessel flying the flag of a Member State.

Member States shall, however, take the necessary measures to ensure that any worker on board a seagoing fishing vessel flying the flag of a Member State is entitled to adequate rest and to limit the number of hours of work to 48 hours a week on average calculated over a reference period not exceeding 12 months.

2. Within the limits set out in paragraph 1, second subparagraph, and paragraphs 3 and 4 Member States shall take the necessary measures to ensure that, in keeping with the need to protect the safety and health of such workers:

(a) the working hours are limited to a maximum number of hours which shall not be exceeded in a given period of time; or

(b) a minimum number of hours of rest are provided within a given period of time.

The maximum number of hours of work or minimum number of hours of rest shall be specified by law, regulations, administrative provisions or by collective agreements or agreements between the two sides of the industry.

3. The limits on hours of work or rest shall be either:

(a) maximum hours of work which shall not exceed:

(i) 14 hours in any 24-hour period; and

(ii) 72 hours in any seven-day period;

or

(b) minimum hours of rest which shall not be less than:

(i) 10 hours in any 24-hour period; and

(ii) 77 hours in any seven-day period.

4. Hours of rest may be divided into no more than two periods, one of which shall be at least six hours in length, and the interval between consecutive periods of rest shall not exceed 14 hours.

5. In accordance with the general principles of the protection of the health and safety of workers, and for objective or technical reasons or reasons concerning the organisation of work, Member States may allow exceptions, including the establishment of reference periods, to the limits laid down in paragraph 1, second subparagraph, and paragraphs 3 and 4. Such exceptions shall, as far as possible, comply with the standards laid down but may take account of more frequent or longer leave periods or the granting of compensatory leave for the workers. These exceptions may be laid down by means of:

(a) laws, regulations or administrative provisions provided there is consultation, where possible, of the representatives of the employers and workers concerned and efforts are made to encourage all relevant forms of social dialogue; or

(b) collective agreements or agreements between the two sides of industry.

([418]) White Paper on sectors and activities excluded from the Working Time Directive, 15 July 1997, COM(97) 334, para. 60.

([419]) Report from the Commission on the operation of the provisions of Directive 2003/88/EC applicable to offshore workers, 22 December 2006, COM(2006) 853 final.

6. The master of a seagoing fishing vessel shall have the right to require workers on board to perform any hours of work necessary for the immediate safety of the vessel, persons on board or cargo, or for the purpose of giving assistance to other vessels or persons in distress at sea.

7. Members States may provide that workers on board seagoing fishing vessels for which national legislation or practice determines that these vessels are not allowed to operate in a specific period of the calendar year exceeding one month, shall take annual leave in accordance with Article 7 within that period.'

Like mobile and offshore workers, workers on board seagoing fishing vessels who do not come within the scope of more specific provisions ([420]) are subject to the general Working Time Directive, which also contains specific provisions for workers on board a seagoing fishing vessel flying the flag of a Member State.

Article 21 allows Member States to derogate from the provisions on daily rest, breaks, weekly rest, maximum weekly working time and length of night work for such workers.

Nevertheless, Member States are required to take measures to ensure that the workers concerned are entitled to 'adequate rest' (see Chapter IV) and to limit maximum weekly working time to 48 hours on average over a reference period of up to 12 months.

In addition, the workers concerned must be subject either to maximum working hours or to a minimum number of hours of rest for which reference limits are set in Article 21(3). The Directive also establishes that hours of rest may be divided into no more than two periods, that one of them must last for at least 6 hours and that the interval between rest periods must not exceed 14 hours. These provisions correspond to those of Directive (EU) 2017/159 ([421]).

Derogations from these accommodating provisions are still permitted by law, regulations or collective agreements under two conditions: (i) the exceptions must be in accordance with the general principles of health and safety protection; and (ii) they can be granted only for objective or technical reasons or for reasons concerning the organisation of work. In such cases, derogations must as far as possible comply with the standards laid down but may give rise to 'more frequent or longer leave periods or the granting of compensatory leave'.

In addition, the master of a seagoing fishing vessel must have the right to waive the rules on working time and minimum rest periods for the immediate safety of the vessel, persons on board or cargo or for the purpose of giving assistance to other vessels or persons in distress at sea.

Article 21(7) also allows the Member States to stipulate that workers must take their annual leave within a specific period of the calendar year of one month or more during which the vessel(s) is(are) not allowed to operate.

([420]) In particular fishermen and fishing vessels engaged in commercial fishing operations covered by Council Directive (EU) 2017/159 of 19 December 2016 implementing the Agreement concerning the implementation of the Work in Fishing Convention, 2007 of the International Labour Organisation, concluded on 21 May 2012 between the General Confederation of Agricultural Cooperatives in the European Union (Cogeca), the European Transport Workers' Federation (ETF) and the Association of National Organisations of Fishing Enterprises in the European Union (Europêche). The Agreement concerning the implementation of the Work in Fishing Convention, 2007 of the International Labour Organisation, annexed to Directive (EU) 2017/159, applies to 'fishermen', i.e. 'every person employed or engaged or working in any capacity on board any fishing vessel', defined as 'any ship or boat, flying the flag of a Member State or registered under the plenary jurisdiction of a Member State, of any nature whatsoever, irrespective of the form of ownership, used or intended to be used for the purpose of commercial fishing'. Port pilots and shore personnel carrying out work on board a fishing vessel at the quay side are excluded from the scope of the Agreement. In respect of one of the applicability criteria, the Agreement provides that '[i]n the event of doubt as to whether a vessel is engaged in commercial fishing, the question shall be determined by the competent authority after consultation'.

([421]) Council Directive (EU) 2017/159 of 19 December 2016 implementing the Agreement concerning the implementation of the Work in Fishing Convention, 2007 of the International Labour Organisation, concluded on 21 May 2012 between the General Confederation of Agricultural Cooperatives in the European Union (Cogeca), the European Transport Workers' Federation (ETF) and the Association of National Organisations of Fishing Enterprises in the European Union (Europêche).

X. **CONCLUSION**

The Working Time Directive is a complex instrument. Its aim is to protect the health and safety of workers by establishing minimum health and safety requirements for the organisation of working time and it should not be subordinated to purely economic considerations.

The Directive remains a flexible instrument since, as shown in this document, it offers possibilities for flexible application of its main standards as well as a number of derogations which allow the specificities of particular sectors or certain categories of workers to be accommodated while protecting workers against the adverse effects of excessively long hours or inadequate rest.

Importantly, the Working Time Directive, as is the case for all EU Directives, is binding on the Member States but its provisions have to be transposed into national law. It is therefore first and foremost the responsibility of the EU Member States to develop their legal frameworks in order to apply the protective rules of the Directive, to take up as appropriate the elements of flexibility it offers or to introduce provisions that are more favourable to the protection of the safety and health of workers.

In the light of the complex architecture of the Directive, the aim of this Communication is to give as much guidance as possible on the interpretation of the Directive based first and foremost on its case-law. It does not intend to create new rules and the elements presented herein therefore remain subject to further developments and complements by the Court.

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

COUNCIL

COUNCIL DECISION

of 21 March 2023

appointing a member of the Advisory Committee on Freedom of Movement for Workers for Estonia

(2023/C 109/02)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union ([1]), and in particular Articles 23 and 24 thereof,

Having regard to the lists of candidates submitted to the Council by the Governments of the Member States,

Whereas:

(1) By Decisions of 20 September 2022 ([2]) and 25 October 2022 ([3]), the Council appointed members and alternate members of the Advisory Committee on Freedom of Movement for Workers for the period from 25 September 2022 to 24 September 2024.

(2) The Government of Estonia has submitted a nomination for a post to be filled,

HAS ADOPTED THIS DECISION:

Article 1

The following person is hereby appointed member of the Advisory Committee on Freedom of Movement for Workers for the period ending on 24 September 2024:

I. EMPLOYERS' ASSOCIATIONS REPRESENTATIVES

Member State	Member
Estonia	Mr Jüri SULIN

([1]) OJ L 141, 27.5.2011, p. 1.

([2]) Council Decision of 20 September 2022 appointing the members and alternate members of the Advisory Committee on Freedom of Movement for Workers (OJ C 393, 13.10.2022, p. 5).

([3]) Council Decision of 25 October 2022 appointing members and alternate members of the Advisory Committee on Freedom of Movement for Workers for Denmark, Germany, Greece, Croatia, Italy, Cyprus, Luxembourg, Malta and Portugal (OJ C 481, 19.12.2022, p. 1).

Article 2

The members and alternate members not yet nominated will be appointed by the Council at a later date.

Article 3

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 21 March 2023.

For the Council
The President
J. ROSWALL

COUNCIL DECISION

of 21 March 2023

appointing an alternate member of the Advisory Committee on Safety and Health at Work for Denmark

(2023/C 109/03)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Council Decision of 22 July 2003 setting up an Advisory Committee on Safety and Health at Work [1], and in particular Article 3 thereof,

Having regard to the lists of candidates submitted to the Council by the Governments of the Member States,

Whereas:

(1) By Decision of 24 February 2022 [2], the Council appointed members and alternate members of the Advisory Committee on Safety and Health at Work for the period from 1 March 2022 to 28 February 2025.

(2) The Government of Denmark has submitted a nomination for a post to be filled,

HAS ADOPTED THIS DECISION:

Article 1

The following person is hereby appointed alternate member of the Advisory Committee on Safety and Health at Work for the period ending on 28 February 2025:

I. GOVERNMENT REPRESENTATIVES

Member State	Alternate member
Denmark	Mr Ulrik SPANNOW

Article 2

The Council shall appoint the members and alternate members not yet nominated at a later date.

Article 3

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 21 March 2023.

For the Council
The President
J. ROSWALL

[1] OJ C 218, 13.9.2003, p. 1.
[2] Council Decision of 24 February 2022 appointing the members and alternate members of the Advisory Committee on Safety and Health at Work (OJ C 92, 25.2.2022, p. 1).

EUROPEAN COMMISSION

Euro exchange rates ([1])

23 March 2023

(2023/C 109/04)

1 euro =

	Currency	Exchange rate		Currency	Exchange rate
USD	US dollar	1,0879	CAD	Canadian dollar	1,4875
JPY	Japanese yen	142,87	HKD	Hong Kong dollar	8,5396
DKK	Danish krone	7,4482	NZD	New Zealand dollar	1,7373
GBP	Pound sterling	0,88523	SGD	Singapore dollar	1,4434
SEK	Swedish krona	11,2220	KRW	South Korean won	1 396,18
CHF	Swiss franc	0,9969	ZAR	South African rand	19,7787
ISK	Iceland króna	149,90	CNY	Chinese yuan renminbi	7,4312
NOK	Norwegian krone	11,2840	IDR	Indonesian rupiah	16 450,63
BGN	Bulgarian lev	1,9558	MYR	Malaysian ringgit	4,8063
CZK	Czech koruna	23,658	PHP	Philippine peso	59,125
HUF	Hungarian forint	384,75	RUB	Russian rouble	
PLN	Polish zloty	4,6868	THB	Thai baht	37,119
RON	Romanian leu	4,9228	BRL	Brazilian real	5,6995
TRY	Turkish lira	20,7179	MXN	Mexican peso	20,1915
AUD	Australian dollar	1,6242	INR	Indian rupee	89,4810

([1]) *Source*: reference exchange rate published by the ECB.

V

(Announcements)

OTHER ACTS

EUROPEAN COMMISSION

Publication of the single document referred to in Article 94(1)(d) of Regulation (EU) No 1308/2013 of the European Parliament and of the Council and of the reference to the publication of the product specification for a name in the wine sector

(2023/C 109/05)

This publication confers the right to oppose the application pursuant to Article 98 of Regulation (EU) No 1308/2013 of the European Parliament and of the Council [1] within two months from the date of this publication.

SINGLE DOCUMENT

'Terras do Dão'

PGI-PT-02352

Date of application: 2.3.2017

1. **Name to be registered**

Terras do Dão

2. **Geographical indication type**

PGI - Protected Geographical Indication

3. **Categories of grapevine products**

1. Wine

4. Sparkling wine

4. **Description of the wine(s)**

1. *Wine (white, red and rosé)*

CONCISE TEXTUAL DESCRIPTION

White – clear to shiny in appearance, with colour ranging from pale white with a slight citrine hue to a more intense golden white. With good expression and fine aromas, mainly floral and fruity notes (white-fleshed fruit) in the case of young wines. Over time they evolve smoothly into more complex and delicate aromas. The taste is well-balanced and mineral, with a significant, elegant acidity that gives them freshness and good consistency. Structure and a medium to long finish.

[1] OJ L 347, 20.12.2013, p. 671.

Rosé - clear to shiny in appearance, with colour ranging from onion skin to cherry pink. Elegant aroma with mild notes, mainly of berries and the red fruits that are characteristic of these grape varieties. Over time, the aromas evolve to acquire more complex and elegant notes. The taste is very sophisticated and mineral, with good expression of fixed acidity and a good balance between freshness and texture. Medium to strong structure, which contributes towards a rich aftertaste.

Red - clear in appearance, with colour ranging from open ruby to deep purple. As the years go by, the colour acquires hues ranging from brick-red to chestnut brown. Very well-defined, distinctively fine aromatic expression, mainly of fruity notes that are characteristic of the grape varieties; red and black fruits are predominant in the case of young wines. Over time, they evolve delicately into more complex aromas with well-established notes, mainly of dried fruits and spices. The taste is complex and delicate, with a good balance between acids and alcohol and distinctive minerality. Medium to strong structure, with well-integrated tannins, velvety texture and a long aftertaste.

The other analytical characteristics must comply with the limits of the applicable legislation.

General analytical characteristics	
Maximum total alcoholic strength (in % volume)	
Minimum actual alcoholic strength (in % volume)	10,0
Minimum total acidity	
Maximum volatile acidity (in milliequivalents per litre)	
Maximum total sulphur dioxide (in milligrams per litre)	

2. *Sparkling wine (white, red and rosé)*

CONCISE TEXTUAL DESCRIPTION

Whites - Wines ranging in colour from citrine to straw-yellow, with mainly floral, fruity (citrus and white fruit) and mineral aromas, a fresh and balanced taste due to their fixed acidity, and fine, persistent bubbles.

Rosés - Pink-coloured wines with mainly fruity aromas. Fresh wines with balanced acidity and fine, persistent bubbles.

Reds - Wines ranging in colour from bright to intense red, with brick-red nuances developing over time. Aromas mainly of ripe red fruit and berries. Balanced wines with fine, persistent bubbles.

The other analytical characteristics must comply with the limits of the applicable legislation.

General analytical characteristics	
Maximum total alcoholic strength (in % volume)	
Minimum actual alcoholic strength (in % volume)	10,0
Minimum total acidity	
Maximum volatile acidity (in milliequivalents per litre)	
Maximum total sulphur dioxide (in milligrams per litre)	

5. **Wine making practices**

a. *Essential oenological practices*

1. Minimum actual alcoholic strength - wine and sparkling wine

Restriction relating to wine-making

Requirement as regards the minimum actual alcoholic strength by volume of the musts:

'Terras do Dão' PGI wines

— white, rosé and red wine: at least 10 % vol.

— cuvée for sparkling wine: at least 10 % vol.

Wines bearing the additional indication 'Terras de Lafões':

— white, rosé and red wine: at least 9,5 % vol.

— cuvée for sparkling wine: at least 9,5 % vol.

2. Method of preparation - Sparkling wine

Specific oenological practices

In preparing sparkling wines covered by the 'Terras do Dão' PGI, the traditional method must be used, in compliance with the applicable legislation.

3. Soils and cultivation methods

Cultivation method

The cultivation methods used in vineyards intended for the production wines entitled to the 'Terras do Dão' PGI must be those which are traditional in the region or recommended by the certification body.

The vineyards used to produce wines entitled to the 'Terras do Dão' PGI are planted in the following types of soils:

— Non-humic or humic lithosols of unconsolidated sandstone materials or humic lithosols of schists and/or granite materials;

— Highly unsaturated argiluvial soils of schists;

— Brown and/or red Mediterranean soils of schists, marls and/or hard limestones;

— Sand or sandstone podzols;

— Sandy psammitic regosols;

— Modern alluvial soils.

b. *Maximum yields*

1. Wine and Sparkling wine - red grapes

18 000 kilograms of grapes per hectare

2. Wine and Sparkling wine - white grapes

20 000 kilograms of grapes per hectare

6. **Demarcated geographical area**

The geographical area for the production of the 'Terras do Dão' GI includes:

a) In the district of Aveiro, only the parish of Cedrim in the municipality of Sever do Vouga and in the union of the parishes of Cedrim and Paradela;

b) In the district of Coimbra, all the parishes of the municipalities of Arganil, Oliveira do Hospital and Tábua;

c) In the district of Guarda, all the parishes of the municipalities of Aguiar da Beira, Fornos de Algodres, Gouveia and Seia;

d) In the district of Viseu, all the parishes of the municipalities of Carregal do Sal, Castro Daire, Mangualde, Mortágua, Nelas, Oliveira de Frades, Penalva do Castelo, Santa Comba Dão, São Pedro do Sul, Sátão, Tondela, Vila Nova de Paiva, Viseu and Vouzela.

The geographical area for the production of wines and sparkling wines entitled to be sold with the complementary indication of the 'Terras de Lafões' sub-region is the following:

a) In the district of Aveiro, the parish of Couto de Esteves in the municipality of Sever do Vouga, and only the parish of Cedrim in the union of the parishes of Cedrim and Paradela;

b) In the district of Viseu, all the parishes of the municipalities of Oliveira de Frades, São Pedro do Sul, Vouzela and Castro Daire. In the same district, the parishes of Bodiosa, Calde, Campo, Lordosa and Ribafeita in the municipality of Viseu.

7. **Main wine grapes variety(ies)**

Alfrocheiro - Tinta-Bastardinha

Alicante-Bouschet

Alicante-Branco

Alvar

Alvar -Roxo

Alvarelhão - Brancelho

Alvarinho

Amaral

Aragonez - Tinta-Roriz; Tempranillo

Arinto - Pedernã

Arinto-do-Interior

Assaraky

Azal

Baga

Barcelo

Bastardo - Graciosa

Bical - Borrado-das-Moscas

Branda

Cabernet Franc

Cabernet Sauvignon

Camarate

Campanário

Castelão - João-de-Santarém(1); Periquita

Cerceal-Branco

Cercial - Cercial-da-Bairrada

Chardonnay

Cidreiro

Coração-de-Galo

Cornifesto

Douradinha

Encruzado

Esganoso

Fernão-Pires - Maria-Gomes

Folgasão - Terrantez

Folgasão-Roxo
Folha-de-Figueira - Dona-Branca
Fonte -Cal
Gewürztraminer
Gouveio
Grand Noir
Jaen - Mencia
Jampal
Loureiro
Luzidio
Malvasia-Fina - Boal; Bual
Malvasia-Fina-Roxa
Malvasia-Preta
Malvasia-Rei
Marufo - Mourisco-Roxo
Merlot
Monvedro
Moreto
Moscatel-Galego-Branco - Muscat-à-Petits-Grains
Mourisco
Pilongo
Pinot Blanc
Pinot Noir
Português-Azul - Blauer-Portugieser
Rabo-de-Ovelha
Riesling
Rufete - Tinta-Pinheira
Sauvignon - Sauvignon Blanc
Semillon
Sercial - Esgana-Cão
Sercialinho
Syrah - Shiraz
Síria - Roupeiro, Códega
Tamarez - Molinha
Terrantez
Tinta-Carvalha
Tinta-Francisca
Tintem
Tinto-Cão
Touriga Franca
Touriga Fêmea
Touriga Nacional
Trincadeira - Tinta-Amarela, Trincadeira-Preta
Tália - Ugni-Blanc; Trebbiano-Toscano

Uva-Cão

Verdelho

Verdial-Branco

Vinhão - Sousão

Viosinho

Vital

Água -Santa

8. **Description of the link(s)**

Wine and sparkling wine

Natural and human factors

The geographical area is surrounded by mountain ranges which provide protection against easterly winds from further inland and humid air masses from the coast.

The many deep valleys are a key characteristic of the landscape, forming a dense network of water bodies.

The climate is temperate, with an average of 1 100 to 1 600 mm of rain per year (mainly concentrated in autumn and winter), and an average of 2 200 to 2 700 hours of sunshine per year (mostly between May and August).

The area has cold winters and hot summers, with very significant temperature variations.

The soils - mainly of granitic origin with traces of pre-Cambrian shale - are generally poor in organic matter and have low pH.

There is ample proof that vines have been grown in this geographical area for over a thousand years. There are records documenting the economic importance of vineyards and wine in this region since the twelfth century.

Characteristics of the wines associated with the geographical area

These wines have predominantly mineral notes, as well as good aromatic expression of the various grape varieties. They are wines with a long finish, with a good balance between alcohol, sweetness and acidity.

The whites and rosés are fresh with noticeably balanced acidity.

The reds are velvety in texture and full-bodied, with smooth tannins.

The sparkling wines are very fine with evident, well-integrated acidity and freshness, and fine, persistent bubbles.

Causal link

The protection provided by the relief is a key characteristic of the geographical area and it also influences the climate. The climate shapes how the vines grow and ripen, meaning it directly influences the quality of the wines. This influence is clearly evident in the smoothness and aromatic expression of the wines.

The mostly granitic soils with poor organic matter content and low pH give the wines and sparkling wines their mineral character and contribute decisively to their good fixed acidity.

The wines are aromatic, mineral and fresh with balanced acidity as a result of the conditions in which the grapes ripen: hot summers with significant daily variations in temperature.

The hot, sunny summers ensure that the grapes are fully ripened. The significant daily variations in temperature ensure that the sugars develop correctly and that an optimal level of acidity is maintained.

As a result, the white and rosé wines are fresh, harmonious and fine with mineral aromas, noticeably balanced fixed acidity, good aromatic expression of the varieties and a long finish. The reds have good aromatic expression of the varieties, optimal polyphenols, a good balance between acids and alcohol, mineral aromas, smooth tannins, a velvety texture and a long finish.

The relatively long and gentle ripening process produces wines with good expression of the aromas of the grape varieties.

Given its dense network of water bodies, the ease with which the soils are weathered by the rain and build-up of water in winter and the influence of the severe cold while the vines lie dormant, the geographical area is well-suited to wine-growing.

Having preserved the tradition over more than a thousand years, the human factor is reflected in the choice of the varieties that are best suited to the conditions of the geographical area. This is decisive in ensuring the production of quality grapes and the characteristics of the wines.

9. **Essential further conditions**

Wine and sparkling wine

Legal framework:

In national legislation

Type of further condition:

Additional provisions relating to labelling

Description of the condition:

Additional provisions relating to labelling:

— Prior approval of labelling: The labels to be used on 'Terras do Dão' PGI products must first be submitted for approval by the Certifying Authority.

— The trade mark must be registered with the INPI [National Institute for Industrial Property], but is not exclusive to the PGI.

— Use of the additional indication 'Terras de Lafões': only to be used on the labels of wines covered by the 'Terras do Dão' PGI that have been produced in the geographical area of the 'Terras de Lafões' sub-region (and which have a minimum actual alcoholic strength of 9,5 % vol.).

Link to the product specification

http://www.ivv.gov.pt/np4/8616.html

CORRIGENDA

Corrigendum to Position (EU) No …/2023 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1806 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Kosovo *)

Adopted by the Council on 9 March 2023

(Official Journal of the European Union C 105 of 21 March 2023)

(2023/C 109/06)

On the cover, in the table of contents, and on page 4, the title should read:

'**POSITION (EU) No 1/2023 OF THE COUNCIL AT FIRST READING**

with a view to the adoption of a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1806 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Kosovo *)

Adopted by the Council on 9 March 2023'

Corrigendum to Statement of the Council's reasons: Position (EU) No …/2023 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1806 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Kosovo *)

(Official Journal of the European Union C 105 of 21 March 2023)

(2023/C 109/07)

On the cover, in the table of contents, and on page 8, the title should read:

'**Statement of the Council's reasons: Position (EU) No 1/2023 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1806 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Kosovo *)**'

Corrigendum to Public holidays 2023

(*Official Journal of the European Union C 39 of 1 February 2023*)

(2023/C 109/08)

On page 20, in the 24th row of the table:

for:

'Slovenija	2.1, 6.4, 7.4, 10.4, 1.5, 29.5, 21.7, 31.10, 1.11, 25.12, 26.12'

read:

'Slovenija	1.1, 2.1, 8.2, 10.4, 27.4, 1.5, 2.5, 25.6, 15.8, 31.10, 1.11, 25.12, 26.12'

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